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REPORTERS

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COMMENCEMENT OF AN ACT OF PARLIAMENT (or its provision)

Probation of Offenders Act, 1958 (20 of 1958), Section 1 (3) — Appointment of date — Said Act shall come into force on 1-10-1970 in the areas of Osmanabad, Ahmednagar, Sholapur, Dhulia, Thana and Jalgaon — Maha. Govt. Gaz., 30-7-1970, Pt. IV-A, p. 825

Registration of Births and Deaths Act, 1969 (18 of 1969), Section 1 (3) — Appointment of Enforcement date — Said Act shall

come into force on 1-7-70 in whole of Delhi Union Territory. — Gaz. of Ind., 29-6-1970, Pt. II S. 3 (i), Ext. p. 585

Usurious Loans Act, 1918 (10 of 1918), Section 3 (2) — Appointment of enforcement date for Union Territory — 1-9-1970 appointed as the date on which said Act shall come into force in Pondicherry Union Territory. — Pondi. Gaz., 22-8-1970, Ext.

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General Clauses Act

- I. Whether the expression 'former enactment' in S. 8 of the General Clauses Act (1897) includes Acts passed by State Legislatures? (Yes)

AIR 1970 SC 1641

Gift Tax

2. Whether the declaration by which the assessee has impressed the character of joint Hindu family property on the self-acquired properties owned by him amounts to a transfer so as to attract the provisions of Gift Tax Act (1958)? (No)

AIR 1970 SC 1722

Hindu Law

- B. (1) Was *Togore's Case*, I. A. (1872) Supp. 47 wrongly decided? (Yes)
- (2) Should it be followed by applying maxim communis error facit jus? (the law so favours the public good, that

Hindu Law (contd.)

it will in some cases permit a common error to pass for right)? (Yes)

AIR 1970 SC 1759

Municipalities

4. Whether the Election tribunal constituted under the rules framed under the Andhra Pradesh Municipalities Act can go into question of improper reception of vote by reason of voter being below 21 years of age though his name appeared in the electoral roll? (Yes). AIR 1970 Andh Pra 337 (FB)

Prevention of Food Adulteration

5. Whether a sample taken in the absence of proprietor or seller who has slipped away on the approach of the Food Inspector, ceases to be a sample under Section 10 (1) and Section 2 of the Prevention of Food Adulteration Act? (No) AIR 1970 Cal 435

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—Pre. — Interpretation of Statutes — Power given to do a certain thing in certain way — Other methods cannot be adopted

Manipur 73 C (C N 21)

—S 9 — Suit expressly barred — See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S 16

SC 1727 (C N 368)

—Ss. 11 and 47 — Executing Court — Lack of inherent jurisdiction to execute decree by attachment and sale of immovable property — Execution sale is null and void and J. D. can ignore it — Separate suit to declare it as void is not barred by S. 47 or by constructive res judicata

All 544 C (C N 79) (FB)

—S. 11 — Subject matter of two litigations must be same

Bom 341 D (C N 60)

—S. 34 — Interest — Suit for compensation under Fatal Accidents Act — Interest can be awarded to the plaintiffs from the date of the suit

Ker 241 D (C N 35)

—S. 42 — Powers of transferee Court executing Decree — Effect of amendment of S. 42, by U. P. Act 24 of 1954 — Powers of the transferee Court have been made coterminous with the powers of the transferor Court

All 544 A (C N 79) (FB)

Civil P. C. (contd.)

—Ss. 42 (U. P.), 51 and O. 21, R. 82 — Money decree by Small Cause Court prior to 1954 — Transfer for execution to Munsiff's Court — Transferee Court has no power to order attachment and sale of J. D.'s property in view of S. 42 (U. P.) read with O. 21, R. 82 — Execution sale is null and void — Modes of execution prescribed in S. 51 are subject to other sections including S. 42 in Code — Civil Misc. Writ No. 350 of 1968, D/-23-4-1969 (All), Reversed; AIR 1968 All 153 & AIR 1968 All 312, Overruled — U. P. Civil Laws (Reforms and Amendment) Act (24 of 1954), S. 3

All 544 B (C N 79) (FB)

—S. 47 — Bar of suit — Executing Court — Lack of inherent jurisdiction to execute decree — Execution sale null and void and J. D. can ignore it — Separate suit to declare it as void is not barred by S. 47 or by constructive res judicata — See Civil P. C. (1908), S. 11

All 544 C (C N 79) (FB)

—S. 51 — Section relates to procedure only — Modes of execution in S. 51 are subject to not only rules but also other sections in Code including S. 42 — See Civil P. C. (1908), S. 42 (U. P.)

All 544 B (C N 79) (FB)

—S. 73(1), proviso (c) — Mortgaged property — Sale in execution of decree of first mortgagee — Excess sale proceeds — Next first preference to second mortgagee as substituted security — Balance left over for simple money decree-holder by rateable distribution

Mad 401 (C N 119)

—S. 87-B — Right to property — Section 87-B of Civil P. C. (1908) does not violate Art. 31 — See Constitution of India, Art. 31 — Delhi 190 B (C N 41)

—S. 87-B — Consent of Central Government to sue former Ruler of Indian State — Refusal to grant consent — It is not justiciable it being for Central Government to decide whether to grant or refuse consent

Delhi 190 C (C N 41)

—S. 87-B — Consent of Central Government to sue former Ruler of Indian State — Refusal or grant of consent is an act of State — Refusal is not subject to judicial review

Delhi 190 D (C N 41)

—S. 100 — Finding of fact — Interference with

Delhi 188 A (C N 40)

—S. 100 — Second appeal — Grounds for — Question of law — Question whether evidence to support a finding of facts exists is a question of law — Correctness of finding can be challenged in second appeal

Tripura 76 D (C N 19)

—S. 113, O. 46, R. 1 — Reference cannot be made on hypothetical questions of law — Reference when can be made

Andh Pra 365 (C N 56)

—S. 114 — Applicability to orders passed in arbitration proceedings — See Arbitration Act (1940), S. 41

Manipur 76 (C N 23)

Civil P. C. (contd.)

—S. 115 — Arbitration Act (1940), Section 39 — Revision — Order setting aside an award — It is a 'case decided' and is revisable. AIR 1936 All 686 (FB). Held overruled by 1963 All LJ 109 (FB)

—S. 115 — Court not considering important material on record — Failure to record finding on crucial matter — Court acts illegally at least with material irregularity — Such order is fit for revision

—S. 115 — High Court under S. 115 cannot exercise appellate powers and set aside an order under S. 39, Arbitration Act — See Arbitration Act (1940), S. 12

—S. 115 — Order of setting aside abatement — Not to be ordinarily interfered with in revision — See Civil P. C. (1908), O. 22, R. 9

—S. 115 — Revision — Aggrieved party has no vested right to claim interference by High Court

—S. 151 — Application to set aside dismissal of suit for default — Application also dismissed for default — Dismissal of application cannot be set aside under O. 9, R. 9, but possible under S. 151 — No limitation is prescribed for the application under S. 151 — Article 163 of Limitation Act does not govern — See Civil P. C. (1908), O. 9, R. 9

—S. 151 — Original Court's decree merges in that of the Appellate Court whether the latter order be either under R. 11 or under R. 32 of O. 41 — The original court cannot thereafter disturb its decision even in exercise of the power under S. 151 — Principle does not apply where appeal is dismissed for default — Dismissal of application filed under O. 9, R. 9 is the same as rejection — Hence appealable under O. 43, R. 1(c) — See Civil P. C. (1908), O. 41, R. 11

—O. 1, R. 9 — Non-joinder of parties — Suit for eviction of lessee — Sub-lessees and parties deriving right from defendant are not necessary parties

—O. 1, R. 9 — Non-joinder of parties — Suit cannot be dismissed on basis of non-joinder of parties

—O. 1, R. 10(2) — Necessary parties to suit — Court can bring any necessary party on record if in his absence effectual and complete adjudication and settlement of all questions involved in suit is impossible

—O. 6, Gen. — Proceedings under before custodian are quasi judicial — Rules of pleading cannot be enforced strictly — See J. & K. Evacuees' Property Administration Act (2006), S. 9

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Civil P. C. (contd.)

—O. 7, R. 1 — Suit for ejectment — Determination of lease — Language of pleadings may sufficiently indicate determination

—O. 7, R. 7 — Joint demise by way of lease — Suit for ejectment and possession by some lessors only, others being made party defendants — Lessor defendants also interested in obtaining recovery of possession and supporting plaintiff-lessors — Plaintiff-lessors can be given decree for recovery of possession jointly with defendant lessees

—O. 8, R. 6 — Set-off — Suit for ejectment and for payment of rent — Defendants without making valid claim for set off by payment of requisite stamp cannot agitate the claim in suit

—O. 9, R. 9 and S. 151 — Application to set aside dismissal of suit for default — Application also dismissed for default — Dismissal of application cannot be set aside under O. 9, R. 9 but possible under S. 151 — No limitation is prescribed for the application under S. 151 — Article 163 of Limitation Act does not govern — (Limitation Act (1908), Art. 163)

—O. 9, R. 13 — Order setting aside ex parte decree — Conditional on payment of costs within certain period — Date of order not to be counted in calculating period — See General Clauses Act (1897), S. 9

—O. 9, R. 13, Proviso — Ex parte decree — Setting aside of, against several defendants

—O. 21, R. 68 — Time to pass proclamation before effecting sale — Non-compliance with the rule does not vitiate sale unless irregularity has resulted in substantial injury to judgment-debtor — AIR 1954 Nagpur 240, Dissented from

—O. 21, R. 82 — Small Cause Court decree — Transfer of, to Munsiff's Court for execution — Transferee Court whose powers are same as that of Court passing decree under S. 42 (U. P.) cannot execute it by attachment and sale of immovable property — See Civil P. C. (1908), S. 42 (U. P.)

—O. 21, R. 89 (as amended by Patna High Court), and R. 90 — Word "interest" in R. 89 — Meaning of — Right of person attaching property before judgment to get a Court auction sale set aside. AIR 1947 Pat. 293, Overruled

—O. 21, R. 90 — Application for setting aside sale — No difference between whether applicant has attached property before judgment or afterwards — See Civil P. C. (1908), O. 21, R. 89 (as amended by Patna High Court)

Pat 368 A (C N 67) (FB)

Civil P. C. (contd.)

—O. 21, R. 90 (Assam) — Sale proclamation containing misdescription of property — Judgment-debtor not objecting to non-compliance with R. 66 — Sale is not liable to be set aside

Assam 117 B (C N 28)

—O. 21, R. 92 — Setting aside Court sale — Notice to auction-purchaser is necessary — Failure to issue notice an irregularity which should be rectified when case is heard on remand

Pat 368 B (C N 67) (FB)

—O. 22, R. 2 — Death of pro forma defendant — Abatement against him — Right to sue surviving against contesting defendant — Nature of decree to be drawn

Cal 444 B (C N 87)

—O. 22, R. 3 — Abatement — Application for substitution of legal representatives can be treated as for setting aside abatement — See Civil P. C. (1908), O. 22, R. 9

Manipur 70 A (C N 20)

—O. 22, R. 4 — Abatement — Application for substitution of legal representatives can be treated as for setting aside abatement — See Civil P. C. (1908), O. 22, R. 9

Manipur 70 A (C N 20)

—O. 22, Rr. 9, 3, 4 — Abatement — Application for substitution of legal representatives can be treated as application for setting aside abatement

Manipur 70 A (C N 20)

—O. 22, R. 9; O. 43, R. 1(1) — Order setting aside abatement not appealable

Manipur 70 B (C N 20)

—O. 22, R. 9, S. 115 — Order of setting aside abatement — It being discretionary is not ordinarily interfered with in revision

Manipur 70 C (C N 20)

—O. 23, R. 1(3) — 'Subject matter' — First suit for judicial separation — Subsequent suit for divorce on same grounds not barred

Bom 341 E (C N 60)

—O. 26, R. 10 — Report as evidence in suit — Commissioner appointed to ascertain person in possession of suit premises — Statements in report as to sub-letting and time of sub-letting are beyond scope of order of appointment and cannot be relied upon

Delhi 205 F (C N 44)

—O. 26, R. 10(2) — Inspection report by Commissioner — Prior notice under O. 26, R. 18 not given to parties — Report cannot be received as evidence — See Civil P. C. (1908), O. 26, R. 18

Delhi 205 A (C N 44)

—O. 26, Rr. 18 and 10(2) — Parties to appear before Commissioner — Notice to appear not given — Report resulting from inspection cannot be received as evidence under R. 10(2)

Delhi 205 A (C N 44)

—O. 26, R. 18 — Appearance of parties before Commissioner — Non-compliance with Rule — Non service of notice — Report proved by Commissioner — Can be relied on to corroborate his testimony — See Evidence Act (1872), S. 157

Delhi 205 E (C N 44)

Civil P. C. (contd.)

—O. 30, R. 10 — Municipal Corporation carrying on business of B. E. S. T. Undertaking — Mention of undertaking in claim application before Motor Accidents Claims Tribunal is merely a misdescription for the real owner

Bom 337 B (C N 59)

—O. 32, R. 6(2) — Suit for compensation under Fatal Accidents Act decreed — Mother, guardian of minors can be allowed to withdraw money awarded

Ker 241 F (C N 35)

—O. 33, R. 10 — Pauper suit — Court-fees — Order to pay court-fees "on the amount decreed" was patently wrong

Ker 241 E (C N 35)

—O. 39, R. 8 — Notice to be given before application under R. 6 or R. 7 — Provision is directory — Does not preclude court from passing ex parte order including order for inspection of property in terms of Cl. (a) of R. 7(1)

Delhi 205 B (C N 44)

—O. 41, Rr. 11 and 32; O. 43, R. 1(c) and S. 151 — Original Court's decree merges in that of the Appellate Court whether the latter order be either under R. 11 or under R. 32 of O. 41 — The original court cannot thereafter disturb its decision even in exercise of the power under S. 151 — Principle does not apply where appeal is dismissed for default — Dismissal of application filed under O. 9, R. 9 is the same as its rejection — Hence appealable under O. 43, R. 1(c)

Madh Pra 199 B (C N 38)

—O. 41, R. 23 — Execution of decree — Limitation — Petition to take benefit of S. 78(2), Provincial Insolvency Act to exclude period allowed — Appeal by judgment-debtor — Question whether decree debt had been proved — Decree-holder producing certified copies — Appellate Court held could not decide without giving opportunity to judgment-debtor to produce counter-evidence — Remand by it for the purpose to executing Court held proper, for all questions of fact must in first instance be decided by trial Court

Manipur 75 B (C N 22)

—O. 41, R. 27 — Type of subsequent event which Court can take into account at appellate stage — See Fatal Accidents Act (1855), S. 1-A

Ker 241 A (C N 35)

—O. 41, R. 32 — Original court's decree merges in that of the Appellate court whether the latter order be either under R. 11 or under R. 32 of O. 41 — The original court cannot thereafter disturb its decision even in exercise of the power under S. 151 — Principle does not apply where appeal is dismissed for default — Dismissal of application filed under O. 9, R. 9 is the same as rejection — Hence appealable under O. 43, R. 1(c) — See Civil P. C. (1908), O. 41, R. 11

Madh Pra 199 B (C N 38)

—O. 41, R. 33 — Power of Court of appeal — Subsequent events — Court can

Civil P. C. (contd.)

take into consideration

Pat 338 B (C N 62)

—O. 43, R. 1(c) — Original court's decree merges in that of the appellate court whether the latter order be either under R. 11 or under R. 32 of O. 41 — The original court cannot thereafter disturb its decision even in exercise of the power under S. 151 — Principle does not apply where appeal is dismissed for default — Dismissal of application filed under O. 9, R. 9 is the same as rejection — Hence appealable under O. 43, R. 1(c) — See Civil P. C. (1908), O. 41, R. 11

Madh Pra 199 B (C N 38)

—O. 43, R. 1(l) — Order setting aside abatement is not appealable — See Civil P. C. (1908), O. 22, R. 9

Manipur 70 B (C N 20)

—O. 46, R. 1 — Reference cannot be made on hypothetical questions of law — Reference when can be made — See Civil P. C. (1908), S. 113

Andh Pra 365 (C N 56)

—O. 47, R. 1 — Applicability to orders passed in arbitration proceedings — See Arbitration Act (1940), S. 41

Manipur 76 (C N 23)

CIVIL SERVICES

—Central Civil Services (Temporary Service) Rules (1949)

—R. 5, proviso — Suspension of temporary Civil Servant — Termination of his services by one month's full pay and allowances in lieu of one month's notice — Employee entitled to full pay and allowances for period of suspension

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—Kerala Education Act (6 of 1959)

—S. 12 — Kerala Education Rules, Ch. xiv(c), R. 2(A) — Reduction in age of retirement on superannuation made by rules — Not in violation of Arts. 19(1) (f) and 31 of Constitution — See Constitution of India, Art. 19(1) (f) Ker 239 A (C N 34)

—S. 36 — Kerala Education Rules, Ch. xiv(c), R. 2(A) — Reduction in age of retirement on superannuation made by rules — Not in violation of Arts. 19(1) (f) and 31 of Constitution — See Constitution of India, Art. 19(1) (f) Ker 239 A (C N 34)

—Kerala Education Rules

—Ch. xiv(c), R. 2 — Teachers of private schools governed by Ch. xxvii-B — Age of retirement is 55 years and not 60 years — They cannot claim benefit of note to R. 8 of Ch. xxvii-A — See Kerala Education Rules, Ch. xxvii-A, R. 8

Ker 239 B (C N 34)

—Ch. xiv(c), R. 2(A) — Reduction in age of retirement on superannuation made by rules — Not in violation of Arts. 19(1)

Civil Services — Kerala Education Rules (contd.)

(f) and 31 of Constitution — See Constitution of India, Art. 19(1) (f)

Ker 239 A (C N 34)

—Ch. xiv(c), R. 2(A) — Teachers of private schools governed by Ch. xxvii B — Age of retirement is 55 years and not 60 years — They cannot claim benefit of note to R. 8 of Ch. xxvii A — See Kerala Education Rules, Ch. xxvii A, R. 8

Ker 239 B (C N 34)

—Ch. xxvii A, Rule 8, Ch. xxvii B, Rr. 2 and 4 and Chap. xiv C, Rr. 2 and 2 (A) — Chapters xxvii A and xxvii B are mutually exclusive — Teachers of private schools governed by Chap. xxvii B — Age of retirement is 55 years and not 60 years — They cannot claim benefit of note to R. 8 of Chap. xxvii A Ker 239 B (C N 34)

—Chap. xxvii B, R. 2 — Chapters xxvii A and xxvii B are mutually exclusive — Teachers of private schools governed by Chap. xxvii B — Age of retirement is 55 years and not 60 years — They cannot claim benefit of note to R. 8 of Chap. xxvii A — See Kerala Education Rules, Ch. xxvii A, R. 8 Ker 239 B (C N 34)

—Chap. xxvii B, R. 4 — Chapters xxvii A and xxvii B are mutually exclusive — Teachers of private schools governed by Chap. xxvii B — Age of retirement is 55 years and not 60 years — They cannot claim benefit of note to R. 8 of Chap. xxvii A — See Kerala Education Rules, Chap. xxvii A, R. 8 Ker 239 B (C N 34)

—Punjab Civil Services Rules

—Vol. I, Part I, R. 3.26—Compulsory retirement of servant holding ex-cadre post — Director of Industries cannot exercise authority delegated under order of State Government passed on November 10, 1967 (Annexure II) in respect of such ex-cadre post — Order cannot be applied retrospectively so as to authorise Director to remove employees appointed previously by State Government — See Civil Services—Punjab Industries Department (State Service Class III, Rules) Appendix 'A' Punj 459 A (C N 70)

—Vol. 2, R. 5.32, Note 2(c) (i) — Retirement of servant after 55 years — Government can retire by giving three months' salary and allowances in lieu of notice — Government has absolute right to retire employee after he attains 55 years — (Pandit and Mahajan, JJ., Suri, J. Contra). 1967 Ser LR 924 (Punj) & 1968 Lab IC 1435 (Punj). Overruled. Civil Writ No. 1037 of 1968, D/- 22-10-1968 (Punj), Reversed Punj 419 A (C N 66) (FB)

—Vol. 2, R. 5.32, Note 2(c) (ii) — Order of compulsory retirement when will come into operation Punj 419 B (C N 66) (FB)

Civil Services (contd.)

—Punjab Industries Department (State Service Class III Rules)

—Appendix 'A' — Rules-do not apply to ex-cadre post — Compulsory retirement of servant holding ex-cadre post — Director of Industries cannot exercise authority delegated under order of State Government passed on November 10, 1967 (Annexure II) in respect of such ex-cadre post — Order cannot be applied retrospectively so as to authorise Director to remove employees appointed previously by State Government — (Civil Services — Punjab Civil Services Rules, Vol. I, Part I, Rule 3 26) Punj 459 A (C N 70)

Commissions of Inquiry Act (60 of 1952)

—S 3 — Report of Commission appointed under is not binding on Government

Delhi 178 C (C N 37)

—S 3 — Appointment of Commission — Purpose of appointment is to preserve purity and integrity of public administration

Ker 252 B (C N 37)

Companies Act (1 of 1956)

—S. 84 — Title to shares — Necessity of Certificate — See Finance Act (1956), Part II, Sec. D Second Proviso (1) (a) & (b)

SC 1750 (C N 373)

—S 434(1) (a) — Company when deemed unable to pay its debts — Notice under Section 434(1) (a) not stating exactly correct amount of debt not invalid

Cal 418 B (C N 79)

—S. 434(1) (c) — Company when deemed unable to pay its debts — Bona fide dispute regarding the debt — Court will not entertain insolvency petition — Building contracts are generally disputed

Cal 418 A (C N 79)

Constitution of India

—Pre. — Statement of Objects and Reasons — Use of, for seeing infringement of Art 14 of the Constitution

SC 1589 J (C N 340)

—Pre — Reorganization of composite State — Competence of legislature of new State to amend Act applicable to composite State with retrospective effect — See Punjab Reorganization Act (1966), S 88

SC 1742 D (C N 372)

—Art. 3 — Reorganization of composite State — Competence of legislature of new State to amend Act applicable to composite State with retrospective effect — See Punjab Reorganization Act (1966), S 88

SC 1712 D (C N 372)

—Art. 3(2) Proviso — Does not prevail over proclamation under Art. 356

Delhi 178 A (C N 37)

—Art. 14 — Equality before law — Tax laws — Rubber Act (1947), S. 12(2) — No violation of Art. 14

SC 1589 I (C N 340)

Constitution of India (contd.)

—Art. 14 — Equality before law — Allegation of infringement of Article — Facts contained in Statement of Objects and Reasons can be looked at

SC 1589 K (C N 340)

—Art. 14 — Punjab General Sales Tax Act (46 of 1948) (as amended by Act 7 of 1967), Ss. 2(d) and 11-AA proviso — Opportunity given to dealer to ask for reassessment or to submit to old assessment — Article 14 not violated as opportunity is open to every dealer

SC 1742 B (C N 372)

—Art 14 — Punjab Sales Tax (Haryana Amendment and Validation) Act, 1967, Pre — Constitutional validity of Haryana amendment under equality Clause — See Sales Tax — Punjab General Sales Tax Act, (1948) (as amended by Punjab Sales Tax (Haryana Amendment and Validation) Act 1967), Pre.

SC 1742 E (C N 372)

—Art 14 — Maharashtra Industrial Development Act, 1961 (3 of 1962) — Validity — No procedural discrimination between the Act and the Land Acquisition Act, 1894

SC 1771 B (C N 378)

—Art 14 — Right of citizen to practise any profession etc. — Extent of — State can restrict such right — Restrictions must be consistent with Art. 14 — See Constitution of India, Art. 19(1) (g)

Delhi 195 C (C N 42)

—Art. 14 — Equal protection of laws — Madras Land Encroachment Act (3 of 1905), S. 6 — Neither section nor the Act is void as being ultra vires the Article

Mad 387 A (C N 115)

—Art. 14 — Equality before law — Madras Shops and Establishments Act — Exemption from scope of S 41 of persons employed on contract for fixed period — Not invalid on ground of hostile discrimination

Mad 432 B (C N 129)

—Art. 14 — Vesting power in Central Government under Cl 5 (3) Sugarcane (Control) Order (1966), to exempt Sugar Factories from payment of additional price fixed under Cl (4) — Power not arbitrary and uncontrolled and hence, not unconstitutional — See Sugarcane (Control) Order (1966), Cl 5(3)

Mys 243 B (C N 61)

—Art 14 — Equality before law — University Regulations — University misconstruing a Regulation in one case would not justify claim by candidate that same mistake should be allowed to continue in other cases

Orissa 181 A (C N 59)

—Art 14 — Equality before law — Statute giving unguided discretion to authority is void — Section 6, Orissa Prevention of Land Encroachment Act is void — (Orissa Prevention of Land Encroachment Act (15 of 1954), S 6)

Orissa 189 (C N 61)

—Art. 14 — Provision under S 53 of Santhal Parganas Tenancy (Supplementary Provisions) Act — See Tenancy Laws

Constitution of India (contd.)—

—Santhal Parganas Tenancy (Supplementary Provisions) Act, (14 of 1949), Section 53 Pat 358 A (C N 66)

—Art. 14 — Section 20-A of Displaced Persons (Compensation and Rehabilitation) Act (1954) is violative of Art. 14 — See Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 20-A

Punj 452 B (C N 69)

—Art. 15(4) — Prohibition of discrimination on grounds of caste etc. — Special provision for advancement of Backward classes — List of Backward classes for educational purposes notified by Government — Included community eliminated from prospectus of certain educational institution for selection of course of study — Elimination held not justified since Govt. had not altered the notification

Mad 399 (C N 118)

—Art. 16 — Equality of opportunity in matters of public employment — Citizen cannot be debarred from being considered for employment by an ex parte finding that he is dishonest

Delhi 195 D (C N 42)

—Arts. 19 (1) (f) and 31 — Property, acquisition of — Reduction in age of retirement made by rules — Power exercised in making rules being legislative, rules cannot be challenged on ground of violation of principles of natural justice — Right to future employment is not property — Hence, reduction in age of retirement does not amount to deprivation of property in violation of Arts. 19 (1) (f) and 31 of Constitution — (Civil Services — Kerala Education Act (6 of 1959), Ss. 36, 12) — (Civil Services — Kerala Education Rules, Ch. xiv(e), R. 2 (A))

Ker 239 A (C N 34)

—Art. 19(1) (f) — Section 20-A of Displaced Persons (Compensation and Rehabilitation) Act (1954) is violative of Article 19(1) (f) — See Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 20-A

Punj 452 B (C N 69)

—Art. 19(1) (g) — Right to practise any profession etc. — Ban on employment of certain citizen — Although full-fledged inquiry under Art. 311 or any service rules not necessary, opportunity must be given to him to know evidence against him and to explain it

Delhi 195 A (C N 42)

—Arts. 19(1) (g) and 226 — Right to practise any profession etc. — Ban on — Circular letter issued by Government to all States reflecting on citizen's conduct indicating that such person should not be employed — No privilege on ground of affairs of State — Government's action can be challenged in writ petition

Delhi 195 B (C N 42)

—Arts. 19(1) (g), 14 — Right of citizen to practise any profession etc — Extent of — State can restrict such right — Restrictions must be consistent with Art. 14.

Delhi 195 C (C N 42)

Constitution of India (contd.)

—Art. 22(1) — Conviction for offence under S. 123 of Motor Vehicles Act — Provisions of Ss. 191 and 556 of Criminal P. C. not complied with — Accused held was deprived of his privileges under Article 22(1) Tripura 72 G (C N 18)

—Art. 31 — Right to property — Section 87-B of Civil P. C. (1908) does not violate Art. 31 as it does not deprive any person of his property — (Civil P. C. (1908), S. 87-B) (Obiter)

Delhi 190 B (C N 41)

—Art. 31 — Property — Right to future employment is not property — Hence, reduction in age of retirement made by Kerala Education Rules and Kerala Service Rules does not amount to deprivation of property in violation of Arts. 19(1) (f) and 31 of Constitution — See Constitution of India, Art. 19(1) (f) Ker 239 A (C N 34)

—Art. 31(2), (5) and (6) — Provision under S. 53 of Santhal Parganas Tenancy (Supplementary Provisions) Act violative of Art. 31(2) of the Constitution and hence void — See Tenancy Laws — Santhal Parganas Tenancy (Supplementary Provisions) Act (14 of 1949), S. 53

Pat 358 A (C N 66)

—Art. 31(2) — Acquisition not for public purpose — Section 20-A of Displaced Persons (Compensation and Rehabilitation) Act (1954) is ultra vires Art. 31 (2) — See Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 20-A

Punj 452 A (C N 69)

—Art. 105 (2) — "In respect of anything said in Parliament" — Meaning — Speech whether must be relevant to business of Parliament

SC 1573 A (C N 332)

—Art. 133 — Appeal — Notice of lodgment of appeal to respondents — Non-appearance of respondents — Effect

SC 1573 B (C N 332)

—Art. 133(1) (c) — Certificate of fitness — Interpretation of Section 22-A (3) of Electricity Act — Question is one of wide public importance fit to be resolved by Supreme Court

Guj 194 (C N 33)

—Art. 136 — Appraisal of evidence by Supreme Court — Evidence believed by High Court — Supreme Court will not ordinarily re-examine evidence — Original document missing from record — Case being of a serious nature Supreme Court undertook to examine evidence in respect of the document

SC 1566 C (C N 331)

—Art. 136 — Suit for permanent injunction restraining defendant from infringing registered trade mark 'Ruston' in respect of engines — Defendant using words 'Rustam India' on similar engines manufactured by it — Suit dismissed — High Court in appeal holding that there was deceptive resemblance between 'Ruston' and 'Rustam' and constituted in-

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fringement of plaintiff's trade mark 'Ruston' — High Court however holding that the suffix 'India after Rustam' was a sufficient warning to purchaser and that defendant could be allowed to use the combination — Appeal by special leave by plaintiff — No appeal by defendant against finding that use of bare word 'Rustam' constituted infringement — Finding cannot be challenged before Supreme Court — Fact that word 'India' was added to defendant's trade mark was of no consequence and plaintiff was entitled to succeed in its action for infringement of trade-mark — F. A. No. 208 of 1958, D/- 23-11-1965 (All), Reversed SC 1649 B (C N 350)

— Art. 141 — Law declared by Supreme Court — Extent of its binding effect

Delhi 190 A (C N 41)

— Art. 166 (2) — Authentication of Government orders — Appointment of Commission under Commissions of Inquiry Act (1952) — Order for issue of notification in official gazette not signed nor authenticated — Notification is void

Ker 252 A (C N 37)

— Art. 166 (2), (3) — Authentication of Government Orders — Rules framed under by Government of Kerala, Rule 12 — Special Secretary to Government even though not specifically mentioned in Rule is competent to sign orders or instruments of Government

Ker 252 C (C N 37)

— Art. 226 — Jurisdiction of High Court to issue writs — Court will not interfere unless there is an apparent error of law or fact resulting in injustice — Wrong decision resulting in injustice is a fit case for interference. (Per-Sinha, J. Dissenting)

All 544 D (C N 79) (FB)

— Art. 226 — Procedure — Declaring enactment ultra vires — Notice to Advocate-General essential

Bom 351 C (C N 51)

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— Art. 226 — Retrospective operation — Madras High Court's jurisdiction extended by Section 9, Pondicherry (Administration) Act (1962) — Article could not be applied retrospectively.

Mad 424 D (C N 126)

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— Art. 226 — Power to issue writs — Petitioner's interest — Grant of stage carriage permit for a particular route from A to B — Existing permit holder on a different route but from and to the same place has sufficient interest to apply for writ

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—Art. 226 — Delay — Termination of service in terms of contract — 6 years' limitation for suit begins under Article 120, Limitation Act from date of order — Writ filed four years after termination of period of limitation — Limitation once started is not suspended right from date of employee's arrest on charge under Section 420 I.P.C., till his final acquittal by Supreme Court, when order terminating his services had no nexus, on the face of it to the criminal charge against him — He could have gone to Civil Court or to High Court under Article 226, immediately after termination of service — The writ petition filed after such an inordinate delay will be dismissed

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—Art. 227 — Power of superintendence by High Court — Lower Courts misconstruing provisions of Rent Act and proceeding to pass decree for eviction of tenant — It being a patent error of law can be corrected in exercise of powers of superintendence vested in High Court under Article 227

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—Art. 233 (1) — Promotion of person to be Additional District Judge, vests in Governor. AIR 1969 Assam 128, Reversed

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—Art. 235 — Reconstitution of subordinate judicial service in State by amending rules, leaving no scope for exercise of power of High Court to make promotions in case of persons below the rank of District Judges (which term includes Assistant District Judges) — New hierarchy of Courts cannot be ignored by High Court — Remedy is not to go against the Civil Courts Act as amended but to have the amendment rescinded. AIR 1969 Assam 128, Reversed

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—Art. 311 — Termination of service in terms of service Rules — Non-applicability of procedure under article

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to that institution and from M. P. Board, at
time of submission of their admission forms
— Held, admission of candidates to examina-
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duct' within meaning of Reg. 126 and that
M. P. Board was entitled to cancel their
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—Art. 102 — Cause of action when accrues — Employee suspended on 19-11-1953 — Notice of termination given on 28-1-1953 — Suit for full wages filed on 10-9-1959 — Part of claim for period beyond three years preceding the filing of suit cannot be said to be barred by time — As order of suspension stands revoked on date of order of termination of service, in view of Rule 53 Fundamental Rules, prior to that date claim of full wages would not accrue to the employee and he would have no cause of action

Delhi 135 C (C N 39)

—Art. 142 — Principle that possession follows title — Property not capable of possession — Proof of title in favour of plaintiff — Presumption that possession follows title does not become unavailable

Limitation Act (1908) (contd.)

on ground that plaintiff put forward a case of effective possession which he could not prove — AIR 1931 Mad 282 and AIR 1922 Cal 557, Dissented from

Mys 249 (C N 62)

—Art. 142 — Suit for recovery of possession of lands — Date of dispossession not proved — Court cannot hold suits to be filed within limitation

Tripura 76 C (C N 19)

—Art. 163 — Application to set aside dismissal of suit for default — Application also dismissed for default — Dismissal of application cannot be set aside under O. 9, R. 9, but possible under S. 151 — No limitation is prescribed for the application under S. 151 — Art. 163 of Limitation Act does not govern — See Civil P. C. (1903), O. 9, R. 9 — Madh Pra 199 A (C N 38)

—Art. 182 (5) — Step-in-aid of execution — Mad 425 (C N 127)

Limitation Act (36 of 1963)

—S. 12, Explanation — Time requisite for copy — Time taken to prepare decree or order — "Shall not be excluded" — Mean "shall be included" in time requisite

Cal 443 (C N 86)

—Art. 64 — Adverse possession — Possession of co-heir or co-sharer — Presumption is that he holds possession for other co-heirs or co-sharers — Hostile title by adverse possession must be established

Mad 411 (C N 122)

—Art. 115 — Sixty days for appeal under Criminal P. C. — Right of appeal under Section 11 of Probation of Offenders Act is not governed by this Article — Appeal must, however, be filed within reasonable time — Revision, which is incompetent filed 70 days after order — Revision entertained as an appeal — (Probation of Offenders Act (1958), S. 11)

Cal 437 E (C N 83)

Madhya Bharat Abolition of Jagir Act (28 of 1951)

See under Tenancy Laws.

Madhya Pradesh Board of Secondary Education Regulation (1965)

See under Education.

Madras Buildings (Lease and Rent Control) Act (18 of 1960)

See under Houses and Rents.

Madras City Tenants' Protection Act (3 of 1922)

See under Tenancy Laws.

Madras General Sales Tax Act (1 of 1959)

See under Sales Tax.

Madras Hindu Religious and Charitable Endowments Act (22 of 1959)

—S. 108 — Suit praying for declaration that trustee of a Math was not a duly ap-

Madras Hindu Religious and Charitable Endowments Act (contd.)

pointed trustee, for framing a scheme to appoint a new trustee and for rendition of account — If any of the prayers fell under Section 108 or any other section? *Quaere*
Mad 402 C (C N 120)

Madras Land Encroachment Act (3 of 1905)

See under Tenancy Laws.

Madras Shops and Establishments Act (36 of 1947)

See under Shops and Establishments.

Maharashtra Co-operative Societies Act (24 of 1961)

See under Co-operative Societies.

Mahomedan Law

— Marriage — Divorce — Agreement between husband (Khana Damad) and wife that on breach of any of the conditions therein wife would be entitled to divorce — Agreement held opposed to public policy

J & K 154 B (C N 34)

— Marriage — Restitution of conjugal rights — Suit by Khana Damad — On proof that wife has refused to live with her husband in her own house or to perform her marital obligations, Khana Damad is entitled to a decree to that extent

J & K 154 A (C N 34)

— Possession by co-heir — Possession of — Adverse possession — Proof — See Limitation Act (1963), Article 64

Mad 411 (C N 122)

Minimum Wages Act (11 of 1948)

— Pre. — The Act and the Industrial Disputed Act are not *pari materia*

Bom 380 B (C N 64)

— Ss. 20 and 24 — Adjudication of claims — Relationship between claimant and person claimed against — Determination — Power of Authority under Act

Bom 380 A (C N 64)

— S. 24 — Bar of suits — Jurisdiction of Authority — Extent of — See Minimum Wages Act (1948), Section 20

Bom 380 A (C N 64)

Motor Vehicles Act (4 of 1939)

— S. 24 — Registration of vehicle — Application to be made only by owner — Owner includes guardian of minor in possession of vehicle and also person in possession of vehicle under hire-purchase agreement. AIR

1952 SC 192, held not good law in view of amendment

Raj 216 D (C N 47)

— S. 48 — Application for permit on new route rejected on ground that there was no justification for a new route — Order does not fall under Section 48 and is not appealable under Section 64 (a)

SC 1704 (C N 362)

Motor Vehicles Act (contd.)

— S. 48 — Grant of stage carriage permit — Condition that vehicle should be employed within particular time and that permit would stand revoked if there is default, is valid

Raj 216 A (C N 47)

— S. 48. — Grant of stage carriage permit — Permit granted subject to condition that it would stand revoked if vehicle is not employed within particular time — Grantee though purchasing vehicle unable to get transfer of registration within prescribed time — Permit stands revoked as there is non-compliance with Rule 86, Rajasthan Motor Vehicles Rules, 1951

Raj 216 B (C N 47)

— S. 57 (8) — Order refusing to vary terms of a permit — Appeal against, is not maintainable — See Motor Vehicles Act (1939), Section 64 (a), (b)

Madh Pra 220 (C N 40)

— Ss. 64 (a), (b), 57 (8) — Order refusing to vary terms of a permit under — Appeal against is not maintainable

Madh Pra 220 (C N 40)

— S. 110-A (2) — Motor Vehicles Rules (Bombay) (1959), Rule 291, Form No. Comp. A — Application to Claims Tribunal — Prescribed form does not require to mention anybody as opposite party in title of claim application — Formal defect does not defeat claim

Bom 337 A (C N 59)

— S. 111-A — Rules under — Bombay State Rules — See Motor Vehicles Rules (Bombay), (Published in 1967)

— S. 123 — Offence under — Sec. 130 (1) applies and not Criminal P. C.

Tripura 72 D (C N 18)

— S. 123 — Offence under — Provisions of Sections 191 and 556 Cri. P. C. not complied with — Accused deprived of his privilege under Article 22 (1) of the Constitution — Trial held vitiated

Tripura 72 H (C N 18)

— S. 130 (1) (as amended by Amending Act of 1956) — Summary disposal of cases — Word "shall" is mandatory — Infraction of provisions invalidates trial.

Tripura 72 A (C N 18)

— S. 130 (1) — Summary disposal — Offence under Section 123 of Act — Issue of summons — Motor Vehicles Act being special law within Section 1 (2) of Criminal P. C., provisions of Section 130 (1) apply in trial of offence under the Act

Tripura 72 B (C N 18)

Motor Vehicles Rule (Bombay) (Published in 1967)

— R. 291, Form No. Comp. A — Application to claims Tribunal — Prescribed form does not require to mention anybody as opposite party in title of claim application — See Motor Vehicles Act (1939), Section 110-A (2)

Bom 337 A (C N 59)

MUNICIPALITIES

—Andhra Pradesh Municipalities Act (3 of 1965)

—S. 11 — Voter below 21 years of age — His name appearing in electoral roll — Election tribunal has jurisdiction to go into question to improper reception of vote by reason of voter being under-aged — (1961) 2 Andh WR 23, Overruled; AIR 1968 Punj & Har 1 (FB) & AIR 1969 Guj 334 & AIR 1959 All 357 (FB) & AIR 1969 Mys 84, Dissented from. Andh Pra 337 (C N 55) (FB)

—Bombay Municipal Corporation Act (3 of 1888)

—S. 140 — Educational cess — Amount can be added to standard rent in fixing rateable value of building — See Municipalities — Bombay Municipal Corporation Act (3 of 1888), Section 154 (1) SC 1584 (G N 337)

—Ss. 154 (1), 140 — Rateable value — Educational cess levied under Section 140 can be added to standard rent for purpose of valuation — (Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Ss. 5 (7), 7, 10AA) — AIR 1965 Bom 263, Reversed SC 1581 (C N 637)

—S. 354 — Notice under — Authorities taking further action under Section 488 but finally abandoning demolition work — Original order under Section 384 held no longer operative — See Municipalities — Bombay Municipal Corporation Act (3 of 1888), Section 488 Bom 376 C (C N 63)

—Ss. 488 and 354 — Notice under Section 354 (1) for demolition of structure — Municipal Authorities proceeding further with their action under Section 488 and finally abandoning demolition work on their satisfaction that the building is no longer in dangerous condition — Effect — Original order issued under Section 354 no longer remains operative — Express orders cancelling requisition to demolish not necessary in every case — From subsequent conduct it can be inferred that the initial direction is withdrawn Bom 376 C (G N 63)

Orissa Prevention of Land Encroachment Act (15 of 1954)

See under Tenancy Laws.

PANCHAYATS

—Assam Panchayat Act (24 of 1959)

—Pre. (as amended in 1964) — Meeting for co-option of members under Section 17 (2) (i) and (ii) — Government failing to nominate member of unrepresented area under Section 17 (1) (iv) — Meeting is incompetent and unauthorised — See Panchayats — Assam Panchayat Act (24 of 1959), Section 17 Assam 124 A (C N 30)

Panchayats — Assam Panchayat Act (contd.)

—Ss. 17 (as amended in 1964), 18, Preamble — Meeting for co-option of members under Section 17 (2) (i) and (ii) — Government failing to nominate member of unrepresented area — Meeting is incompetent and unauthorised Assam 124 A (C N 30)

—S. 18 (as amended in 1964) — Meeting for co-option of members under Sec. 17 (2) (i) and (ii) — Government failing to nominate member of unrepresented area under Section 17 (1) (iv) — Meeting is incompetent and unauthorised — See Panchayats — Assam Panchayat Act (24 of 1959), Sec. 17 Assam 124 A (C N 30)

—Rule under, Rule 55 (3) (as amended) — Reference to Section 17 (1) (ii) in sub-rule (3) should be Section 17 (2) (i) and (ii). Assam 124B (C N 30)

Parsi Marriage and Divorce Act (3 of 1936)

—S. 32 (c) — Desertion, what amounts to — Constructive desertion, when takes place Bom 341 B (C N 60)

—S. 32 (g) — Desertion — Period of Bom 341 C (C N 60)

—S. 35 (a) — Resumption of cohabitation after desertion must be with the intention of forgetting and remitting the wrong on condition that the spouse commits no further matrimonial offence — If a further matrimonial offence is committed, the condonation is cancelled and the old cause of complaint is revived Bom 341 A (C N 60)

—S. 40 — Condonation — Withdrawal of suit for judicial separation, whether with consent — Question of law Bom 341 C (C N 60)

—S. 40 — Question of law — Whether constructive desertion has ended by husband's residence in matrimonial home has to be decided by inference from facts — Decision thus is on facts and is liable to be disposed of finally by delegates Bom 341 I (C N 60)

—S. 47 — High Court will not substitute its own finding of fact for that of delegates — There would be nothing before the High Court, to form its own opinion, the delegates not being bound to record their reasons Bom 341 II (C N 60)

—S. 47 — Question of law whether constructive desertion has ended, is to be decided by inference drawn from facts — Decision of the question therefore, has to be finally disposed of by delegates — High Court will not interfere Bom 341 J (C N 60)

—S. 47 — High Court in appeal will not refer to evidence on question of fact — High Court, however, referred to evidence because of the contention that the delegates ignored the evidence on record on certain issues. (Decision of delegates held was not contrary to overwhelming evidence on record) Bom 341 K (C N 60)

Penal Code (45 of 1860)

—S. 25 — Words "intent to defraud" in Section 25 — Meaning of

Mys 254 D (C N 63)

—S. 75 — Offence under Section 379 read with Section 75 — For purpose of compounding only offence is one under Section 379 — Section 75 does not give different colour to it — See Penal Code (1860), Section 379

Ker 251 (C N 36)

—S. 182 — Information — Must be one falling under Section 154 — Subsequent statement during inquiry or investigation cannot be basis of offence under Section 182

Guj 218 C (C N 36)

—S. 302 — Sentence — Offence deliberate and pre-planned — Capital sentence held not excessive

SC 1566 E (C N 331)

—S. 307 — Attempt to murder — It is not necessary that injury capable of causing death should have been actually inflicted — Liability of accused should be limited to act which he actually did

Raj 220 (C N 49)

—S. 366 — Kidnapping, or abducting a female — Taking away must be against her will

Punj 450 A (C N 68)

—S. 366 — Kidnapping or abducting a female — Age of girl — Proof — Entry in school certificate not reliable with implicit faith as against medical evidence — Test of epiphyses on basis of fusion being scientific test would be acceptable — If there be conflicting evidence as to age, benefit of uncertainty as to age of the girl should be given to accused — (Evidence Act (1872), S. 45)

Punj 450 B (C N 68)

—Ss. 379, 75 — Offence under Sec. 379 read with Section 75 — For purpose of compounding only offence is one under Section 379 — Section 75 does not give different colour to it — (Criminal P. C. (1898), Section 35)

Ker 251 (C N 36)

—S. 409 — Misappropriation alleged against Post Master — Payee of money order amount not stating before Sessions Court that she did not receive amount from accused but stating that thumb impressions on money order form in token of receipt of amount, were not hers — Prosecution merely establishing that out of two thumb impressions one was that of accused — Prosecution failing to prove that other was not of payee — Held, charge against accused was not proved

Mys 254 (C N 63)

—S. 464 — Making of false document — Offence is committed when document is made dishonestly or fraudulently — Mere proof of making of such document without establishing 'intention', is not sufficient to constitute offence

Mys 254 C (C N 63)

—S. 467 — Forgery of valuable security — Essentials of offence — Offence is committed when preparation of false document is made dishonestly or fraudulently within meaning of expressions in Sections 463, 464

Mys 254 B (C N 63)

Pondicherry Civil Courts Act (12 of 1966)

—S. 6 — The Act and particularly Section 6 are within competency of Pondicherry Legislative Assembly and are valid

Mad 419 A (C N 124)

Press and Registration of Books Act (25 of 1867)

—S. 12 — Distribution of pamphlet by its literate author — Author is publisher. AIR 1960 All 450, Diss. from

Assam 128 (C N 31) (FB)

Prevention of Corruption Act (2 of 1947)

—S. 5 (2) — Charge, not disclosing amounts taken as bribes and names of bribe-givers — This does not invalidate the charge though it may be a ground for asking for better particulars — Charge, however, should have contained better particulars

SC 1636 D (C N 347)

—Section 5 (3) — Appeal against conviction under Section 5 (2) — Pending appeal sub-section (3) repealed — Appellate Court can invoke presumption under Section 5 (3)

SC 1626 A (C N 347)

Prevention of Food Adulteration Act (37 of 1954)

—Section 2 (xiv) — Seller leaving the shop on the approach of Food Inspector — Shop under watch by Police — Sample taken in the absence of seller but following the prescribed procedure — Sample does not cease to be one within the meaning of Section 10 (1) and Section 2 — See Prevention of Food Adulteration Act (1954), Section 10 (1)

Cal 435 (C N 82)

—Section 10 (1) — Enumeration in Section 10 of circumstances is not exhaustive — Seller leaving the shop on the approach of Food Inspector — Sample taken in the absence of seller from shop and godown but following the prescribed procedure — Sample does not cease to be one within the meaning of Section 10 (1) and Section 2 — Shop continued to be in seller's possession though under police guard

Cal 435 (C N 82)

—S. 10 (1) (a) and (7) — Food Inspector prevented from taking sample — Ss. 10 (7), 10 (1) (a) and 11 (1) (a) cannot apply — See Prevention of Food Adulteration Act (1954), S. 16 (1) (b)

Guj 209 A (C N 35)

—S. 11 (1) (a) — Food Inspector prevented from taking sample — Ss. 10 (7), 10 (1) (a) and 11 (1) (a) cannot apply — See Prevention of Food Adulteration Act (1954), Section 16 (1) (b)

Guj 209 A (C N 35)

—Ss. 16 (1) (b), 10 (1) (a) and (7) and 11 (1) (a) — Prosecution under Section 16 (1) (b) — Power of Food Inspector

Guj 209 A (C N 35)

—S. 16 (1) (b) — Prosecution under — Knowledge of accused that Food Inspector is taking sample — Proof

Guj 209 B (C N 35)

—Ss. 16 (1) (b), 19 (1) — Offence of preventing Food Inspector from taking sample

Prevention of Food Adulteration Act (contd.)

— Mens rea — Essential

— Cuj 209 C (C N 35)

— S. 16 (1) (b) — Word "prevent" — Meaning of

— Cuj 209 D (C N 35)

— S. 19 (1) — S. 19 (1) is limited in operation to Cl. (a) of S. 16 (1) and not to Cl. (b) — See Prevention of Food Adulteration Act (1934), Section 16 (1) (b)

— Cuj 209 C (C N 35)

— S. 19 (2) — Defence of Warranty — When available to vendor

— Cal 450 A (C N 90)

— S. 19 (3) — Prosecution for adulteration

— Vendor pleading Warranty — Prosecution

disputing the same — Vendor not bound to

examine him as defence witness

— Cal 456 B (C N 90)

Preventive Detention Act (4 of 1950)

See under Public Safety

Probation of Offenders Act (20 of 1958)

— S. 3 — Offenders under R. 126-P, De-

fence of India Rules (1962), can be dealt

with under Section 3 — See Defence of

India Rules (1962), R. 126-P (2)

— Cal 437 C (C N 83)

— S. 3 — Order under, is appealable —

Not revisable — See Probation of Offenders

Act (1958), Section 11 Cal 437 D (C N 83)

— S. 4 — Offenders under the Defence

of India Rules (1962), can be dealt with

under Section 4 — See Defence of India

Rules (1962), Rule 126-P (2)

— Cal 437 C (C N 83)

— S. 4 — Order under, is appealable —

Not revisable — See Probation of Offenders

Act (1958), Section 11 Cal 437 D (C N 83)

— Ss. 11, 3 and 4 — Order under Sec. 3

or Section 4 — Appeal lies notwithstanding

Section 411, Criminal P. C. — Revisions

against those orders are incompetent — (Crim-

inal P. C., (1898), Sections 411, 439)

— Cal 437 D (C N 83)

— S. 11 — Appeal — Sixty days' period of

limitation under Article 115 of the Limita-

tion Act not applicable — See Limitation

Act (1963), Article 115

— Cal 437 E (C N 83)

Provincial Insolvency Act (5 of 1920)

— S. 53 — Fraudulent transfer — Mort-

gage executed solely by father — Setting

aside of, under Section 53 — Effect — See

Hindu Law — Mad 406 (C N 121)

— S. 78 (2) — Decree-holder seeking ad-

vantage by exclusion of period while com-

puting limitation for execution — His

case must be covered by Section 78

(2) — Burden is on decree-holder to satisfy

executing Court that the decretal debt had

been proved by him in Insolvency Court to

qualify for benefit of Section 78 (2)

— Manipur 75 A (C N 22)

— S. 78 (2) — Remand by Appellate

Court to executing Court to decide question

whether decree debt was proved in insol-

Provincial Insolvency Act (contd.)

vency, held proper — See Civil P. C. (1903),

O. 41, R. 23 — Manipur 75 B (C N 22)

Provincial Small Cause Courts Act (9 of 1887)

— S. 23 — Questions of title — Power of

Court to try — Mad 390 B (C N 117)

PUBLIC SAFETY**— Preventive Detention Act (4 of 1950)**

— S. 13 (2) — Fresh order of detention

after expiry of previous order, served on day

of expiry must disclose fresh grounds arising

after expiry of previous detention — That

detenu who was in jail maintained links, with

his associates who had gone underground,

during period of his detention, is not such

fresh ground — SC 1664 (C N 355)

Punjab Civil Service Rules

See under Civil Services.

Punjab General Sales Tax Act (46 of 1948)

See under Sales Tax

Punjab General Sales Tax (Haryana Amend-

ment and Validation) Act (14 of 1967)

See under Sales Tax

Punjab Industries Department (State Service

Class III Rules)

See under Civil Services.

Punjab Reorganization Act (31 of 1960)

— S. 88 — Reorganization of Punjab State

on 1-11-1966 — Competence of legislature of

new State to amend Act with retrospective

effect — (Constitution of India, Pro., Art. 3

and Art. 245) — (Punjab General Sales Tax

Act (46 of 1948)) — (Punjab General Sales

Tax (Haryana Amendment and Validation)

Act (1967)) — SC 1742 D (C N 372)

Punjab Security of Land Tenures Act (10

of 1953)

See under Tenancy Laws.

Punjab Security of Land Tenure Rules (1056)

See under Tenancy Laws.

Punjab Tenancy Act (16 of 1887)

See under Tenancy Laws.

Rubber Act (24 of 1947)

— S. 12 (2) (as amended in 1960) — Im-

position of new rubber cess — Excise duty on

rubber — Levy and collection from users of

rubber does not affect essence of duty

— SC 1559 B (C N 340)

— S. 12 (2) — Tax not mentioned in either

List I or List II — Excise duty on rubber

— Levy and collection from users of rub-

ber — Parliament has legislative competence

under List I, Entry 97 Sch. 7 read with

Article 248 of the Constitution even with

Rubber Act (contd.)

regard to imposition which does not fall within Entry 84 — See Constitution of India, Sch. 7 List 1 Entry 97

SC 1589C (C N 340)

—Section 12 (2) — Imposition of new rubber cess — Provision does not suffer from vice of excessive delegation

SC 1589F (C N 340)

—Section 12 (2) — Act does not suffer from vice of excessive delegation — See Constitution of India, Article 245

SC 1589G (C N 340)

—S. 12 (2) — Imposition of rubber cess — Discretion conferred on Rubber Board to levy and collect tax — No violation of Article 14 of the Constitution on the ground of discrimination — Board cannot discriminate in arbitrary manner between owners of rubber estates and users of rubber or between persons inter se of same category

SC 1589 H (C N 340)

—S. 12 (2) — Equality before law — Tax laws — No violation of Article 14 — See Constitution of India, Article 14

SC 1589 I (C N 340)

—S. 25 — Rules framed under — Rules relating to furnishing of returns and collection of duties are not properly worded and suffer from lack of clarity.

SC 1589 L (C N 340)

Sale of Goods Act (3 of 1930)

—S. 4 — Sale made to Government under Levy Order — Dealer liable to pay sales-tax — See Sales Tax — U. P. Sales Tax Act (15 of 1948), Section 2 (h)

All 518 (C N 76) (FB)

SALES TAX

—Bombay Sales Tax Act (3 of 1953)

—S. 26 (3) — Dissolved firm can be assessed in respect of pre-dissolution turnover — Section 26 (3) can be looked into to see intention of legislature, even if declared ultra vires by Gujarat High Court in AIR 1965 Guj 60 — Impediment to assessment is set at rest in enacting Section 19 (3) in Bombay Sales Tax Act, 1959 Bom 351 A (C N 61)

—Bombay Sales Tax Act (51 of 1959)

—S. 19 (3) — Assessment of dissolved firm for pre-dissolution turnover — Section is indication of intention behind Section 26 (3) of 1953 Act — See Sales Tax — Bombay Sales Tax Act (3 of 1953) Section 26 (3) Bom 351A (C N 61)

—C. P. and Berar Sales Tax Act (21 of 1947)

—Section 2 (g), Explan. 1 — Transaction before Constitution — Sale under contract of sale entered into outside State by agents of dealer in State — When liable to sales tax — Situs of sale SC 1756 (C N 374)

Sales Tax (contd.)

—Central Sales Tax Act (74 of 1956)

—S. 9 (3) — Right of assessee under Act to rebate provided in Section 13 (8), Orissa Sales Tax Act. SC 1672 (C N 357)

—S. 15 — Provisions of Punjab General Sales Tax Act, 1948 (as amended in 1967) no longer offend Section 15 — See Sales Tax — Punjab General Sales Tax Act (46 of 1948) (as amended by Act 7 of 1967), S. 5 (3) SC 1742 A (C N 372)

—S. 15 — Delegation of taxation power — Provisions of Punjab and Haryana Amendments of 1967 of Punjab General Sales Tax Act (46 of 1948) not invalid on ground of unguided delegation to administrative authority — See Constitution of India, Article 245 SC 1742 C (C N 372)

—S. 15 — Punjab Sales Tax (Haryana Amendment and Validation) Act 1967 — Validity of Haryana amendment — See Sales Tax — Punjab General Sales Tax Act (1948) (as amended by Punjab Sales Tax (Haryana Amendment and Validation) Act (1967))

SC 1742 E (C N 372)

—Madras General Sales Tax Act (1 of 1959)

—S. 38 — Revision — High Court under revisional jurisdiction under the Act cannot rule on vires of any provisions of the Act Mad 422 A (C N 125) (FB)

—Punjab General Sales Tax Act (46 of 1948) (as amended by Act 7 of 1967)

—No unguided delegation to administrative authority — See Constitution of India, Article 245 SC 1742 C (C N 372)

—Pre. — Amended Act does not offend Section 15 of Central Sales Tax Act or equality clause of the Constitution

SC 1742 E (C N 372)

—S. 2 (d) — Not violative of Article 14 of Constitution — See Constitution of India, Article 14 SC 1742 B (C N 372)

—Ss. 5 (3), 11 — Provisions as amended no longer offend Section 15 of Central Sales Tax Act SC 1742 A (C N 372)

—S. 11 — Provisions as amended no longer offend Section 15 of Central Sales Tax Act (1956) — See Sales Tax — Punjab General Sales Tax Act (1948) (as amended by Act 7 of 1967), Section 5 (3)

SC 1742 A (C N 372)

—S. 11-AA proviso — Not violative of Article 14 of Constitution — See Constitution of India, Article 14

SC 1742 B (C N 372)

—Punjab General Sales Tax (Haryana Amendment and Validation) Act (14 of 1967)

—Pre. — Validity — Amendments effected do not offend Section 15 of Central Sales Tax Act (1956) — See Sales Tax — Punjab General Sales Tax Act (1948) (as amended by Act 7 of 1967), Section 5 (3)

SC 1742 A (C N 372)

—Pre. — No unguided delegation to administrative authority — See Constitution of India, Article 245 SC 1742 C (C N 372)

Sales Tax — Punjab General Sales Tax (Haryana Amendment and Validation) Act (contd.)

—Pre. — Competence of Haryana State Legislature to amend Punjab Sales Tax Act (46 of 1948) with retrospective effect for date anterior to 1-11-66 — See Punjab Reorganization Act (1966), Section 88
SC 1742 D (C N 372)

—Pre. — Amendment not violative of Article 304 of Constitution — See Constitution of India, Article 304
SC 1742 F (C N 372)

—U. P. Sales Tax Act (15 of 1948)

—S. 2 (h) — U. P. Wheat Procurement (Levy) Order (1959), Pre., Cls. 3, 2 (d) — Sale made under Levy Order by licensed dealer to Regional Food Controller — Licensed dealer is liable to pay sales-tax on such sales
All 518 (C N 76) (FB)

Santhal Parganas Tenancy (Supplementary Provisions) Act (14 of 1949)

See under Tenancy Laws.

Sea Customs Act (8 of 1878)

—S. 19 — Export of manganese ore — Exporter making declaration in form prescribed by Rule 3 supported by evidence required by Rule 5 — Invoice value not representing full export value — Does not constitute contravention of restrictions imposed by Section 12 (1) and is not punishable under Section 23A read with Section 167 (8), Sea Customs Act, 1878 — See Foreign Exchange Regulation Act (1947), Section 12 (1)
SC 1597 A (C N 341)

—S. 167 (8) — Export of manganese ore — Exporter making declaration in form prescribed by Rule 3 supported by evidence required by Rule 5 — Invoice value not representing full export value — Does not constitute contravention of restrictions imposed by Section 12 (1) and is not punishable under Section 23A read with S. 167 (8), Sea Customs Act, 1878 — See Foreign Exchange Regulation Act (1947), Section 12 (1)
SC 1597 A (C N 341)

—S. 167 (81) — Punishment — Watches smuggled secretly — Deterrent punishment is necessary
Cal 428 D (C N 80)

SHOPS AND ESTABLISHMENTS

—Madras Shops and Establishments Act (36 of 1947)

—S. 6 — Order exempting from scope of Section 41 persons employed on contract for fixed periods — Validity — Does not violate Article 14 of the Constitution
Mad 432 A (C N 129)

States Reorganization Act (37 of 1956)

—S. 119 — Reorganization of Punjab State on 1-11-1966 — Competence of legislature

States Reorganization Act (contd.)

of Haryana State to amend Act applicable in composite State with retrospective effect from date anterior to 1-11-66 — See Punjab Reorganization Act (1966), Section 88
SC 1742 D (C N 372)

—S. 120 — Reorganization of Punjab State on 1-11-1966 — Competence of legislature of Haryana State to amend Act applicable in composite State with retrospective effect from date anterior to 1-11-66 — See Punjab Reorganization Act (1956), Section 88
SC 1742 D (C N 372)

Succession Act (39 of 1925)

—S. 59 — Will by Hindu widow — Bequeathing her husband's property held as such — Will ineffective for the legatee — Widow with limited rights cannot make a will with respect to property held with limited rights — See Hindu Law — Widow
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- O. 43, R. 1 (c) — AIR 1953 Bom 122 — Diss. AIR 1970 Madh Pra 199 B (C N 38).

- O. 43, R. 1 (c) — AIR 1932 Pat 238 — Diss. AIR 1970 Madh Pra 199 B (C N 38).

- O. 43, R. 1 (c) — AIR 1953 Bom 122 — Diss. AIR 1970 Madh Pra 199 B (C N 38).

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- S. 4 — ('68) I. D. No. 10 of 1967, D/- 24-5-1968 (Ind-Tri-Andh-Pra) — Revers. AIR 1970 SC 1626 B (C N 346).

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—S. 14 (1) & (2) — AIR 1967 Mad 429 — Diss. AIR 1970 Pat 348 (C N 63).

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—Ss. 2 (6-A), 66 — ('68) I. T. Ref. No. 158 of 1964, D/- 23-2-1968 (Cal) — Revers. AIR 1970 SC 1702 A, B (C N 361).

—S. 15-C (1) & (4) — AIR 1967 Mad 12 — Revers. AIR 1970 SC 1667 (C N 356).

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—S. 271 — AIR 1969 Madh Pra 72 — Diss. AIR 1970 Cal 440 (C N 84).

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—S. 18 — ('68) I. D. No. 10 of 1967, D/- 24-5-1968 (Ind Tri Andh Pra) — Revers. AIR 1970 SC 1626 A (C N 346).

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—S. 12, Proviso — AIR 1965 Mad 484 — Revers. AIR 1970 SC 1683 (C N 359).

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—S. 24 — AIR 1952 SC 192 — Held not good law in view of amendment as interpreted. AIR 1970 Raj 216 D (C N 47).

—S. 57 (8) — AIR 1964 Raj 177 — Diss. AIR 1970 Madh Pra 220 (C N 40).

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—S. 32(g) — ('40) 1940 AC 631 — Over. AIR 1970 Bom 341 C (C N 60).

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—S. 12 — AIR 1960 All 450 — Diss. AIR 1970 Assam 128 (C N 31) (FB).

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—Vol. 2, R. 5.32, Note 2 (c) (i) — 1967 Ser LR 924 (Punj) — Over. AIR 1970 Punj 419 A (C N 66) (FB).

—Vol. 2, R. 5.32, Note 2 (c) (i) — 1968 Lab IC 1435 (Punj) — Over. AIR 1970 Punj 419 A (C N 66) (FB).

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—S. 52 — AIR 1957 Pat 408 — Revers. AIR 1970 SC 1717 C, B, E (C N 366).

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Head Note points A & B in place of the Head Note in
 A. I. R. 1970-8 C 1351 (August)

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Cut appropriately and paste on
 the earlier Head Note.

(A) T. P. Act (1882), S. 41 — P advancing
 a sum to M, his brother, and in return taking
 a khola from M in his name in respect of M's
 share in joint property — High Court holding
 contrary to case of both parties that there were
 two transactions one of loan repayable without
 interest and another of a nominal transfer of
 M's share to secure repayment of loan — Docu-
 ment conveying property held was valid and M's
 share in property passed to P. Decision of Cal-
 cutta High Court, Reversed. (Para 7)

(B) Civil P. C. (1908), O. 41, R. 2 — New
 case in appeal — High Court in appeal cannot
 make out a case contrary to the case of both
 parties in absence of any pleading, issue or
 evidence on it. (Para 7)

..... Out

THE CONTINGENCY FUND OF INDIA (AMENDMENT) ACT, 1970

(Act 20 of 1970)*

[21st May, 1970]

An Act to amend the Contingency Fund of India Act, 1950.

Be it enacted by Parliament in the Twenty-first Year of the Republic of India as follows :

1. Short title.

This Act may be called the Contingency Fund of India (Amendment) Act, 1970.

2. Amendment of S. 2.

In S. 2 of the Contingency Fund of India Act, 1950, for the words "fifteen crores of rupees", the words "thirty crores of rupees" shall be substituted.

THE CENTRAL SILK BOARD (AMENDMENT) ACT, 1970

(No. 21 of 1970)†

[23rd May 1970]

An Act further to amend the Central Silk Board Act, 1948.

Be it enacted by Parliament in the Twenty-first Year of the Republic of India as follows :—

1. Short title.

This Act may be called the Central Silk Board (Amendment) Act, 1970,

2. Amendment of section 1.

In the Central Silk Board Act, 1948 (hereinafter referred to as the principal Act), in section 1, in sub-section (2), the words "except the State of Jammu and Kashmir" shall be omitted.

3. Amendment of section 8.

In section 8 of the principal Act,—

(a) in sub-section (2)—

(i) in clause (b), for the words "reeling of silkworm cocoons", the words "reeling or, as the case may be, spinning of silkworm cocoons and silk waste" shall be substituted;

(ii) clause (c) shall be omitted;

(b) in sub-section (3)—

(i) clause (b) shall be omitted;

(ii) in clause (c), the word "other" shall be omitted.

* Received the assent of the President on 21-5-1970. Act published in Gaz. of Ind., 25-5-1970, Pt. II-S. 1, Ext., p. 291.

For Statement of Objects and Reasons, see Gaz. of Ind., 19-12-1969, Pt. II-S. 2, Ext., p. 1124.

† Received the assent of the President on 23-5-1970. Act published in Gaz. of Ind., 25-5-1970, Pt. II-S. 1, Ext. p. 293.

For Statement of Objects and Reasons, see Gaz. of Ind., 1-4-1969, Pt. II-S. 2, Ext. p. 320.

4. Amendment of section 12.

In section 12 of the principal Act, for sub-sections (2) and (3), the following sub-sections shall be substituted, namely :—

"(2) The accounts of the Board shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Board to the Comptroller and Auditor-General.

(3) The Comptroller and Auditor-General of India and any person appointed by him in connection with the audit of the accounts of the Board shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India has in connection with the audit of Government accounts, and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Board.

(4) The accounts of the Board as certified by the Comptroller and Auditor-General of India or any person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause a copy of the same to be laid before each House of Parliament.

(5) A copy of the accounts of the Board as so certified together with the audit report thereon shall be forwarded simultaneously to the Board."

5. Insertion of new section 12A.

After section 12 of the principal Act, the following section shall be inserted, namely :—
Annual report.

"12A. The Board shall prepare for every financial year a report of its activities and achievements during that year and submit the report to the Central Government in such form and on or before such date as may be prescribed, and that Government shall cause a copy of the report to be laid before each House of Parliament."

6. Amendment of section 13.

In section 13 of the principal Act,—

(a) in sub-section (2)—

(i) in clause (viii), the words "and the audit of such accounts" shall be omitted;

(ii) after clause (viii), the following clause shall be inserted, namely :—

"(viii) the form of the annual report of the Board and the date on or before which it shall be submitted to the Central Government;"

(b) for sub-section (3), the following sub-section shall be substituted, namely :—

"(3) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

THE TEA (AMENDMENT) ACT, 1970

(Act No. 22 of 1970)*

[23rd May, 1970.]

An Act further to amend the Tea Act, 1953.

Be it enacted by Parliament in the Twenty-first Year of the Republic of India as follows:—

1. Short title.

This Act may be called the Tea (Amendment) Act, 1970.

2. Insertion of new section 25A.

In the Tea Act, 1953 (hereinafter referred to as the principal Act), after section 26, the following section shall be inserted, namely:—

Grants and loans by the Central Government to the Board.

"26A. The Central Government may, after due appropriation made by Parliament by law in this behalf, pay to the Board by way of grants or loans such sums of money as the Central Government may consider necessary."

3. Amendment of section 27.

In section 27 of the principal Act, in sub-section (1), after clause (a), the following clause shall be inserted, namely:—

"(aa) any sum of money that may be paid to the Board by way of grants or loans under section 26A;"

4. Amendment of section 49.

In section 49 of the principal Act, for sub-section (3), the following sub-section shall be substituted, namely:—

"(3) Every rule made under this Act shall be laid as soon as may be after it is made

before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

THE INDIAN SOLDIERS (LITIGATION) AMENDMENT ACT, 1970

(Act 23 of 1970)*

[29th May 1970]

An Act further to amend the Indian Soldiers (Litigation) Act, 1925.

Be it enacted by Parliament in the Twenty-first Year of the Republic of India as follows:—

1. Short title.

This Act may be called the Indian Soldiers (Litigation) Amendment Act, 1970.

2. Amendment of Section 2.

In the Indian Soldiers (Litigation) Act, 1925 (hereinafter referred to as the principal Act), in section 2,—

(i) for clause (a), the following clause shall be substituted, namely:—

"(a) 'Court' means a Court other than a Criminal Court and includes any such tribunal or other authority as may be specified by the Central Government by notification in the Official Gazette being a tribunal or authority which is empowered by law to receive evidence on any matter pending before it and on the basis of such evidence to determine, after hearing the parties before it, the rights and obligations of the parties in relation to such matter;"

(ii) in clause (b), the words and figures "or the Navy Act, 1957" shall be added at the end;

(iii) after clause (d), the following clause shall be inserted, namely:—

"(e) any reference to a decree or order of a Court shall be deemed to include a reference to a judgment, determination or award of a Court."

a. Received the assent of the President on 22-5-1970. Act published in Gaz. of Ind., 25-5-1970, Pt. II, S. 1, Ext. p. 295.

For Statement of Objects and Reasons, see Gaz. of Ind., 3-3-1969, Pt. II-S. 2, Ext., p. 393.

* Received the assent of the President on 29-5-1970. Act published in Gaz. of Ind., 29-5-1970, Pt. II-S. 1, Ext. p. 237.

For Statement of Objects and Reasons, see Gaz. of Ind., 26-8-1969, Pt. II-S. 2, Ext. p. 1043.

3. Amendment of Section 3.

In section 3 of the principal Act, in clause (a), the words "or at any such place within India as may be specified by the Central Government by notification in the Official Gazette" shall be added at the end.

4. Amendment of Section 13.

In section 13 of the principal Act, the words "after consulting the High Court concerned," shall be omitted.

THE PETROLEUM (AMENDMENT) ACT, 1970

(Act 24 of 1970)*

[29th May 1970]

An Act further to amend the Petroleum Act, 1934.

Be it enacted by Parliament in the Twenty-first Year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called the Petroleum (Amendment) Act, 1970.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of long title and preamble.

In the Petroleum Act, 1934 (hereinafter referred to as the principal Act), in the long title and preamble, the words "and other inflammable substances" shall be omitted.

3. Amendment of Section 2.

In section 2 of the principal Act,—

(a) for clause (b), the following clauses shall be substituted, namely:—

'(b) "petroleum Class A" means petroleum having a flash-point below twenty-three degrees Centigrade;

(bb) "petroleum Class B" means petroleum having a flash-point of sixty-five degrees Centigrade and above but below sixty-five degrees Centigrade;

(bbb) "petroleum Class C" means petroleum having a flash-point of twenty-three degrees Centigrade and above but below ninety-three degrees Centigrade;'

(b) in clause (c), for the word "flashing-point", the word "flash-point" shall be substituted;

(c) for clause (d), the following clause shall be substituted, namely:—

'(d) "to transport petroleum" means to move petroleum from one place to another in India and includes moving from one place to

another in India across a territory which is not part of India;'

4. Amendment of section 3.

In sub-section (2) of section 3 of the principal Act, for the words "any dangerous petroleum", the words and letter "petroleum Class A" shall be substituted.

5. Amendment of section 4.

In section 4 of the principal Act,—

(a) for the words "dangerous petroleum" wherever they occur, the words and letter "petroleum Class A" shall be substituted;

(b) in clause (1), the words "including the charging of fees for any services rendered in connection with the import, transport and storage of petroleum" shall be inserted at the end.

6. Amendment of section 5.

In clause (b) of sub-section (2) of section 5 of the principal Act, for the words "dangerous petroleum", the words and letter "petroleum Class A" shall be substituted.

7. Amendment of section 6.

In section 6 of the principal Act,—

(a) for the words "dangerous petroleum" wherever they occur, the words and letter "petroleum Class A" shall be substituted;

(b) in clause (a) of the proviso, for the words "two gallons", the words "ten litres" shall be substituted.

8. Substitution of new sections for sections 7 and 8.

For sections 7 and 8 of the principal Act, the following sections shall be substituted, namely:—

No licences needed for transport or storage of limited quantities of petroleum Class B or petroleum Class C.

"7. Notwithstanding anything contained in this Chapter, a person need not obtain a licence for the transport or storage of—

(i) petroleum Class B if the total quantity in his possession at any one place does not exceed two thousand and five hundred litres and none of it is contained in a receptacle exceeding one thousand litres in capacity; or

(ii) petroleum Class C if the total quantity in his possession at any one place does not exceed forty-five thousand litres and such petroleum is transported or stored in accordance with the rules made under section 4.

No licence needed for import, transport or storage of small quantities of petroleum Class A.

8. (1) Notwithstanding anything contained in this Chapter, a person need not obtain a licence for the import, transport or storage of petroleum Class A not intended for sale if the

* Received the assent of the President on 29-5-1970.
Act published in Gaz. of Ind., 29-5-1970, Pt. II-S. 1, Ext. p. 298.

total quantity in his possession does not exceed thirty litres.

(2) Petroleum Class A possessed without a licence under this section shall be kept in securely stoppered receptacles of glass, stoneware or metal which shall not, in the case of receptacles of glass or stoneware, exceed one litre in capacity or, in the case of receptacles of metal, exceed twenty-five litres in capacity."

9. Amendment of section 9.

In section 9 of the principal Act,—

(a) in sub-section (1),—

(i) for the words "dangerous petroleum" in both places where they occur, the words and letter "petroleum Class A" shall be substituted;

(ii) for the words "twenty gallons" in both places where they occur, the words "one hundred litres" shall be substituted;

(b) in sub-section (2),—

(i) for the words "The dangerous petroleum", the words and letter "Petroleum Class A" shall be substituted;

(ii) for the words "six gallons", the words "thirty litres" shall be substituted.

10. Substitution of new section for section 11.

For section 11 of the principal Act, the following section shall be substituted, namely:—

Exemption of heavy oils.

"11. Nothing in this Chapter shall apply to any petroleum which has its flash-point not below ninety-three degrees Centigrade."

11. Amendment of section 15.

In sub-section (1) of section 15 of the principal Act, for the word "flashing-point", the word "flash-point" shall be substituted.

12. Amendment of section 16.

In sub-section (1) of section 16 of the principal Act, for the word "flashing-point", the word "flash-point" shall be substituted.

13. Amendment of section 19.

In section 19 of the principal Act,—

(a) for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) The testing officer after testing samples of petroleum shall make out a certificate in the prescribed form, stating whether the petroleum is petroleum Class A or petroleum Class B or petroleum Class C, and if the petroleum is petroleum Class B or petroleum Class C, the flash-point of the petroleum."

(b) for sub-section (3), the following sub-section shall be substituted, namely:—

"(3) A certificate given under this section shall be admitted as evidence in any proceed-

ings which may be taken under this Act in respect of the petroleum from which the samples were taken, and shall, until the contrary is proved, be conclusive proof, that the petroleum is petroleum Class A or petroleum Class B or petroleum Class C, and, if the petroleum is petroleum Class B or petroleum Class C, of its flash-point."

14. Amendment of section 23.

In section 23 of the principal Act,—

(a) in sub-section (1), for the words "with fine which may extend to five hundred rupees", the words "with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both" shall be substituted;

(b) in sub-section (2), for the words "with fine which may extend to two thousand rupees", the words "with simple imprisonment which may extend to three months, or with fine which may extend to five thousand rupees, or with both" shall be substituted.

15. Substitution of new section for section 27.

For section 27 of the principal Act, the following section shall be substituted, namely:—

Notice of accidents with petroleum.

"27. Whenever there occurs in or about, or in connection with, any place in which petroleum is refined, blended or kept, or any carriage or vessel either conveying petroleum or on or from which petroleum is being loaded or unloaded, any accident by explosion or by fire as a result of the ignition of petroleum or petroleum vapour attended with loss of human life or serious injury to person or property, or of a description usually attended with such loss or injury, the occupier of the place or the person for the time being in charge of the petroleum or the person in charge of the carriage or the master of the vessel, as the case may be, shall, within such time and in such manner as may be prescribed, give notice thereof and of the attendant loss of human life, or injury to person or property, if any, to the nearest Magistrate or to the officer in charge of the nearest police station and to the Chief Inspector of Explosives in India."

16. Amendment of section 28.

In sub-section (3) of section 28 of the principal Act, the words "in a Presidency town" shall be omitted.

**THE MERCHANT SHIPPING
(AMENDMENT) ACT, 1970**
(Act 25 of 1970)*

[31st May, 1970]

An Act further to amend the Merchant Shipping Act, 1958.

Be it enacted by Parliament in the Twenty-first Year of the Republic of India as follows :—

1. Short title and commencement.

(1) This Act may be called the Merchant Shipping (Amendment) Act, 1970.

(2) This section and sections 2 to 14 (both inclusive) shall be deemed to have come into force on the 21st day of July, 1968 and the remaining sections of this Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different sections.

2. Amendment of section 3.

In section 3 of the Merchant Shipping Act, 1958 (hereinafter referred to as the principal Act),—

(a) in clause (5),—

(i) in sub-clause (a), the words "or is deemed to have been declared" shall be omitted;

(ii) in sub-clause (b), for the words "article twenty-one", the words "article thirty-two" shall be substituted;

(b) for clause (14), the following clause shall be substituted, namely :—

'(14) "free board" means the distance measured vertically downwards, amidships, from the upper edge of the deck line to the upper edge of the related load line;'

(c) for clause (20), the following clause shall be substituted, namely :—

'(20) "Load Line Convention" means the International Convention on Load Lines signed in London on the 5th day of April, 1966, as amended from time to time;'

3. Amendment of section 283.

In section 283 of the principal Act, the brackets and figure "(1)", in the first place where they occur, and sub-section (2), shall be omitted.

4. Insertion of new section 283A.

After section 283 of the principal Act, and before the sub-heading "Construction of ships", the following section shall be inserted, namely :—

Definitions.

'283A. (1) In this Part, unless the context otherwise requires,—

(a) "existing ship" or "existing vessel" means a ship or vessel which is not a new ship or a new vessel,

(b) "new ship" or "new vessel" means a ship or vessel whose keel is laid or which is at a similar stage of construction on or after the material date as defined in sub-section (2).

(2) For the purposes of sub-section (1) "material date",—

(i) in relation to an Indian ship, means the 21st July, 1968;

(ii) in relation to a foreign ship belonging to a country to which the Load Line Convention applies, means the date as from which it is declared under section 283 that the Government of such country has accepted the Load Line Convention or, as the case may be, that the said Convention has been applied to such country.'

5. Amendment of section 310.

In section 310 of the principal Act,—

(a) in sub-section (2), for clause (a), the following clause shall be substituted, namely :—

"(a) any sailing vessel, being an existing vessel of less than one hundred and fifty tons gross, or a new vessel of less than twenty-four metres in length, and in either case employed in plying coastwise between ports situated within India, Pakistan, Burma and Ceylon;";

(b) in sub-section (3), for clause (d), the following clauses shall be substituted, namely :—

"(d) any coasting ship, being an existing ship of less than one hundred and fifty tons gross or a new ship of less than twenty-four metres in length :

Provided that any such ship does not carry cargo;

(e) any ship which embodies features of a novel kind, if the Central Government is satisfied that the application of the provisions of this Part relating to load lines to such a ship might seriously impede research into development of such features and their incorporation in ships and the Central Government and the Governments of the countries to be visited by the ship are satisfied that the ship complies with safety requirements which are adequate for the purposes for which the ship is intended and are such as to ensure the overall safety of the ship;

(f) any ship which is not normally engaged on voyages to ports outside India but which in exceptional circumstances is required to undertake such voyage if the Central Government is satisfied that the ship complies with safety requirements which are adequate for such voyage."

*. Received the assent of the President on 31-5-1970. Act published in Gaz. of Ind., 1-6-1970 Pt II-S. 1, Ext. p. 305.

For Statement of Objects and Reasons, see Gaz. of Ind., 10-12-1969, Pt. II-S. 2, Ext. p. 1601.

6. Amendment of section 312.

In section 312 of the principal Act,—

(a) in sub-section (1), for the words, figures and letters "after the 30th day of June, 1932", the words, figures and letters "on or after the 21st day of July, 1968" shall be substituted;

(b) in sub-section (2),—

(i) for the words, figures and letters "before the 1st day of July, 1932," the words, figures and letters "before the 21st day of July, 1968" shall be substituted;

(ii) for clause (c), the following clause shall be substituted, namely:—

"(c) the load lines are in the position required by clause (a) of sub-section (1)."

7. Insertion of new section 312-A.

After section 312 of the principal Act, the following section shall be inserted, namely:—

Alterations alter survey.

"312A. Where any survey under this Part of a ship for the purpose of assignment and marking of load lines has been completed, then, notwithstanding anything contained in this Act, the owner, agent or master of the ship shall not make or cause to be made any alteration in the structure, equipment, arrangements, material or scantlings covered by the survey without the prior written permission of the Central Government or a person authorised by that Government in this behalf."

8. Amendment of section 316.

In section 316 of the principal Act, in sub-section (1), for clause (a), the following clauses shall be substituted, namely:—

"(a) in the case of an existing ship which is of one hundred and fifty tons gross or more or a new ship of twenty-four metres or more in length, and which in either case carries cargo or passengers, a certificate to be called "an international load line certificate";

(aa) in the case of a ship which is exempted under clause (e) or clause (f) of sub-section (3) of section 310, a certificate to be called "an international load line exemption certificate"; and

9. Substitution of new section for section 317.

For section 317 of the principal Act, the following section shall be substituted, namely:—

Duration and cancellation of certificates.

"(1) Every certificate issued in respect of a ship under clause (a) or clause (b) of sub-section (1) of section 316 and every certificate issued under clause (aa) of that sub-section to a ship referred to in clause (e) of sub-section (3) of section 310 shall be in force for a period of five years from the date of its issue or for such shorter period as may be specified in the

certificate but subject to the provisions of this Part, a new certificate may be issued in respect of such ship:

Provided that where it is not possible to issue such new certificate to any ship before the expiry of its existing certificate, the Central Government or any other person authorised by it to issue such certificate may, on being satisfied that no alterations affecting the ship's free board have been made in the structure, equipment, arrangements, material or scantlings, after the last survey of the ship under sub-section (5), extend the validity of the existing certificate for such period not exceeding five months as the Central Government or such person may deem fit.

(2) Every certificate issued under clause (aa) of sub-section (1) of section 316 to a ship referred to in clause (f) of sub-section (3) of section 310 shall cease to be valid upon the completion of the voyage in respect of which such certificate was issued.

(3) Notwithstanding anything contained in the foregoing provisions of this section, any certificate issued in respect of a ship under sub-section (1) of section 316 shall cease to be valid when the ship ceases to be an Indian ship.

(4) The Central Government may, by order in writing, cancel any certificate issued in respect of a ship under sub-section (1) of section 316 if it is satisfied that—

(a) material alterations such as would necessitate assignment of an increased free board have taken place in the hull or superstructure of the ship,

(b) the fittings and appliances for the protection of openings, the guard rails, freeing ports, or the means of access to the crew's quarters are not maintained in an effective condition,

(c) the structural strength of the ship is lowered to such an extent as to render the ship unsafe,

(d) the markings of the deck line and load lines on the ship have not been properly maintained:

Provided that no such order shall be made unless the person concerned has been given a reasonable opportunity to represent his case.

(5) The owner of every ship in respect of which any certificate has been issued under sub-section (1) of section 316 shall, so long as the certificate remains in force, cause the ship to be surveyed in the prescribed manner once at least in each year during the period commencing three months before and ending three months after the anniversary date of issue of the certificate for the purpose of determining whether the certificate should, having regard

to the provisions of sub-section (4), remain in force:

Provided that the Central Government may, if satisfied in any case for reasons to be recorded in writing that it is necessary or expedient so to do, extend by order in writing the time within which a ship shall be caused to be so surveyed.

(6) If the owner fails to cause the ship to be surveyed as aforesaid, the Central Government may, after giving the owner a reasonable opportunity to represent his case and without prejudice to any other action that may be taken under this Act in respect of such failure, cancel the certificate.

(7) Notwithstanding anything contained in sub-section (1), any international load line certificate issued or renewed under this Act before the date of publication of the Merchant Shipping (Amendment) Act, 1970, in the Official Gazette and in force on that date, shall continue to be in force,—

(a) for the unexpired portion of the period for which such certificate had been issued or, as the case may be, renewed; or

(b) for a period of two years from the commencement of this section, whichever is shorter.

(8) Where any certificate has ceased to be valid or been cancelled under this section, the Central Government may require the owner or master of the ship to which the certificate relates to deliver up the certificate as it directs and the ship may be detained until such requirement has been complied with.

(9) On the survey of any ship in pursuance of this section, there shall be paid by the owner of the ship such fee as may be prescribed."

10. Amendment of section 321.

Section 321 of the principal Act shall be re-numbered as sub-section (1) of that section, and—

(a) in sub-section (1) as so re-numbered, for the word "registered", the words "registered or to be registered" shall be substituted; and

(b) after sub-section (1) as so re-numbered, the following sub-section shall be inserted namely:—

"(2) The Central Government shall, as soon as may be, after the issue of a certificate in respect of a ship under sub-section (1), forward to the Government at whose request such certificate was issued a copy each of the certificate, the survey report used in computing the free board of the ship and of the computations."

11. Amendment of section 322.

In section 322 of the principal Act, for the words "load line certificate", in both the places where they occur, the words "load line

certificate or, as the case may be, an international load line exemption certificate" shall be substituted.

12. Amendment of section 323.

In section 323 of the principal Act,—

(a) for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) A surveyor may, at any reasonable time, go on board any ship (other than an Indian ship) carrying cargo or passengers and registered in a country to which the Load Line Convention applies, when such ship is within any port in India, for the purpose of demanding the production of any international load line certificate or, as the case may be, international load line exemption certificate for the time being in force in respect of the ship:

Provided that such ship is an existing ship of one hundred and fifty tons gross or more or a new ship of twenty-four metres or more in length."

(b) in sub-section (2),—

(i) for clause (c), the following clause shall be substituted, namely:—

"(c) that no material alterations as would necessitate the assignment of an increased free board have taken place in the hull or superstructure of the ship;"

(ii) in clause (d), for the words "in as effective a condition as they were in when the certificate was issued", the words "in an effective condition" shall be substituted;

(c) after sub-section (2), the following sub-section shall be inserted, namely:—

"(2A) If a valid international load line exemption certificate is produced to the surveyor on demand made under sub-section (1), the surveyor's powers of inspecting the ship with respect to load lines shall be limited to seeing that the conditions stipulated in the certificate are complied with."

(d) in sub-section (3), sub-section (4) and sub-section (5), for the words "on any such inspection", the words, brackets and figures "on any inspection under sub-section (2) or, as the case may be, sub-section (2A)" shall be substituted;

(e) in sub-section (6), after the words "load line certificate", the words "or, as the case may be, international load line exemption certificate" shall be inserted.

13. Amendment of section 326.

In section 326 of the principal Act,—

(a) for clause (a), the following clause shall be substituted namely:—

"(a) no ship belonging to a country to which the Load Line Convention applies being an existing ship of one hundred and fifty tons gross or more or being a new ship of twenty-four metres or more in length shall

be detained and no proceedings shall be taken against the owner or master thereof by virtue of the said decision except after an inspection by a surveyor as provided by section 323; and";

(b) in clause (b), in sub-clause (i), after the words "load line certificate", the words "or, as the case may be, an international load line exemption certificate" shall be inserted.

14. Amendment of section 328.

In section 328 of the principal Act.—

(a) in sub-section (1),—

(i) for the words, "renewal and cancellation of Indian load line certificates", the words "and cancellation of Indian load line certificates or, as the case may be, international load line exemption certificates" shall be substituted;

(ii) in clause (a), for the words "any such certificate issued in respect of a ship of one hundred and fifty tons gross or more carrying cargo or passengers", the following shall be substituted, namely:—

"any such certificate issued in respect of a ship carrying cargo or passengers being an existing ship of one hundred and fifty tons gross or more or being a new ship of twenty-four metres or more in length";

(h) in sub-section (2), for the proviso, the following proviso shall be substituted, namely:—

"Provided that such direction shall not apply to any ship carrying cargo or passengers being an existing ship of one hundred and fifty tons gross or more or being a new ship of twenty-four metres or more in length if such ship is registered in a country to which the Load Line Convention applies, and is engaged in plying on voyages from or to any port in India to or from any port outside India".

15. Amendment of heading of Part X.

In the heading to Part X of the principal Act, the words, "Limitation of" shall be omitted.

16. Insertion of new Part XA.

For section 352 of the principal Act, the following shall be substituted, namely:—

PART XA

LIMITATION OF LIABILITY

Definitions.

352. In this Part, under the context otherwise requires,—

(a) "claim" means a personal claim or property claim;

(b) "franc" means a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred;

(c) "Fund", in relation to a vessel, means the limitation Fund constituted under section 352C;

(d) "liability", in relation to owner of a vessel, includes liability of the vessel herself;

(e) "occurrence" means an occurrence referred to in sub-section (1) of section 352A;

(f) "personal claim" means a claim resulting from loss of life or personal injury;

(g) "property claim" means any claim other than a personal claim arising from an occurrence.

Limitation of liability of owner for damages in respect of certain claims.

352A. (1) The owner of a sea-going vessel may limit his liability in accordance with the provisions of section 352B in respect of any claim arising from any of the following occurrences unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner—

(a) loss of life of or personal injury to, any person being carried in the vessel, or loss of, or damage to any property on board the vessel;

(b) loss of life of, or personal injury to, any other person (whether on land or on water), loss of or damage to any other property or infringement of any rights—

(i) which is caused by the act, neglect or default of any person on board the vessel for whose act, neglect or default the owner is responsible; or

(ii) which is caused by the act, neglect or default of any person not on board the vessel for whose act, neglect or default the owner is responsible;

Provided that the owner shall be entitled to limit his liability in respect of any claim arising out of any act, neglect or default as is referred to in sub-clause (ii) only when the act, neglect or default is one which occurs in the navigation or the management of the vessel or in the loading, carriage or discharge of cargo or in the embarkation, carriage or disembarkation of its passengers.

(2) The burden of proving that the occurrence giving rise to a claim against the owner of a vessel did not result from his actual fault or privity shall be on the owner.

(3) Nothing in this section shall apply to—

(a) any obligation or liability imposed by any law relating to the removal of wreck and arising from or in connection with the raising, removal or destruction of any vessel which is sunk, stranded or abandoned (including anything which may be on board such vessel) and any obligation or liability arising out of damage caused to harbour works, navigation and navigable waterways;

(b) claims for salvage or to claims for contribution in general average;

(c) any claim by the master or a member of the crew of the vessel or any servant of the owner who is on board the vessel or whose duties are connected with the vessel (including

any claim by the legal representative of such master, member of the crew or servant) if the contract of service between the owner and such master or member of the crew or servant is governed by the law of any foreign country and that law either does not set any limit to the liability in respect of such claims or sets a limit exceeding that set to it by section 352B.

(4) Any action on the part of the owner of a vessel to limit his liability under sub-section (1) shall not merely by reason of such action constitute an admission of liability.

(5) An owner of a vessel shall be entitled to limit his liability under sub-section (1) in respect of any occurrence even in cases where his liability arises, without proof of negligence on the part of the owner or of persons for whose conduct he is responsible, by reason of his ownership, possession, custody or control of the vessel.

Limits of liability.

352B. (1) The amounts to which the owner of a vessel may limit his liability under sub-section (1) of section 352A shall be—

(a) where the occurrence has given rise to property claims only, an aggregate amount not exceeding the amount equivalent to one thousand francs for each ton of the vessel's tonnage;

(b) where the occurrence has given rise to personal claims only, an aggregate amount not exceeding the amount equivalent to three thousand and one hundred francs for each ton of the vessel's tonnage;

(c) where the occurrence has given rise both to personal claims and property claims, an aggregate amount not exceeding the amount equivalent to three thousand and one hundred francs for each ton of the vessel's tonnage of which the first portion of the each ton of the vessel's tonnage shall be exclusively appropriated amount equivalent to two thousand and one hundred francs for the payment of personal claims and of which the second portion of the amount equivalent to one thousand francs for each ton of the vessel's tonnage shall be appropriated to the payment of property claims;

Provided that in cases where the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank rateably with the property claims for payment against the second portion of the amount.

Explanation.—For the purposes of this sub-section, the tonnage of a vessel of less than three hundred tons shall be deemed to be three hundred tons.

(2) The limits set by sub-section (1) to the liabilities mentioned therein shall apply to the

aggregate of such liabilities which are incurred on any distinct occasion, and shall so apply in respect of each distinct occasion without regard to any liability incurred on another occasion.

(3) For the purposes of this section a vessel's tonnage shall be determined in such manner as the Central Government may, by general or special order, specify.

(4) The Central Government may from time to time by order determine the amounts which for the purposes of this section are to be taken as equivalent to three thousand and one hundred and one thousand francs respectively.

Limitation Fund and consolidation of claims against owners.

352C. (1) Where any liability is alleged to have been incurred by the owner of a vessel in respect of claims arising out of an occurrence and the aggregate of the claims exceeds or is likely to exceed the limits of liability of the owner under section 352B, then the owner may apply to the High Court for the setting up of a limitation Fund for the total sum representing such limits of liability.

(2) The High Court to which the application is made under sub-section (1) may determine the amount of the owner's liability and require him to deposit such amount with the High Court or furnish such security in respect of the amount as in the opinion of the High Court is satisfactory and the amount so deposited or secured shall constitute a limitation Fund for the purposes of the claims referred to in sub-section (1) and shall be utilised only for the payment of such claims.

(3) After the Fund has been constituted, no person entitled to claim against it shall be entitled to exercise any right against any other assets of the owner in respect of his claim against the Fund, if that Fund is actually available for the benefit of the claimant.

(4) Subject to the provisions of this Part, the High Court may distribute the amount constituting the Fund rateably amongst the several claimants and may stay any proceedings pending in any other Court in relation to the same matter and may proceed in such manner and subject to such rules of the High Court as to making persons interested parties to the proceedings, and as to the exclusion of any claims which do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the High Court thinks fit.

(5) Where the owner establishes that he has paid in whole or in part any claim in respect of which he can limit his liability under section 352A, the High Court shall place him in

the same position and to the same extent in relation to the Fund as the claimant whose claim he has paid.

(6) Where the owner has established that he may at a later date be required to pay in whole or in part, any of the claims under this Part, which could be settled from the Fund, the High Court may notwithstanding the foregoing provisions of this section order that a sufficient sum may be provisionally set aside for the purpose to enable the owner to enforce his claim against the Fund at a later date in accordance with the provisions of sub-section (4).

(7) If the owner is entitled to make a claim against a claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of this Part shall only apply to the balance, if any.

Release of ship, etc.

352D. (1) Where a vessel or other property is detained in connection with a claim which appears to the High Court to be founded on a liability to which a limit set by section 352B applies, or security is given to prevent or obtain release from such detention, the High Court may, and in the circumstances mentioned in sub-section (8) of this section shall, order the release of the vessel, property or security if the conditions specified in sub-section (2) are satisfied; and where the release is ordered, the person on whose application it is ordered shall be deemed to have submitted to the jurisdiction of the High Court to adjudicate upon the claim.

(2) The conditions referred to in sub-section (1) are—

(a) that security which in the opinion of the High Court is satisfactory (in this section referred to as "guarantee") has previously been given whether in India or elsewhere, in respect of the said liability or any other liability incurred on the same occasion and the High Court is satisfied that if the claim is established, the amount for which the guarantee was given or such part thereof as corresponds to the claim will be actually available to the claimant; and

(b) that either the guarantee is for an amount not less than the said limit or further security is given which, together with the guarantee, is for an amount not less than that limit.

(3) The circumstances referred to in sub-section (1) are that the guarantee was given in a port which, in relation to the claim, is the relevant port (or as the case may be, a relevant port) and that port is in a convention country.

(4) For the purposes of this section—

(a) a guarantee given by the giving of security in more than one country shall be deemed to have been given in the country in which security was last given;

(b) any question whether the amount of any security is (either by itself or together with any other amount) not less than any limit set by section 352B shall be decided as at the time at which the security is given;

(c) where part only of the amount for which a guarantee was given will be available to a claimant that part shall not be taken to correspond to his claim if any other part may be available to a claimant in respect of a liability to which no limit is set as mentioned in sub-section (1).

(5) In this section—

(a) "convention country" means any country in respect to which the International Convention relating to the Limitation of the Liability of owners of sea-going ships signed in Brussels on the 10th day of October, 1957, is in force and includes any country to which the Convention extends by virtue of article 14 thereof;

(b) "relevant port," in relation to any claim, means a port where the event giving rise to the claim occurred, or if that event did not occur in that port, the first port of call after the event occurred and includes in relation to a claim for loss of life or personal injury or for damage to cargo, the port of disembarkation or discharge.

Application to ships in course of completion or construction, etc.

352E. The provisions of this Part relating to limitation of liability of owners shall extend and apply to the owners, builders or other persons having an interest in any vessel built in any port or place in India from and including the launching of such vessel until the registration thereof in accordance with the provisions of this Act, as they apply in relation to the owner of a vessel registered under this Act.

Application of this Part to charterer, manager, etc., of a vessel.

352F. (1) Subject to the provisions of sub-section (2), the provisions of this Part relating to limitation of liability of an owner of a vessel in respect of claims arising out of an occurrence shall apply to the charterer, manager and operator of the vessel and to the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment in the same manner as they apply in relation to the owner:

Provided that the total limits of liability of the owner and all other persons referred to

in this sub-section in respect of personal claims and property claims arising on a distinct occasion shall not exceed the amounts determined in accordance with the provisions of section 352B.

(2) The master or a member of the crew of a vessel may limit his liability under sub-section (1) even if the occurrence which gives rise to a claim against him resulted from the actual fault or privity of the master and the members of the crew or any one or more of them:

Provided that where the master or a member of the crew is at the same time the owner, co-owner, charterer, manager or operator of a vessel, the provisions of this sub-section shall only apply where such occurrence resulted from any act, neglect or default committed by the master or, as the case may be, the member of the crew in his capacity as master, or, as the case may be, as a member of the crew;

17. Insertion of new Part XIA.

After Part XI of the principal Act, the following Part shall be inserted, namely:—

'PART XIA

PREVENTION OF POLLUTION OF THE SEA BY OIL.

Commencement and application.

356A. (1) The provisions of this Part shall take effect from such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions in respect of tankers and ships other than tankers.

(2) They shall apply to and in relation to—

(a) tankers of one hundred and fifty tons gross or more; and

(b) other ships of five hundred tons gross or more.

Definitions.

356B. In this Part, unless the context otherwise requires,—

(a) "Convention" means the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, signed in London on the 12th day of May, 1954, as amended from time to time;

(b) "discharge", in relation to oil or oily mixture, means any discharge or escape howsoever caused;

(c) "mile" means a nautical mile of 1,852 metres;

(d) "oil" means,—

(i) crude oil,

(ii) fuel oil,

(iii) marine diesel oil conforming to such specifications as may be prescribed,

(iv) lubricating oil;

(e) "oily mixture" means a mixture with an oil content of hundred parts or more in a million parts of the mixture;

(f) "oil reception facilities", in relation to a port, means facilities for enabling vessels using the port to discharge or deposit oil residues;

(g) "prohibited zone" means any such sea area as may be specified in the rules made under section 356J to be a prohibited zone for the purposes of this Part;

(h) "ship" means any sea-going vessel of any type whatsoever, including floating craft, whether self-propelled or towed by another vessel, making a sea voyage;

(i) "tanker" means a ship in which the greater part of the cargo space is constructed or adopted for the carriage of liquid cargoes in bulk and which is not, for the time being, carrying a cargo other than oil in that part of its cargo space.

Prohibitions as to discharge of oil or oily mixture.

356C. (1) No oil or oily mixture shall be discharged from an Indian tanker or other ship within any of the prohibited zones or from a foreign tanker or other ship within the prohibited zone adjoining the territories of India.

(2) The discharge of oil or oily mixture from an Indian ship, other than a tanker or from a foreign ship other than a tanker while such foreign ship is proceeding to any place or port in India, shall, during the period of three years immediately following the commencement of this sub-section, be made as far as practicable from land;

Provided that this sub-section shall not apply to a ship which is proceeding to a port where oil reception facilities are not available.

(3) No oil or oily mixture shall be discharged anywhere at sea from an Indian ship, being a ship of twenty thousand tons gross tonnage or more for which the building contract was entered into on or after the coming into force of this sub-section;

Provided that this sub-section shall not apply in any case where by reason of special circumstances it is impracticable or unreasonable to retain the oil or oily mixture in the ship and the master of the ship reports, as soon as may be, after such discharge the fact in the prescribed form and manner to the Director-General.

Prohibition not to apply in certain cases.

356D. Nothing in section 356C shall apply to—

(a) the discharge of oil or oily mixture from a ship for the purpose of securing the safety of a ship, preventing damage to a ship or cargo or saving life at sea;

(b) the escape of oil or of oily mixture resulting from a damage to a ship or unavoidable leakage, if all reasonable precautions have been taken after the occurrence of the damage or discovery of the leakage for the purpose of preventing or minimising the escape;

(c) the discharge of residue arising from the purification or clarification of fuel oil or lubricating oil when such discharge is made as far from land as is practicable;

(d) the discharge from the bilges of a ship of oily mixture during the period of twelve months following the date on which this clause comes into force and after the expiration of such period of oily mixture containing no oil other than lubricating oil which has drained or leaked from the machinery spaces in the ship.

Equipment in ships to prevent oil pollution.

356E. For the purpose of preventing or reducing discharges of oil and oily mixtures into the sea, the Central Government may make rules requiring Indian ships to be fitted with such equipment and to comply with such other requirements (including requirement for preventing the escape of fuel oil or heavy diesel oil into bilges) as may be prescribed.

Oil record book.

356F. (1) Every Indian tanker and every other Indian ship which uses oil as fuel shall maintain on board the tanker or such other ship an oil record book.

(2) The form and manner in which the oil record book shall be maintained, the nature of the entries to be made therein, the time and circumstances in which such entries shall be made, the custody and disposal thereof and all other matters relating thereto shall be such as may be prescribed having regard to the provisions of the Convention.

Inspection and control of ships to which the Convention applies.

356G. (1) A surveyor or any person appointed in this behalf may, at any reasonable time, go on board a ship to which any of the provisions of this Part apply, for the purposes of—

(a) ensuring that the prohibitions, restrictions and obligations imposed by or under this Part are complied with;

(b) satisfying himself about the adequacy of the measures taken to prevent the escape of oil or oily mixture from the ship;

(c) ascertaining the circumstances relating to an alleged discharge of oil or oily mixture from the ship in contravention of the provisions of this Part; and

(d) inspecting the oil record book.

(2) The surveyor or any such person may, if necessary, make, without unduly delaying the ship, a true copy of any entry in the oil record book of the ship and may require the master of the ship to certify the copy to be a true copy and such copy shall be admissible as evidence of the facts stated therein.

Information regarding contravention of the provisions of the Convention.

356H. (1) If, on report from a surveyor or other person authorised to inspect a vessel under section 356G, the Central Government is satisfied that any provision of the Convention has been contravened anywhere by a foreign ship being a ship to which the provisions of the Convention apply, it shall transmit particulars of the alleged contravention to the Government of the country to which the ship belongs.

(2) On receipt of information from the Government of any country which has ratified the Convention that an Indian ship has contravened any provision of the Convention, the Central Government shall investigate the matter and if satisfied that any provision of this Part or any rule made thereunder has been contravened, take appropriate action against the owner or master and intimate such Government of the action so taken.

Oil reception facilities at ports in India.

356I. (1) Notwithstanding anything contained in any other law for the time being in force, in respect of every port in India, the powers of the port authority shall include the power to provide oil reception facilities.

(2) A port authority providing oil reception facilities or a person providing such facilities by arrangement with the port authority, may make charges for the use of the facilities at such rates and may impose such conditions in respect of the use thereof as may be approved, by notification in the Official Gazette, by the Central Government in respect of the port.

(3) Where the Central Government is satisfied that there are no oil reception facilities at any port in India or that the facilities available at such port are not adequate for enabling ships calling at such port to comply with the requirements of the Convention, the Central Government may, after consultation with the port authority in charge of such port, direct by order in writing such authority to provide or arrange for the provision of such oil reception facilities as may be specified in the order.

(4) The Central Government may, by notification in the Official Gazette, specify the ports in India having oil reception facilities in accordance with the requirements of the Convention.

Explanation.—For the purpose of this section "port authority" means,—

(a) in relation to any major port to which the provisions of the Major Port Trusts Act, 1963, apply, the Board of Trustees constituted in respect of that port under that Act;

(b) in relation to any other port, the Conservator of the Port, within the meaning of section 7 of the Indian Ports Act, 1908.

Power to make rules.

356J. (1) The Central Government may, having regard to the provisions of the Convention, make rules to carry out the purposes of this Part.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1), such rules may—

(a) prescribe the specifications of marine diesel oil for the purposes of clause (d) of section 356B;

(b) specify the areas which shall be deemed to be prohibited zones for the purposes of this Part;

(c) prescribe the form and manner in which the oil record book shall be maintained, the nature of the entries to be made therein, the time and circumstances in which such entries shall be made, the custody and disposal thereof and all other matters relating thereto; and

(d) prescribe the manner in which investigation may be made by the Central Government for the purpose of sub-section (2) of section 356H.

18. Amendment of section 436.

In section 436 of the principal Act, in sub-section (2), in the table,—

(a) in item 102, for the brackets and figure "(5)", in both the places where they occur, the brackets and figures "(8)" shall be substituted;

(b) after item 115A, the following items shall be inserted, namely :—

Serial No.	Offences	Section of this Act to which offence has reference	Penalties
"115B	(a) If oil or oily mixture is discharged in contravention of sub-section (1) of section 356C—		
	(i) where such discharge is from an Indian or a foreign tanker,	356C(1)	The master of the tanker shall be liable to fine which may extend to two thousand rupees.
	(ii) where such discharge is from an Indian ship not being a tanker or a foreign ship not being a tanker.	356C(1)	The master of the ship or, if the ship is unmanned, the person in charge of the operation shall be liable to fine which may extend to one thousand rupees.
	(b) If oil or oily mixture is discharged from an Indian ship other than a tanker or from a foreign ship other than a tanker in contravention of sub-section (2) of section 356C.	356C(2)	The master of the ship or, if the ship is unmanned, the person in charge of the operation shall be liable to fine which may extend to one thousand rupees.
	(c) If oil or oily mixture is discharged from an Indian ship in contravention of sub-section (3) of section 356C.	356C(3)	The master of the ship shall be liable to fine which may extend to one thousand rupees.
	(d) If the master of the ship fails to make the report referred to in the proviso to sub-section (3) of section 356C.	356C(3)-proviso	The master of the ship shall be liable to fine which may extend to five hundred rupees.
115C	If an Indian ship is not fitted with equipment prescribed under section 356E.	356E	The owner, master or agent shall be liable to fine which may extend to two thousand rupees and in addition to a fine which may extend to twenty rupees for every day during which the offence continues after conviction.

Serial No.	Offences	Section of this Act to which offence has reference	Penalties
115D	(a) If the master of an Indian tanker or other ship fails to maintain an oil record book as required by section 356F or contravenes any rule [other than a rule referred to in (b) below] made under that section.	356F(1), 356F(2)	Fine which may extend to two thousand rupees.
	(b) If any person wilfully destroys or mutilates or renders illegible or prevents the making of, any entry in the oil record book or makes or causes to be made a false entry in such book in contravention of any rule made under section 356F.	356F	Imprisonment which may extend to six months or fine which may extend to five thousand rupees or both."

19. Substitution of new section for section 460A.

For section 460A of the principal Act, the following section shall be substituted, namely:—

Removal of Difficulties.

"460A. (1) If any difficulty arises in giving effect to the provisions of this Act, in so far as they relate to the Safety Convention or to the Load Line Convention or to the Convention referred to in clause (a) of section 356B, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for removing the difficulty and giving effect to the provisions of such Convention;

Provided that no order shall be made under this section after the expiry of three years from the date of publication of the Merchant Shipping (Amendment) Act, 1970, in the Official Gazette.

(2) Every order made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions."

20. Certain contraventions, etc., not to be offences.

Notwithstanding the retrospective operation of sections 2 to 14 (both inclusive) of this Act no contravention of, or no failure to comply with, any of the provisions of the principal Act as amended by those sections shall render any person guilty of any offence if such contravention or failure—

(i) relates either to any provision inserted in the principal Act by any of the said sec-

tions, or to any existing provision thereof, as amended by any of the said sections, and

(ii) occurred on or after the 21st day of July, 1968 and before the date of publication of this Act in the Official Gazette.

• THE NORTH-EASTERN COUNCIL ACT, 1970

(Act 26 of 1970)"

[31st May, 1970.]

An Act to provide for the setting up of a Council for the North-Eastern areas of India to be called the North-Eastern Council and for matter connected therewith.

Enacted by Parliament in the Twenty-first Year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called the North-Eastern Council Act, 1970.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "Council" means the North-Eastern Council established under this Act;

(b) "Meghalaya" means the autonomous State known as Meghalaya constituted under section 3 of the Assam Reorganization (Meghalaya) Act, 1969.

a. Received the assent of the President on 31-5-1970. Act published in Gaz. of Ind., 1-6-1970, Pt. II-S. 1, Ext., p. 323.

For Statement of Objects and Reasons, see Gaz. of Ind., 15-12-1969, Pt. II-S. 2, Ext., p. 1110.

(c) "North-East Frontier Agency" has the meaning assigned to it in the North-East Frontier Areas (Administration) Regulation, 1954; and

(d) "State" includes Meghalaya, the Union territories of Manipur and Tripura and the North-East Frontier Agency.

3. Establishment and composition of the North-Eastern Council.

There shall be a Council to be called the North-Eastern Council which shall consist of the following members, namely:—

(a) the Governor of Assam, who shall be the Chairman thereof;

(b) the Chief Ministers of Assam and Meghalaya;

(c) a Minister each from the State of Assam and from Meghalaya to be nominated by the Governor on the recommendation of the Chief Minister concerned;

(d) the Administrators of the Union territories of Manipur and Tripura;

(e) the Chief Ministers of Manipur and Tripura; and

(f) the person for the time being holding the office of the Adviser to the Governor of Assam for Tribal Areas;

Provided that if at any time the Government of Nagaland expresses its desire to be represented on the Council, the Chief Minister of that State and one other Minister to be nominated by the Governor shall also be members of the Council:

Provided further that if there is no Council of Ministers in any State referred to in this section, the President may, if he deems it necessary so to do, nominate not more than one person to represent the State on the Council for so long as there is no Council of Ministers in such State.

4. Functions of the Council.

(1) The Council shall be an advisory body and may discuss any matter in which some or all of the States represented on the Council have a common interest and advise the Government of each State concerned as to the action to be taken on any such matter.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the Council may—

(a) formulate for the States represented thereon a unified and co-ordinated regional plan in respect of such plan schemes for those States as are of common importance to the north-eastern areas of India, such as schemes relating to inter-State communications, common irrigation, power and flood control projects, agricultural production to achieve regional food self-sufficiency and balanced industrial development of the region;

(b) review from time to time the implemen-

tation of the schemes included in the regional plan and recommended measures for effecting co-ordination in implementation of the schemes by the Governments of the States concerned;

(c) discuss and make recommendations with regard to—

(i) any other matter of common interest in the field of economic and social planning, and

(ii) any matter concerning inter-State transport.

5. Meetings of the Council.

(1) The Council shall meet at such time as the Chairman of the Council may appoint in this behalf and shall, subject to the other provisions of this section, observe such rules of procedure in regard to transaction of business at its meetings as it may, with the approval of the Central Government, lay down from time to time.

(2) The Chairman or in his absence any other member chosen by the members present from amongst themselves shall preside at a meeting of the Council.

(3) All questions at a meeting of the Council shall be decided by a majority of votes of the members present and in the case of an equality of votes the Chairman, or, in his absence, any other person presiding shall have a second or casting vote.

(4) The proceedings of every meeting of the Council shall be forwarded to the Central Government and also to the Government of each State represented on the Council.

6. Advisers.

(1) The Council shall have the following persons as Advisers to assist the Council in the performance of its duties, namely:—

(a) one person nominated by the Planning Commission; and

(b) one person nominated by the Ministry of the Central Government dealing with Finance.

(2) Every Adviser to the Council shall have the right to take part in the discussions of the Council but shall not have a right to vote at a meeting of the Council.

7. Co-ordination Committee.

(1) There shall be a Committee of the Council called the Co-ordination Committee consisting of—

(a) the Governor of Assam and the Chief Ministers of Assam and Meghalaya;

(b) the Administrators and Chief Ministers of the Union territories of Manipur and Tripura; and

(c) the person for the time being holding the office of the Adviser to the Governor of Assam for Tribal Areas:

Provided that as and when the State of Nagaland is also represented on the Council,

the Chief Minister of that State shall be a member of the Committee.

(2) The Governor of Assam shall be the Chairman of the Committee.

(3) It shall be the duty of Co-ordination Committee to review from time to time the measures taken by the States represented on the Council for the maintenance of security and public order therein and to recommend to the Governments of the States concerned further measures necessary in this regard.

(4) The Committee shall observe such rules of procedure in regard to transaction of business at its meetings as the Council may, with the approval of the Central Government, lay down from time to time.

8. Office and staff of the Council.

(1) The Council shall have a secretarial staff consisting of a Secretary, a Planning Adviser and such other officers and employees as the Central Government may by order determine.

(2) The office of the Council shall be located at such place as may be determined by the Council.

(3) The administrative expenses of the said office, including the salaries and allowances payable to, or in respect of, members of the secretarial staff of the Council, shall be borne by the Central Government out of moneys provided by Parliament for the purpose.

THE UNIVERSITY GRANTS COMMISSION (AMENDMENT) ACT, 1970

(Act 27 of 1970)

[3rd June, 1970]

An Act to amend the University Grants Commission Act, 1956.

Be it enacted by Parliament in the Twenty-first Year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called the University Grants Commission (Amendment) Act, 1970.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Substitution of new section for section 5.

For section 5 of the University Grants Commission Act, 1956 (hereinafter referred to as the principal Act), the following section shall be substituted, namely:—

a. Received the assent of the President on 3-6-1970. Act published in Gaz. of Ind., 4-6-1970, Pt. II-S. 1, Ext., p. 327.

For Statement of Objects and Reasons, see Gaz. of Ind., 29-3-1953, Pt. II-S. 2 Ext., p. 301.

Composition of the Commission.

15. (1) The Commission shall consist of—

- (i) a Chairman, and
- (ii) eleven other members,

to be appointed by the Central Government.

(2) The Chairman shall be chosen from among persons who are not officers of the Central Government or of any State Government.

(3) The other members shall be chosen as follows:—

(a) two members from among the officers of the Central Government to represent that Government;

(b) not less than five members from among persons who are, at the time when they are chosen as members, teachers of Universities:

Provided that no person, who is the Vice-Chancellor of a University or the head of an institution which is eligible under this Act to receive grants from the Commission, shall be chosen to be a member of the Commission;

(c) the remaining number from among—
(i) persons representing industry, commerce or agriculture,

(ii) persons representing engineering, legal, medical or other learned professions, or

(iii) persons who are educationists of repute or who have obtained high academic distinctions, not being persons who are officers or teachers of Universities:

Provided that not less than one-half of the number so chosen shall be from among persons who are not officers of the Central Government or of any State Government.

(4) The Commission may elect from among its members a Vice-Chairman who shall exercise each of the powers and discharge each of the duties of the Chairman as may be prescribed.

(5) Every appointment under this section shall take effect from the date on which it is notified by the Central Government in the Official Gazette."

3. Amendment of section 6.

In section 6 of the principal Act,—

(i) for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) A person appointed as Chairman or other member, unless he becomes disqualified for continuing as such under the rules that may be made under this Act, shall—

(a) in the case of Chairman, hold office for a term of five years; and

(b) in the case of any other member, hold office for a term of three years:

Provided that—

(i) a person who has held office as Chairman shall be eligible for further appointment as Chairman or other member, and

JOURNAL SECTION

1970 OCTOBER

THIRD MAHARASHTRA STATE LAWYERS' CONFERENCE, 1970 AT PARBHANI

APPEAL

FRIENDS,

You are aware that the Lawyers of the Maharashtra State had met in Conference on two previous occasions., once at Ahmednagar in 1962 and then at Akola in 1966.

At the Conference held at Akola, the Maharashtra State Lawyers' Association, had kindly consented to hold its 3rd Conference at Parbhani, on the invitation extended by the Parbhani Bar Association.

We are, therefore, glad to inform you that with the concurrence of the office-bearers of the Maharashtra State Lawyers' Association, we propose to hold the Conference in the month of October 1970, and the dates fixed for the Conference are 24th and 25th October 1970. We were to hold the Conference in the month of May 1970, but could not do so due to unavoidable circumstances.

Parbhani is District head-quarters of District Parbhani and is situated on the Manmad-Kachiguda (Hyderabad) Meter Gauge Railway line of the South Central Railway and is also approachable by Road from all sides of Maharashtra State. Besides, Parbhani enjoys the position of being situated at Central place in the Maharashtra State. The season and climate in the month of October is very pleasant at Parbhani.

The Reception Committee desires and hopes to house all the Delegates and Members attending the Conference at decent and convenient places and also hopes to serve with best possible refreshments and foods. However, this would be possible, if the Brother and Sister Lawyers register themselves as Patrons, Donors, Members of Reception Committee and Delegates for the Conference in great numbers.

To make arrangements to the full satisfaction of all the attending Delegates and Members, it would be essential for the Reception Committee to ascertain the number of such Delegates and Members. Hence we request that the Lawyers desiring to attend the Conference get themselves registered by 10th of October 1970.

The Reception Committee has fixed the subscription as follows :

(1) Patrons	... Rs. 100/- or more
(2) Donors	... Rs. 50/- or more
(3) Members of Reception Committee	... Rs. 25/- or more
(4) Delegates	... Rs. 10/- or more

In addition to the above subscription, Lawyers desiring Lodging and Boarding facilities during the days of the Conference will be required to pay Rs. 15/- as Lodging and Boarding Charges.

We need not emphasise here that it is an excellent and rare opportunity for us brother and sister Lawyers, to meet together at one place and to discuss matters involving common interests and obligations.

We are further glad to inform the members of the profession that His Lordship the Hon'ble Justice Shri Y. V. Chandrachud, Judge, Bombay High Court, has graciously consented to deliver the inaugural address on 24th October 1970, while Shri A. S. R. Chari, Advocate, Supreme Court of India has kindly agreed to preside over the inaugural function.

We, therefore, most earnestly request all the Brother and Sister Lawyers in the State of Maharashtra to participate in the Conference and make it a Success.

V. CHATRAPATI,

B. A., LL. B., Advocate,
Acting Chairman.

A. R. GAVANE,

B. A., LL. B. Advocate,

& M. L. A., Chairman, Reception Committee.

P. L. KAPSE, Advocate,
President, District Bar Association,
PARBHANI.

D. R. POLE, B. A., LL. B., Advocate,
General Secretary.

(By P. LEELAKRISHNAN, M.A., M. L. Lecturer in Law, University of Kerala.)

The decision of the Supreme Court in *Kraipak v. Union of India*(1) has widened the frontiers of natural justice in India.

2. A High Power Committee for selecting officers to the Indian Forest Service was constituted in the State of Jemmn and Kashmir. The selection was to be made from among the officers of the State Forest Department. Naquishbund, the Acting Chief Conservator of Forests in the State, was also a member of the Selection Board. At the same time he was also a candidate for the selection. A list was prepared by the Board after scrutinising the service records of the officers. Naquishbund was ranked first in the list. One of the petitioners who was admittedly senior to him and two others who claimed to be senior to him, were left out in the list. Appeals filed by some of them on the question of seniority were pending with the Government when the selection was made. The petitioners questioned the selection under Art. 32 of the Constitution on the ground inter alia that membership of Naquishbund in the Selection Board had made him a judge in his own cause and that the selection was vitiated by bias.

3. The Court noted, that, though Naquishbund withdrew from the deliberations of the Committee when his case was considered, he participated in the deliberations of the final preparation of the list when the claims of his rivals particularly those of Bseu were considered. It was in the interest of Naquishbund to keep out his rivals in order to secure his position from further challenge.(2) The Court was of the view that the Chief Conservator of Forests in a State should be the most appropriate person to be in the Selection Board. But 'under the circumstances'(3) it was improper to have included Naquishbund as a member of the Selection Board. It was contended that the findings of the Selection Board were only of a recommendatory nature, that the final list would be prepared by the Union Public Service Commission after seeing the comments of the Ministry of Home Affairs, and thus that the final authority would not have been under the influence of this Selection Board. Repelling the contention the Court held that the recommendations of the Selection Board would carry considerable weight with the Union Public Service Commission.(4) The Court did not accept in full the contention of the respondent that the power of the Selection

Board was administrative and not quasi-judicial in character. Even assuming for the purpose of the present case that power of the Selection Board was administrative, the Court took notice of the growing trend in recent times towards narrowing down the division between the two powers.

4. The *Kraipak* decision in AIR 1970S C 150 is a pointer to the growth of natural justice in India in two ways. Firstly, the decision has almost pulled down the traditional barriers between the administrative and quasi-judicial powers and thus made an extensive application of natural justice. Secondly, the decision cut at the root of the pleas of necessity, efficiency and expertise under which the administrative authorities tried to evade the observance of natural justice. This led to an intensive application of natural justice.

I

5. The traditional division of public acts into quasi-judicial and administrative had given a right to the citizens to demand for natural justice in the former and a protective excuse to the administrative authorities for the avoidance of natural justice in the latter. The attitude with which the English Courts endorsed this division was not a consistent one.(5) Following the British practice Indian Courts also found the difficulty in adopting consistent rule to maintain this division. Even in matters characterised as purely administrative, the extent of the infringement of the rights of the citizens may be of such magnitude that it is clearly unjust not to make a fair deal of the citizens before they are deprived of their rights.(6)

6. Recently in England and in India an attempt was made to reconcile the procedures in the above two divisions of powers and thus

5. In *Cooper v. Wandsworth Board of Works* (1863) 14 CB (N S) 180, the public act of pulling down a house was held to be a judicial one. In *Nakkinds Ali v. Jayaratna*, (1951) A C 66 the deprivation of a textile dealer's privilege (if not a right?) to carry on his means of livelihood was held to be an administrative act. Cf. *Smith v. R.* (1870) 3 A C 614—the act of the Commissioner of Crown lands in Queensland cancelling the license was a judicial function or even a function of a judicial nature.

6. See, Wade, H. W. R. "The Twilight of Natural Justice." 67 L Q R 103. (1951), p. 104. The writer calls the enquiry whether a power is judicial or administrative as "false dilemma." The real question must be whether the power "deprives some individual of his rights or liberties, so that he must be given the elementary justice of a hearing before his rights are destroyed by administrative action."

1. AIR 1970 S C 150: (1970) 1 S C J 581.

2. Ibid, p. 155.

3. Ibid, See, n. 23. infra.

4. Ibid, p. 157.

to make people feel that both procednres are adopted in a fair manner. Thus it was held that even though an Immigration Officer while admitting a person to the United Kingdom under Commonwealth Immigration Act, 1962, was not acting quasi-judicially he must give the immigrant an opportunity to explain the doubts of the Immigration Officer.(7) Parker C. J. took this question as not that 'of acting or being required to act judicially, but of being required to act fairly.'(8)

He continued to observe,

"Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problems, but acting fairly"(9)

The Supreme Court of India in *State of Orissa v. Dr. (Miss) Binapani*(10) observed that the governmental action of determining the date of birth of the respondent from the different disputed dates was an administrative matter. Still as the final determination of the date of birth would involve civil consequences in the form of an early pension to the respondent, the Court held the act should have been carried in a fair manner observing the rules of natural justice. Quoting the above two decisions(11) Hegde J., noted in *Kraipak* that it was not easy to draw the line that demarcated administrative enquiries or quasi-judicial enquiries.(12) If the purpose of the rules of natural justice is to prevent miscarriage of justice and the aim of both quasi-judicial and administrative enquiries is to arrive at a just decision there is no reason why rules of natural justice should be made inapplicable to administrative enquiries.(13) An unjust decision in an administrative enquiry may have more far-reaching effect than a decision in a quasi-judicial enquiry. Shah J., did not hold that the power of the Selection Board is judicial(14) in character. He assumed(15) it to be the so-called administrative power for the purpose of the present case. Even then the Court was of the view that rules

of natural justice must be observed in the exercise of that power.

7. The *Kraipak* decision AIR 1970 S C 150 merits scrutiny in its finding into the intensive application of one of the rules of natural justice i.e. freedom from bias.

8. The non-participation of the Acting Chief Conservator of Forests in the deliberations of the Board when his case was considered did not rule out the likelihood of bias in the selection. The real question was not whether the Acting Chief Conservator was biased. As Hegde J. observed it was difficult to prove the state of mind of a person.(16) So the question whether there was "reasonable ground" for believing that he was likely to have been biased".(17) The judge was categorically saying that a mere suspicion of bias is not sufficient(18).

9. The Supreme Court in the *Kraipak* decision AIR 1970 S C 150 took into consideration 'human probabilities and ordinary course of human conduct'(19) and adopted the test of 'real likelihood' of bias which had been accepted and adopted by judicial precedents(20) in determining the question of personal bias.(21) As Delvin L. J.(22) has pointed out 'real likelihood' depends on the impression which the court gets from the circumstances in which the administrators were sitting. In *Kraipak* also there were certain circumstances(23) that will give an impression of the likelihood of bias.

10. *Ibid.*

11. *Ibid.*

12. *Ibid.* p. 156.

13. *Ibid.* p. 155.

20. *R. v. Camborne Justices, Ex parte Pearce*, (1955) 1 Q B 41 per Slade J. p. 51. Held, that the right test to disqualify a person from acting upon the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding is to show a real likelihood of bias. This holding was made on the basis of the dictum of Blackburn J. in *R. v. Rand* (1866) 1 Q B 230, at p. 232. See also, *R. v. Barnsley Licensing Justices*, (1960) 2 Q B 167.

21. Writers in Administrative Law referred to different kinds of bias. There are bias on the subject matter, pecuniary interest and personal bias. See, Griffith & Street, *Principles of Administrative Law* (1967), pp. 156-158. There are pecuniary bias, personal but non-pecuniary bias and lastly official bias. See, Markosc. A. T., *Judicial Control of Administrative Action in India* (1956), p. 216.

22. *R. v. Barnsley Licensing Justices*, (1960). 2 Q. B. 167, p. 167. Delvin L. J. noted also the following words in the same page. "Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so".

23. *Eg.* :- The seniority question of some of the petitioners pending in appeal with the Government, the likelihood of the ignorance of

7. In re H. K. (An Infant), (1967) 2 Q B 617.

8. *Ibid.* p. 630.

9. Cf. *Board of Education v. Rico*, 1911 AC 179 per Lord Loreburn L. C., p. 182.

10. AIR 1967 SC 1269=(1967) 2 SCJ 339.

11. In Re H. K. (An Infant), (1967) 2 Q B 617; *State of Orissa v. Dr. (Miss) Binapani*, AIR 1967 SC 1269=(1967) 2 SCJ 339.

12. *Kraipak v. Union of India*, AIR 1970 SC 150, p. 157=(1970) 1 SCJ 381, p. 389.

13. *Ibid.*

14. *Ibid.* p. 154. In the earlier part of his judgment Shah J., has emphatically held that the requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously.

15. *Ibid.* p. 155.

10. A fair judge must be free from any kind of bias. English and Indian Laws recognize 'freedom from bias' as an integral part of the first rule of natural justice i. e., 'no man shall be judge in his own cause'. In *Frome United Breweries Co. Ltd. v. Bath Justices*(24) the House of Lords asserted that a body or a person who decided a dispute could not be both a party and a judge in the same dispute.(25) Obviously referring to *United Breweries case*(26) Subba Rao J. observed in *Nagaswara Rao v. State of Andhra Pradesh*(27) that when bias of a person must be assumed to exist he ought not to take part in the decision or sit on the tribunal and that any interest would disqualify him as a judge if it be "sufficiently substantial to create a reasonable suspicion of bias".(28) In *State of U.P. v. Mohamad Nuhn*(29) Das, C. J. had categorically declared that no man could be prosecutor and judge at the same time in a judicial enquiry. If it happens so it would indubitably evidence 'a state of mind which clearly discloses considerable bias'.(30)

11. On the facts of the present case under comment one comes across the decision in *Ramanand v. Union of India*(31) which is similar to *Kralpak*. In this case, the Selection

the other members of the Board about the fact of these pending appeals, the likely anxiety of Nagishband to get himself free from any further challenge in future in case the seniority questions were won by the respective petitioners, the participation of Nagishband in the final preparation of the list and lastly the likelihood of the subtle influence Nagishband could have upon the minds of the other members of the Board.

24. 1926 A.C. 586. The Licensing Justices referred to the Compensation Authority an application for the renewal of an old one—licence. At the same time they instructed that a Solicitor should appear to oppose the renewal before the Authority. Three of the Justices who had given such an instruction were also members of the Compensation Authority which eventually refused the renewal of the licence. The Court held that the decision of the Authority would be vitiated by bias as the Justices were biased.

25. *Ibid*, p. 531.

26. *Ibid*.

27. AIR 1952 S.C. 1376.

28. *Ibid*, p. 1378. Quoting this, Mehrotra, J. in *Narendra Kumar v. Appellate Board* (AIR 1960 Assam 100) held that when the Regional Transport Authority were making decision as to the grant of bus-routes a member who was interested in one of the applicants should have withdrawn from the authority.

29. AIR 1958 S.C. 86. In a departmental enquiry by the D. S. P. against a Head Constable, a witness deposed exactly contrary to what he said in the presence of the D. S. P. previously. Hence the D.S.P. thought that this should be rebutted, went to the witness box and got his deposition recorded by another officer.

30. *Ibid*, p. 91.

31. AIR 1962 All 370.

Board consisted among other men the Inspector General of Forests and the Chief Conservator of Forests who were themselves candidates for entry into the Indian Forest Service. Jagdish Sahai, J. held that in a case of necessity the principles of natural justice did not apply.(32) The judge was of the view that there could not be better persons to sit in the Board than the Inspector General of Forests who was at the apex of the Forest Department of the country and the Chief Conservator of Forests who was the head of the Forest Department in the State. The judge had not pointed out the necessity of including the incumbents in the Selection Board except the plea of their higher position in the forest service. However, the Allahabad decision does not seem to keep pace with the aims(33) of the courts and the legislature towards finding and establishing an alternative forum in instances when the 'necessity rule' was to be invoked. Though the necessity rule is regarded as an exception to the first principles of natural justice the possible establishment(34) of an alternative forum has relegated this exception to the background.

12. The necessity rule under which the Allahabad Court(35) sustained the membership of the officers in the Selection Board did not attract the Supreme Court in the *Kralpak*(36) decision. On the other hand Hegde J. had opined that it was improper to have included the officer in the Selection Board.(37) It is submitted that in *Kralpak* the real question was not how to apply the doctrine of necessity but how to utilize the expert knowledge of the higher officers of public service as well as the wealth of their experience in selecting the other candidates. Here comes the hurdle in taking up a definite stand. Why cannot one agree with the statement(38) that the high Government officials are such 'men of conscience and intellectual discipline' that when they are facing to decide an important matter, their mind will not be a victim to prejudices and bias and that they shall decide

32. *Ibid*, p. 373. Quoting *Sergeant v. Dale*, (1877) 2 Q.B.D. 553 and *Laxmi Chand Agarwal v. State of U. P.*, AIR 1962 All 117.

33. Marshall H. H. *Natural Justice* (1951), p. 39.

34. *Ibid*, pp. 33 to 41.

35. *Ramanand v. Union of India*, AIR 1962 All 370.

36. *Kralpak v. Union of India*, AIR 1970 S.C. 150.

37. *Ibid*, p. 235.

38. *United States v. Morgan* (1911) 218 U.S. 409, 421 per Frankfurter, J. In this Fourth Morgan case, the Secretary refused to disqualify himself in a proceeding to fix the new rates when the market agencies alleged bias in him on account of a letter written by him condemning a previous Supreme Court decision on the point. It was held that the record did not show any bias and that the refusal of the Secretary to disqualify was a 'dignified' one.

ing advocates or from the cadre of active judicial service in the State or from amongst retired District or High Court Judges and that such appointments be made by the State Government in consultation with the High Court and that the members of the tribunal should be subject to superintendence of the High Court of Judicature at Bombay and the members of such tribunals should have such security of service and tenure as is usually made available to the members of the judicial service in the State."

(2)

The Bar Council at its meeting held on 27th June, 1970, at Bombay, elected the following office-bearers of the Bar Council.

Shri Narayan Hari Helekar, B.A., LL.B., Advocate, was unanimously elected the Chairman of the Council for a period of one year.

Shri Deokinandan Ramlal Dhanuka, LL.B., Advocate was unanimously elected as Vice-Chairman for one year.

PARTLY SUCCESSFUL WRIT PETITIONS

(By V. B. RAJU, Retired High Court Judge, Ahmedabad).

When a writ petition succeeds only in part, sometimes, some High Courts order that there should be no order as to costs. This is not just because in order to get even one relief a petition has to be filed. Court-fee

stamp of writ petitions does not depend on the number or value of the reliefs claimed. Even if one just claim is refused a petition has to be filed. Petitioner should get costs even if one of his claims is just.

CHAPTER 8 OF PRESIDENCY SMALL CAUSE COURTS ACT SUPERSEDED BY BOMBAY RENTS CONTROL ACT, 57 OF 1947

(By V. B. RAJU, Retired High Court Judge, Ahmedabad).

It has escaped the notice of superior Courts that Chapter 8 relating to recovery of arrears of rent by applications made to a Judge of Court of Small Causes or to the Registrar, has been superseded by Section 28 of Bombay Rents Control Act, 1947 under which the Court of Small Causes has exclusive jurisdiction in proceedings relating to recovery of rent. A Judge or Registrar of Small Causes Court does not function as a Court of Small Causes. Section 41 of Presidency Small Cause Courts Act speaks of applications to the Small Cause Court but S. 53 in Chapter 8 of that Act speaks of application to a Judge of Small

Cause Court or to the Registrar of Small Cause Court.

Proceedings under Chapter 8 of Presidency Small Cause Courts Act are not proceedings of the Small Cause Court. Under S. 28 of Bombay Act 57 of 1947, only the Small Cause Court has exclusive jurisdiction. A Judge of the Small Cause Court, as such Judge and Registrar of that Court have no jurisdiction. Chapter 8 of the Act which gives them jurisdiction is therefore of no force so long as S. 28 of Bombay Act 57 of 1947 is in force. This section gives exclusive jurisdiction only to the Court of Small Causes notwithstanding anything in any other Act.

OBITUARY

We regret to report the sudden death, on the 2nd September last, due to a heart attack of Shri C. R. Krishna Rao, the Reporter of the All India Reporter in the High Court of Madras for the last more than 30 years. We wish to place on record our deep sense of loss on the passing away of Shri Krishna Rao who gave his sincere and invaluable co-operation to us in reporting the judgments of the Madras High Court. We offer our sincere condolences to the members of his family.

May his soul rest in peace.

May 21st 1971
of the D. S.

LAWBREAKERS AND KEEPERS OF PEACE. By S. K. Ghosh, 2nd Edition, 1969. Eastern Law House Private Ltd., Calcutta 12. Pp. xxi & 424. Price, Rs. 18.

Written by a high Police Officer who is the author of "Crime on the Increase" and other books on criminology, the present book should come as an invaluable guide and *vade mecum* to police officers, whose special charge is public safety and security, as well as to young trainees at Police Training Schools; it should greatly help them in their day-to-day work in dealing with law breakers. In this second edition, which is being published eighteen years after the appearance of the first one, necessary changes and amendments have been made and particularly the chapter relating to Police in Riots and Crowd Control has had to be thoroughly revised in view of subsequent developments. It is a comprehensive handbook to help the policeman know his trade and his "do's" and "don'ts", and it collects all up-to-date methods of policing and rules of conduct of the policeman in public life. It delineates each sub-head with definite instructions and advice in a matter-of-fact and businesslike manner. It examines the policeman's peculiar inter-relationship with the public in general and the press and politicians, and offers apt observations and advice under the heads "Ideal police" and "The Use of Discretion". The chapters on the various important forms of crime summarise the up-to-date methods and practice & procedure, and carry detailed instructions covering all contingencies. It is expected that the author's notes on rioting and the special precautions for controlling crowds as well as on "Traffic Accidents" will supply a felt want in the Department, while the chapter on "The Policeman on the Beat" brings to mind his proto-type who is such a popular institution in London streets.

The forms of crime to which separate chapters have been devoted include burglary, robbery and dacoity, murder, arson and rape, while two of the chapters deal with receivers of stolen property and with wounds. In view of the violence and disorder that has been stalking the land in recent months, especially in Gujarat, Maharashtra and West Bengal, the author's comments on riots and crowd control are particularly significant; it would appear that several of his earlier suggestions have been accepted, and with success. As important as the text are the appendices; in fact they take up the greater part of the book. They contain all preventive sections of the Criminal Procedure Code, Police powers & duties under them and other special and local laws, use of armed reserve for dispersal of a riot, equipment of armed police detachment on riot

duty, orders regarding playing of music in places of public worship, questions to be put to medical witnesses and tabular statement of offences. There is a useful index.

There is a special chapter meant to indicate certain rules of guidance for beginners who are entrusted with the task of conducting prosecutions. The prosecutor must first read the case diary thoroughly and study the relevant sections of the law carefully every time, and see if the material in the diary is complete and adequate to prove the charge. He must stick to the rules of relevancy and admissibility of evidence as laid down in the Evidence Act. As Magistrates have to deal with several cases and may commit errors of record, the prosecutor can prevent this by careful analysis and presentation of the case, in friendly co-operation with counsel for the complainant. In the final analysis, the police and their conduct of a case depend largely on the sympathetic attitude of the magistrate, who should work in the recognised interests of justice. The relationship between Magistracy and police should be one of true friendship and, the author suggests, periodical meetings of the magistrates and the police will be useful to achieve this end. The present publication should continue to be useful to the members of the police force as well as to the magistracy and the members of the Bar and the Bench.

: R.S.S.

THE JURY. By W. R. Cornish. Allen Lane The Penguin Press; London, 1968. (In India : Penguin Overseas Ltd., D-338, Defence Colony, New Delhi-3.), pp. 298. Price, 50 S.

The aim of the volume under review is to describe the present function of juries in the English Courts and to consider how far the system achieves its objects. Although concerned mainly with the English Judicial system and the jury in English Courts, it glances, for purposes of comparison, at the introduction and development of the jury system in other parts of the world. The author interviewed a considerable number of persons and discussed many aspects of their service with them, and the interviews provide a valuable insight into the attitudes, experiences and problems of the jury service, and they are referred to at various points throughout the book.

The introductory chapter is followed by a description of the present system of selecting juries and of the changes proposed. The third chapter describes the extent to which the jury has now been superseded by other types of Courts and examines the degree to which procedural rules are the product of jury trial

The law of evidence is so intimately connected with the presence of juries that it is separately discussed in this chapter. Dealing with Judge and Jury, the next chapter explores the extent to which Judges have taken issues from the jury which would normally be regarded as 'questions of fact,' and the degree to which Judges are enabled by their position to persuade juries to their own point of view, after which the author proceeds to assess the constitutional role of the jury.

Chapter 6 raises a number of questions about how juries decide serious criminal cases, about the ways in which their judgment may differ from that of professional lawyers, and about the ability of amateur jurors to act as 'Judges of fact,' while the next chapter explores specific areas of the criminal law in which trial by jury either creates special problems or provides a particular advantage. Chapter 8 examines whether juries are worth preserving for the few cases that they now try, or whether they deserve to be given a more extensive role in the Civil Courts once more. That the use of juries has never been restricted merely to the trial of issues between the parties in civil and criminal cases is the theme of the next chapter, which refers to two kinds of juries, those which used to determine questions of compensation for compulsorily acquired land and those which decided whether a person was a lunatic, both of which have now disappeared in favour of other special tribunals.

Research projects on the jury system have been under way for some time in America and England, and the American studies would seem to suggest four important avenues of research, viz., interviewing juries before or after service, comparing the verdict reached by juries with the views of lawyers, playing recordings of trials to experimental juries, and recording and analysing discussion in the jury room. The author concludes that it is useless to discard the jury system without replacing it, before considering possible reforms under the heads of administrative changes, fundamental changes in the character of the jury system, and administrative tribunals.

It is noteworthy that all the footnotes in the book have been relegated to the closing pages, the text pages thereby providing unbroken reading matter in the same type. There is a useful index.

The present publication should be of particular benefit to those who have performed jury service or are liable to do so, and wish to find out what it involves, how it functions, and the merits and demerits of the system. It has proved extremely difficult to transplant the jury system in other countries. In India, the Law Commission was forced to recommend

the abandonment of juries because bribery of juries was widespread. In the present conditions in India, therefore, the subject-matter of the book is of doubtful relevance. R.S.S.

COMPARATIVE ADMINISTRATIVE LAW. Vol. I. General Principles. By Justice Durga Das Basu, of the Calcutta High Court. S. C. Sarkar & Sons (Private) Ltd., Calcutta 12. 1969. Pp. xv & 507. Price Rs. 30.

Administrative Law is that aspect of Constitutional Law which deals in detail with the powers and functions of the administrative authorities, including the civil services, public departments, local authorities and other statutory bodies exercising public functions and wielding quasi-judicial powers. Its subject-matter is public administration and it determines the organisation, functions, powers and duties of "administrative" authorities. Starting as an adjunct of Constitutional Law, it has rapidly increased in importance and become the subject of separate study in the universities of the English speaking world, including India. Like the United States of America, India has a written Constitution with a Bill of Rights and Judicial Review as a sanction for it, so that administrative action can be challenged on constitutional grounds besides the common law and statutory grounds as in England. Administrative law deals with the powers of the administrative authorities, the legal relationship between such authorities and the citizen, and the justiciable rights of the citizen as against "the Administration." The scope of the present work is to indicate the remedies which are available in a Court of law and the principles which help to keep the administrative authorities under the Rule of Law, the emphasis always being on the judicial aspect of administrative law.

In France, *Droit Administratif* is that part of public law which deals with the rights and liabilities of the citizen in relation to the administration, and is based on the principle that Government possess, as representative of the nation, a whole body of special rights, privileges or prerogatives as against the citizen, and that the legislature, the executive and the Court must be prevented from encroaching on one another's province. Special rules, special administrative Courts, and the Court of Conflicts (of jurisdiction) are distinguishing characteristics of French administrative law. In England the power to adjudicate upon legal rights has been vested in various bodies other than the Courts, like special tribunals, quasi-judicial officers, Ministerial Tribunals and Ministers with quasi-judicial

powers. In the U. S. A. the enactment of the Administrative Procedure Act of 1946 may be said to constitute a statutory code relating to the judicial control of administrative action in that country.

In India the study of Administrative Law as a separate subject received an impetus by the adoption of the written constitution after Independence, and the Law Commission of 1955 also focussed attention on the different aspects of administrative laws. Although administrative law is to be found from sources outside the written constitution, like statutes, statutory instruments and case-law, here, too, there is close inter-relation between constitutional and administrative law; many of the cases in the constitutional writ jurisdiction of the High Courts in India raise questions of ultra vires and breach of statutory duties, which pertain to the realm of Administrative Law.

The early chapters of the book under review dwell on Separation of Functions and Delegation, the Quasi-Legislative Functions of the Administration; purely Administrative Functions and Statutory Authorities in general. Quasi-judicial Functions, Natural Justice, Administrative Tribunals, Commissions of Inquiry, Statutory Domestic Tribunals and the Ombudsman, are the titles of succeeding chapters, while three chapters are given over to the Judicial control of Administrative Action, Limits of Judicial Review and the Forms of Judicial Review. Scope of review of administrative action, judicial review of quasi-judicial decisions, proper exercise of jurisdiction, breach of natural justice, fraud and unconstitutionality, are among the subjects covered in the first of these chapters, and among the particular modes of judicial review are enumerated constitutional remedies, remedies under the ordinary law, statutory remedies, and the prerogative Writs of Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo Warranto.

The current prominence of administrative law is irrefutable. The majority of cases before the Indian Supreme Court and the High Courts in the sphere of Public Law appertain to it; so is the case in America. A treatise on the subject, from the comparative point of view, should be useful to students everywhere as well as to practising lawyers; it has been prescribed as a text book by the Calcutta University.

R.S.S.

CASE LAW ON THE INDIAN CONSTITUTION. By N. A. Subramanian, Advocate, and Lecturer, Madras Law College. Vimala Publications, Mysore, Madras 4. 1969. Pp. xii and 268. Price, Popular Edition, Rs. 12; Library Edition, Rs. 15.

It is hard to minimise the importance of Case Law in any study of the Indian Constitution. Although the present publication is not strictly a Case-Book, it presents an able exposition of the important provisions of the Constitution through selected judgments of the Supreme Court of India. The summaries are not confined to a statement of the facts of the case and the conclusions of the Court; an attempt is made to bring out prominently the arguments advanced as well as the process of reasoning adopted by the Court. The cases are arranged according to the provisions of the Constitution, with head-notes focussing attention on the salient principles of law enunciated in each judgment.

So far as the Constitution itself is concerned, any amendment of it must be construed as "Law," and any future constitutional amendment which abridges or takes away the fundamental rights will be void. The amendments already made will, however, continue to be valid as declared in the prior decisions by the Doctrine of Prospective Overruling. The Constitution being supreme and the task of interpreting it having been entrusted to the Judiciary, the jurisdiction of the Courts to determine the existence and extent of the powers and privileges of the Legislature cannot be questioned. The citizen's fundamental right under Art. 21 not being subject to the powers and privileges of the House, he is entitled to move the courts for enforcing that right by appropriate proceedings and the Courts have power to entertain and deal with them. There is nothing in the Constitution which prevents the Supreme Court from departing from a previous decision, if the Court is convinced of its error and its adverse effect. And the conduct of a Judge in the discharge of his duties cannot even be discussed in the Legislature; much less can it form the subject-matter of proceedings for contempt.

The Executive Power connotes the residue of governmental functions that remains after the legislative and judicial functions are taken away. It is not limited to the mere carrying out of law already enacted, but extends to the determination of policy as well as carrying it into execution. Somewhat related to it is the decision that the State is not liable for the tortious acts of its servants done in the exercise of the sovereign power of the State. Articles 19 to 22 of the Constitution.

attempt to strike a balance between individual liberty and social control. Article 22 contains the procedural safeguards relating to preventive detention. The validity of a law of preventive detention is not to be judged with reference to Art. 19. There is a marked and deliberate difference in the language of the Due Process Clause of the American Constitution and Art. 21 which refers to "procedure established by law," which only means such procedure as is prescribed by enacted law.

As regards religion, it is not a mere doctrine or belief, but includes essential religious practices. Articles 25 and 26 protect not only freedom of religious opinion but also acts done in pursuance of religion. They do not authorise the regulation of religious practices but only of activities which are associated with religious practices. Under Art. 26 the law must leave the right of management with the religious denomination itself.

The cases in the book have been carefully selected and analysed and the method of presentation has been influenced by the author's teaching experience. It should be a useful supplement to the bigger volumes consulted by the lawyer and the law student. There is an alphabetical table of cases cited with the corresponding page numbers. An index would perhaps have added to the usefulness of the book, whose finish and get-up would seem to be capable of great improvement. B.S.S.

AMERICAN LEGISLATURES. (Structure and process). By George S. Blair, Claremont Graduate School, Claremont, California. University Book House, 15—U. B. Bungalow Road, Delhi-7. First Indian Reprint, 1969. Pp. x and 449. Price, Rs. 6.

The Constitution of the United States of America works on a system of checks and balances. While the power to "make" laws is entrusted to the legislative branch, the President is granted the authority to present a State of the Union Message in which he recommends measures which he considers necessary, and a veto power by which he can check the actions of Congress. The Congress, on the other hand, can check the President by passing a law over his veto, by refusing to enact legislation which he recommends and by refusing to confirm his appointments or to notify treaties promulgated by him. In the final analysis, it is in the power of the Congress, acting as a Court, to impeach a President and remove him from office. It is, however, the Supreme Court which is empowered to check both the Congress and the President

when it feels they have exceeded or abused their constitutional powers. The power of the Courts to declare acts of the legislatures to be beyond the bounds of their constitutional powers is one of the basic tenets of the American system of Government. It was Chief Justice Marshall who laid down that the Constitution is a paramount law limiting the powers of the Government, including the legislature. Courts interpret what the law is, and acts in conflict with that law should be invalidated.

The present volume, it is well to note, would appear to be among the first to cover both the Houses of the U. S. Congress as well as the State legislatures. Its approach to the role of the legislatures in American Government and politics shows their interrelationships with the executive and judicial branches as well as with political parties and interest groups. In order to make the reader understand meaningfully the character and functions of the legislatures, the author discusses, in the first chapter, the eight basic tenets of popular sovereignty, federation, republican form of Government, Government of limited powers, separation of powers, checks and balances, judicial review, and supremacy of the national government. He then traces the development of representative assemblies in U. S. and describes their formal and constitutional position, and proceeds to examine the major functions of legislative bodies in a democratic society. The processes for choosing legislators is the topic discussed in Chap. 4, while the next chapter deals with legislative apportionment, which is the problem of apportioning electoral areas for legislative representation. The role and characteristics of legislators is dealt with in Chap. 6, while legislative structure is the subject of Chap. 7; in the next two chapters are discussed the role of the committee system and the performing of the law making function. Chapter 10 on party influences on legislatures poses the question: how far should responsible political parties develop without reducing legislators to a subordinate role? The part played by organised pressure groups, executives and legislation, legislative oversight of administration, and popular law-making like the Initiative and Referendum, form the subject matter of three of the other chapters.

There is a separate chapter on legislative-judicial relations, under the heads of Court structure and personnel, system of Courts, selection of judges, tenure, removal and salary of judges, judicial law-making, judicial review and legislative reversal of Court decisions. Judicial review of legislative actions enables Courts to influence policy in two ways: the Court may play a positive role by extend-

ing the language of the law, and a negative one by restricting its application. This chapter describes the inter-relationships of the legislative and judicial branches, which though normally marked by harmony, are occasionally marred by guerrilla warfare.

In conclusion, the author finds that the American Congress still possesses the full range of powers given to it by the Constitution and has added to these through custom and tradition. Although there are great possibilities of improvement, the American legislature, it is believed, still possesses most of the attributes of an ideal democratic legislature.

The volume has an useful index, and its usefulness is increased by the insertion of over twenty tables showing, inter alia, the growth in the size of the House, occupational history of senators, standing committees of Congress, Party agencies in legislatures, Methods of judicial selection in the States, and cases in which Acts of Congress have been declared unconstitutional by the Supreme Court, 1789-1963. R.S.S.

THE BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES (CONTROL) ACT, 1947. A Commentary. By J. H. Dalal, B. A., LL. B., Advocate. With a Foreword by Mr. Justice J. C. Shah (of the Bombay High Court). N. M. Tripathi, Private Ltd., Bombay 2. 4th Edition, 1969. pp. cxx & 895. Price Rs. 30.

The Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (the Bombay Rent Act, for short) was passed in order to meet the grave housing shortage caused by World War II. The Legislature had to impose restrictions on the landlord's right to eject the tenant or to curtail other essential supplies and services and to demand exorbitant rents and to impose restrictions on the tenant's right to sub-let or assign the premises or to make such use of it as he likes. The Act consolidated the provisions of the Rent Restriction Acts of 1939 and 1944 and made amendments therein. It was passed as a temporary measure, but its life had, for a variety of reasons, to be extended from time to time. The present Commentary on the Act was first published in 1950 under the auspices of the Bombay Advocates' Association, Court of Small Causes, Bombay to serve as an annotated hand-book elucidating the provisions of this compendious Act for the benefit of the members of the Bar and others interested.

In the second edition, which appeared in 1955, the subjects relating to the constitutional aspect, jurisdiction of courts, grounds of eviction, breach of terms of tenancy and distinc-

tion between lease and licence were discussed in detail. When the third edition followed in 1959, subjects like the powers of the Appeal Court, limitation for revisional applications, appeals to the Supreme Court, suits involving title, denial of title, rights of mortgagor and mortgagee, landlord's right to claim increases due to increase in taxes, period of terminating leases and removal of bar against sub-letting and transfer of tenancy rights were newly added. The Rent Acts in force in the areas of Vidarbha, Marathwada, Saurashtra and Kutch were given in Appendix, while the Index was considerably enlarged.

In the fourth and latest edition, various topics have been revised and enlarged. Some new topics such as judicial precedents, husband and wife, ownership flat, valuer's report, burden of proof, doctrine of part performance, tenant pendente lite, tenant under Displaced Persons Act, inherent powers, abatement of appeal, fraud, collusion, and decision on merits of the case, have been added. On the whole, the volume now includes 2834 cases interspersed into 6490 citations. Case-law up to the end of May 1969 and notifications up to the end of April 1969 have been incorporated. In order to facilitate references, several equivalent citations of the references are given in the foot-notes and the table of cases.

The 51 sections of the Act, which have been given in three Parts viz., Preliminary, Residential and other premises, and Hotels and Lodging Houses, are preceded by the usual introductory sections giving the Preamble, Objects and Reasons, Previous Law, Constitutional Aspects, Interpretation, Judicial precedents, Estoppel and Res Judicata, and the Act, Contracting out and Burden of Proof. The sections in Part II deal with rent in excess of standard rent, increase in rents on account of improvements and other causes, determining permitted increases, recovery of possession, landlord's and tenant's respective duties and obligations and jurisdiction of courts. Part III deals, inter alia, with fixation of fair rents, penalties, appeals and procedure in courts. The exhaustive Appendices, the table of cases and the detailed Index are quite satisfying.

The book incorporates the decisions of the Bombay and other Indian High Courts as well as English courts and the Small Causes Court, Bombay. It analyses the decisions of the court, includes a mass of useful information, and presents the author's views on controversial matters. The case law on the Act and cognate provisions of rent restriction legislation elsewhere have been ably treated and the presentation is such that a busy legal practitioner may find his authorities on the required point quickly. R.S.S.

FOUNDATIONS OF WAGE POLICY (WITH SPECIAL REFERENCE TO THE SUPREME COURT'S CONTRIBUTION). By K. S. V. Menon. N. M. Tripathi, Private Ltd., 164 Samaldas Gardhi Marg, Bombay 2, 1969. pp. ix & 311. Price, Rs. 22.

Wages are at the root of many of the industrial disputes that have been affecting production and harming the economy in other ways, and it was but natural that the Industrial Truce Resolution should have laid down, *inter alia*, that the system of remuneration to capital and labour should be so devised that both will share the product of their common effort after making provision for fair wages to labour, fair return to capital, and reasonable reserves. Three kinds of wages are distinguished, viz., minimum wage, living wage, and fair wage, the last one ranging from the minimum wage to the industry's capacity to pay. According to the Fourth Plan the total wage should have three components, the minimum wage, an element related to cost of living, and an element related to increase in productivity. Statutory wage regulation, collective bargaining, conciliation, arbitration and adjudication are the methods through which wage policy is implemented in India.

The volume under review is divided into three parts, and Part I contains two introductory chapters of which the first one discusses certain aspects of wage policy from an operational angle. In the determination of wages, controversies often arise between Government, employers and workers, and the machinery of industrial law and adjudication have to be set in motion for their judicious discussion and disposal. In this connection the Supreme Court has built up over the years a great deal of case-law on different aspects of wages, and the second chapter synthesises the different principles laid down by it from time to time. Its interpretation of different aspects of wage policy and the evolution of a scientific and rational wage structure has been meaningful and constructive.

Part II discusses important case-law on wages decided by the Supreme Court between 1957 and 1968. At the outset a gist of the background is given, and how the Supreme Court has dealt with the problem and come to a particular decision are subsequently examined. The general observations of the Supreme Court in cases of all-India importance, with far-reaching implications on the question of wages, have been extensively quoted. There is a fairly descriptive index to the cases contained in the book in tabular form, with the title of the case, the subject matter of dispute and the decision. Part III presents some important guidelines provided and observa-

tions made by the Indian Labour Conference, Standing Labour Committee, and the Commissions and Committees of Government. The relevant recommendations from the Five Year Plans and extracts from I. L. O. publications have also been included. The important observations made by the Supreme Court in some other labour cases are given in an Appendix, and they refer to production bonus, hours of work and wages, freedom of contract, housing accommodation, gratuity and retrenchment compensation, rules of natural justice, contract labour, payment of retaining allowance, and concept of industry. There is a useful general index at the end.

Before the question of reward to labour is decided, both economic and legal aspects have to be properly considered and appropriate weightage given. That the decisions of the Supreme Court have exerted a profound influence on the evolution of wage policy and wage structure is amply illustrated in the present perspicacious analysis by Mr. Menon, who is a Bombay University Gold Medalist in Industrial Economics. The claim is made that this is the first systematic attempt to study the contribution made by the Supreme Court to the evolution of a wage policy from the operational angle. R.S.S

CONDITIONS OF EMPLOYMENT AND DISCIPLINARY ACTION AGAINST WORKMEN. By Om Prakash Aggarwala, formerly of the Punjab Civil Service. Metropolitan Book Co. (Private) Ltd., Faiz Bazar, Delhi. 1st Edition. 1969. pp. xlvii, 488 *ivl*. Price, Rs. 30.

Industrial conflicts are harmful alike to the employers, the employees and the community in general. Although industrial organisations are basically the outcome of contractual obligations between the first two parties, the State has to play the role of a watch-dog to see that the weaker elements are not exploited by the stronger ones at the cost of the community. It has therefore passed legislation like the Trades Union Act, 1926, to regulate in certain matters the conditions of employment in industrial organisations, giving the workers freedom to form unions for collective bargaining and to strike work under certain conditions in pursuance of their demands.

The volume under review, which studies the whole question of the conditions of employment and disciplinary action against workmen in industrial and commercial establishments and shops, is divided into twelve convenient chapters, each with a detailed

synopsis of the different topics dealt with. For the proper appreciation of what constitutes "disciplinary action", the first two chapters are devoted to a description of the relationship of employer and workmen, the conditions of employment and their regulation by standing orders and the method of changing them. The next chapter states how the worker's employment may be terminated, by retrenchment, discharge or dismissal, or on closure, transfer of business or 'lay-off', and strikes and lock-outs, consequences of illegal strikes or lock-outs, and the payment of wages for the period of work stoppage, have been fully discussed in Chapters IV and XI. Chapter IV explains what is 'misconduct' and points out the action to be taken in situations such as gheraos, picketing, passive resistance, demonstration and mass casual leave. Chapter V deals with the principles of "natural justice" and their application to a "domestic enquiry" and states the nature of evidence in such enquiry and how it is to be recorded, while the procedure for disciplinary action is covered in the next chapter. Writing on the "Ethics of Punishment" in Chapter VII, the author states that as a measure of discipline in an industrial establishment, the attitude to be taken should be one of *patria potestas* (head of the family, for keeping discipline in the family) rather than that of a criminologist, and suggests what punishment should be awarded for proved acts of misconduct.

Chapter VIII comprehensively discusses what procedure is to be followed against a worker, whether by discharge or punishment, during the pendency of a dispute relating to an industrial dispute. A delinquent punished for misconduct may feel aggrieved even after a "domestic enquiry", in which case an "industrial dispute" arises and it may be referred by Government for adjudication. What then are the principles of social justice? To what extent can Industrial Tribunals, National Tribunals and Labour Courts interfere in matters relating to disciplinary action? What is the jurisdiction of the High Courts to interfere under the relevant provisions of the Constitution of India? And what is the jurisdiction of the Supreme Court? The answers to these questions form the subject of Chapter IX, while the topics of reinstatement, payment of compensation in lieu thereof, back-wages and other compensation, are covered in the next chapter. The last chapter, Chapter XII, makes it clear that if an establishment falls within the definition of "Shops and Commercial Establishments" of any State legislation on the subject and also within the definition of "industry" in the Industrial Disputes Act, 1947, it will be governed by the provisions of both the Acts.

The case-law quoted in the book is complete up to June 1969. Several Supreme Court cases have been cited which have not been reported so far, the latest being that of 30th April 1969. The book contains a Table of Cases and an exhaustive index, while the texts of some of the Acts, Rules and Standing Orders are given in the appendices.

The author feels that a re-orientation of the approach to the problem of discipline in industry is called for, more emphasis being laid on psychological and sociological aspects. "Social Justice" should be available to everybody on an equitable basis. A close perusal of the book should lead to a more intelligent understanding of the problems besetting the harmonious working of the two arms of production, capital and labour. R.S.S.

THE LAW OF PREVENTIVE DETENTION IN INDIA. By S. K. Ghosh
Foreword by S. R. Das, Retired Chief Justice of India. N.M. Tripathi, Private Ltd., Bombay 2. 1969. Pp. xxi & 207. Price, Rs. 20.

"Preventive Detention" means detention without trial as opposed to "punitive detention", which can be made only after a trial in a Court of law in which the person to be detained is proved to have committed an offence punishable under a law. It implies the detention of a person by executive order with a view to preventing him from endangering the security of the State, disturbing the maintenance of public order or essential supplies and services, or adversely affecting other specified objects of public interest. The present circumstances in India, political, economic and social, have brought the provisions of the Preventive Detention Act to the forefront of public attention, the anti-social activities of some people having necessitated their application in particular cases. In this connection the experience of the newly independent countries of Asia and Africa have some relevance. In most of them laws providing for preventive detention exist even in peace time in order to meet either the threat or the presence of internal subversion or external aggression, or the threat of elements within a nation sufficiently strong to disrupt the life of the community and jeopardise the existence of the prevailing form of Government. The activities of these elements may stem from either political or non-political causes. Even the co-operation of the public not being sometimes available to the police, the Government has to fall back on measures like the Preventive Detention Act.

The reasons which had prompted the framers to make provisions relating to preventive detention in the Constitution were fear of Communist subversion and activities of communalists and other anti-social elements, and they made it necessary for the Government of India to pass a Law of Preventive Detention for the whole country in 1950. The object of the Preventive Detention Act, 1950, is to provide for detention in order to prevent persons from acting in a manner prejudicial to the defence of India, the relations of India with foreign powers, the security of India, the maintenance of public order, and the maintenance of essential supplies and services. A commentary on the Act, with the decisions of the High Courts and the Supreme Court about the constitutional provisions in this respect and on the various other provisions of the Act is being applied by the volume under review. For easy reference, the author gives also some specimens of the report of the Superintendent of Police to the District Magistrate for detention, the grounds for detention, and the detention orders passed by the District Magistrate and the State Government in the Appendices, which include the text of the Preventive Detention Act, 1950. There are fourteen chapters bearing, *inter alia*, on detention orders and grounds for detention, execution of the order, absconders, place and conditions for detention, constitution and functions of the Advisory Board, period of detention, writs against the order and grant of bail. The chapters have been arranged logically, and the law has been lucidly set forth under different sub-heads. The statements of the law are supported by the pronouncements of the Supreme Court and the High Courts; the Supreme Court has held that the validity of a Law of Preventive Detention is not to be judged with reference to Art. 19 of the Indian Constitution which strikes a balance between individual liberty and social control.

The Index and Table of Cases are useful, while the several appendices illustrate the practical working of the Act. The accurate exposition of the law and of the propositions deducible from the different reported decisions should be helpful to the members of the Bar, the Bench, and the public alike. B.S.S.

THE INDIAN EXTRADITION LAW.

By R. C. Hingorani. Asia Publishing House, Calicut Street, Ballard Estate, Bombay 1, 1969, pp. x and 133. Price, Rs. 22.

The problems of extradition are becoming ever more important in a fast shrinking world where air traffic has made the flight of a

fugitive from the law easier than before, and extradition proceedings are a necessary instrument to secure the return of the offender to his country. Extradition is defined as the surrender of an accused person or a convict by the territorial state where he is found to the requesting state where he is alleged to have committed or to have been convicted of a crime. Extradition Law is a dual law involving municipal as well as trans-national law, so that the author of the present volume, who holds the Yale University Doctorate in Law, has treated international law and practices in this regard, with the Indian Extradition Law as the base.

There are seven chapters in the book and an Introduction dwelling upon the importance of extradition in modern times. Escape from justice by sheltering in a foreign country must become impossible, but at the same time surrender must be preceded by proper precautions to ensure the observance of the due process of law. In the six chapters that follow, the author has tried to interpret the Indian Extradition Act in the light of this safeguard. The first chapter deals with the historical background of extradition law in general, the second chapter discusses the method of requisition and other preliminary formalities and the judicial enquiry is discussed thoroughly in the next chapter, where one finds the customary rules of International Law developed in the process, doctrine of double criminality, non-extradition of political offenders, proof of *prima facie* case against fugitives, rule of specialty, rule against double jeopardy and the interpretation of extradition treaties. Chapter IV deals with the special procedure with respect to Commonwealth countries with extradition arrangements with India. The next chapter studies executive action taken by the Ministry of External Affairs in India in determining whether the fugitive should be extradited or not, and Chap. VI examines the procedure for obtaining custody of such criminals abroad as are fugitives from Indian justice. The book contains relevant provisions of the Indian Constitution and the Criminal Procedure Code for ready reference, and concludes with suggestions for improving extradition law in general and Indian Extradition Law in particular. The texts of the Indian Extradition Act, 1962, the three extradition treaties between India and Nepal, India and U. S. A., and India and Sikkim, are given in Appendix, while Appendix V gives a list of pre-Independence treaties with the author's remarks in the light of the replies received from the respective embassies.

The Indian Extradition Act has certain special features like Basis of Extradition, categorisation of States, pre-Independence treaties, two categories of extradition offences,

Extradition with formalities and Extradition without formalities, and the Rule of Specialty. The Indian Act envisages extradition from India in three situations, viz., on the strength of a treaty, with a non-treaty State in certain conditions, and with Commonwealth countries with or without extradition arrangements. In the interpretation of the Extradition Act, the magistrate is given certain specific powers, while there are also certain implied powers vested in the magistrate specially nominated by Government. Altogether, this is a fruitful discussion of the various aspects of extradition law, both from the Indian and global points of view.

In concluding the book, the author thinks that the facility of expeditious surrender without proof of a *prima facie* case against the fugitive may be extended beyond Commonwealth countries to neighbouring States like Ceylon, Pakistan, Burma, Nepal, Afghanistan, Thailand, Singapore, Malaysia and Indonesia. India should also conclude extradition treaties with these neighbouring countries, and there should be some rethinking on the doctrine of double criminality. A bibliography, table of cases and Index complete the usefulness of the volume.

Nominated as Chairman of the Committee on International Tensions at a meeting in 1964 sponsored by Singapore University, Professor Hingorani also attended the Conference of Experts on Laws of War, Geneva, 1969; he is the author of "Prisoners of War." R.S.S.

CRIME ON THE INCREASE. By S. K. Ghosh, Inspector-General of Police, Orissa. Foreword by Sir S. M. Bose, Kt., Former Advocate-General, West Bengal. Eastern Law House Private Ltd., Calcutta. 2nd Edition. 1969. Pp. xvi & 170. Price, Rs. 14.

The book under review furnishes the reader with some very necessary facts about the personnel and tactics of the underworld of criminals and crime, which is an ever present menace to civilisation. It seeks to find answers to the questions: Is our Police Force well trained in the modern methods of dealing with crime? Is the Police Force inadequate or inefficient? Is it true that the public do not co-operate with the Police? If so, why? In anti-social offences like corruption and bribery, does the procedural law require any change? The book surveys the police and their work, and their position in the domestic administration and in the life of society in general.

There are fourteen chapters in the book and among the chapter titles are: The Crimi-

nal, Breach of the Peace, Crime on the Railways, Crime and Religion, Crime and Woman, Juvenile Delinquency, Crimes of Violence, Corruption, Public Relations and Police Problems. Having been originally written so far back as 1958, the book has had to be revised in view of the changes that have taken place during the last fifteen years. Unemployment, rapid industrialisation, communal, regional, linguistic and labour riots, student indiscipline and the increasing number of civil disobedience demonstrations, altogether go to create a crime problem of huge dimensions and, in this view, the chapter "Police Problems" has been thoroughly revised, and two new chapters on "Crime on the Railways" and "Public Relations" have been added.

The crime map and police records indicate the comparative rise and fall of the crime wave and the fluctuations are due to one or more factors which are carefully examined in the second chapter. Discussing the danger of failing to take timely action under the preventive S. 110 of the Criminal P. C., the author urges that as soon as a police officer gets to know of the criminal activities of anybody who cannot be sent up in specific cases for want of evidence, he should promptly start collecting materials for starting proceedings under the law of bad livelihood. In no country, says he, are the bona fides of the police suspected, and there is no reason why India should be an exception. Every police officer feels that confessions and admissions made to him should be admissible in evidence and the Indian Evidence Act should be amended accordingly.

There is a separate chapter on Juvenile Delinquency. In India the incidence of juvenile delinquency is not as high as that in the U. K. or the U. S. A., and yet there was a phenomenal increase of 68.8 per cent in juvenile delinquency in India in 1958-60. The chapter opens with a useful quotation from Ruskin: "Crime cannot be hindered by punishment, but only by letting no man grow up a criminal." This is perhaps the idea behind the Juvenile Aid Police Unit started in Bombay and some other cities. The unit deals with cases of pre-delinquents, delinquents, socially handicapped juveniles and victimised children. Juvenile delinquency sometimes contributes to the increase in crime and several reports on the subject emphasise the difference between the practical and theoretical approaches. The author considers that emphasis should be placed on the importance of medical and psychological investigation, now more or less absent in our Borstal Schools. Treatment, it is urged, is always preferable to punishment, but we have not yet reached the stage where we can do without

punishment. The treatment that the police accords to suspected juvenile delinquents at the time of their interrogation or on their arrest affects their attitude to conventional society. In this connection are reproduced some of the valuable instructions given by INTERPOL for the guidance of police officers working in the field.

The above analysis of the fluctuating factors in crime should be of help to those intimately concerned with the prevention and detection of crime. A good contribution to criminology, police officers and the public should benefit by it; the author himself has risen to the highest rank in the police force, having won several Medals for gallantry and distinguished services. He is also the author of a number of books on criminology. R.S.S.

THE LEGAL REGIME OF MERCHANT SHIPPING. By Nagendra Singh, M.A., LL.B., (Cantab), etc. With a Foreword by P. B. Gajendragadkar, Vice-Chancellor, University of Bombay, Bombay, 32. 1st edition, 1969. pp. xxiv & 320. Price, Rs. 25.

In 1968 Dr. Nagendra Singh, with his richly varied administrative experience and formidable array of academic distinctions, was invited to deliver, under the auspices of the University of Bombay, the Kashinath Tryambak Telang Endowment Lectures, on a "topic of law with distinct preference in favour of Constitutional and International Law in relation to India". The author selected the subject of "The Legal Regime of Merchant Shipping with special Reference to India" for several reasons. The regime of merchant shipping is both benign and beneficial, because it is based on co-operation and harmony at every step to avoid conflicts, it is peaceful and not belligerent, it establishes a regime which is international rather than parochial or national and its ultimate objective is service. The subject is associated with our independence and sovereignty and, in the hustle and bustle of trade and commerce, it is an indispensable handmaid. The subject is of importance to university students and legal practitioners, because India, with her long coast line, holds a strategic position on the cross-roads of international sea-borne trade. These lectures have now been brought together in the volume under review, each lecture being listed as a chapter.

The book is divided into two parts, the first one dealing with the Regime of Maritime International Law, the second with the law governing Merchant Shipping Operations each Part consisting of three chapters. The first

chapter in the I Part on the "Concept of Legal Regime" analyses the factors constituting a legal regime whether in the economic political or social fields, and, as merchant shipping is founded and controlled by the political state, it is devoted to a study of the constituent factors of the legal regime of the national political state with special reference to Indian political theory. The second and third chapters describe the law governing merchant shipping and the rights and responsibilities of sovereign states as subjects of International Maritime Law. This Part has general application including India, a sovereign state member of the maritime community, and, wherever possible, references have been made to India. The first chapter in Part II is devoted to a discussion in general of the law governing merchant shipping operations, under the heads of customary international law, treaty law or International conventions, conflict of laws or private international law, and the municipal law and its position in India. The last two chapters are exclusively devoted to India and its Municipal Law, and its enforcement machinery and case law. In conclusion, the author observes that the legal regime of merchant shipping has a clear and precisely worded law with effective sanctions behind it; there is a law-abiding atmosphere and regular municipal Courts of law to adjudicate and administer the law. This is in addition to the facility provided by the International Court of Justice. In certain conditions, the utilisation of National Laws and their national judicial machinery would in the long run be conducive to the maintenance of world order.

The merchant shipping laws depend for their enforcement as much on international agencies as on the machinery of the municipal state. The law is markedly effective in this sphere of inter-state activity, for, in order to enjoy the rights equally, maritime States not only conform to international maritime legislation but also make their municipal legislation fall in line with international regulation by enacting national laws readily enforceable in their Municipal Courts of law. Thus disputes in the maritime field are invariably settled through goodwill and negotiations, and, if necessary, by adjudication, whether by arbitration or by using the machinery of the national Courts.

The volume furnishes particulars about the principal merchant fleets of the world and about international sea-borne shipping, while in the Curriculum Vitae are given particulars about the author himself, under the heads of academic distinctions, academic interests, membership of legal institutes and international law associations, publications, adminis-

trative experience, positions held, and representation at international conferences. R.S.S.

JUDGING DELINQUENTS (CONTEXT AND PROCESS IN JUVENILE COURT). By Robert M. Emerson, University of California, Los Angeles, U.S.A. Aldine Publishing Co., 529 South Wabash Avenue, Chicago, Ill., U.S.A. 1969. pp. xiv and 293. Price \$ 8.95.

Juvenile delinquency is only one manifestation of deviation from the normal conduct and character of teenage boys and girls throughout the world. It is a more or less universal phenomenon, varying only in extent and emphasis from one country to another. So that the findings and conclusions of the study now under review, although primarily based upon American experience, should be of profound interest and significance to social workers and sociologists everywhere, including India. The Juvenile Court is a world unto itself, and its atmosphere is different from that of an adult Court. The problem of court personnel is to distinguish between the real delinquent from the occasional trouble-maker or disturbed child in order to prescribe the most appropriate 'treatment,' and the present publication provides a detailed description of the operations of the Juvenile Court, being a useful addition to the sociological literature on the operations of legal institutions.

The book describes some critical aspects of the functioning of the Juvenile Court and analyses the nature of the working of the court, the handling of delinquents and the court's functions in relation to the wider social and legal system. It focuses attention on how a particular legal institution defines, reacts to and deals with the cases brought to its attention and describes the processes that produce different case outcomes, whereby some emerge to be identified in future as 'criminals' and the others escape unharmed despite the formal adjudication of 'delinquency'. The research and analyses that went to the preparation of this book were basically exploratory, and the statistical data cited are very general. Besides, the analyses themselves are intended to be only illustrative and suggestive. The technique of observation was supplemented by interviews with court staff and research on the progress of individual cases through the stages of court processing. Although this research is essentially a case study, an effort was made to overcome some of the essential limitations of this approach by observing other courts and related institutions in the area.

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The book is divided into three Parts, the first one, "Dilemmas of Treatment," consisting of three chapters, the second one, "Case Management and Moral Character," consisting of four chapters, and Part III on "The Dilemmas of Authority," consisting of three chapters. Chapter I presents the general setting and internal organisation of the court, and the succeeding two chapters explore the nature of court relations with the political, enforcement and welfare institutions that make up its organisational environment. How far are traditional legal protections to be extended in juvenile matters? The U. S. Supreme Court, it is noteworthy, held that the child and parent should be told the charges against them, and that they must have the right to an attorney and may cross-examine their accusers. Part II describes some basic features of the practices used by the American courts in dealing with these cases. The categories employed by court staff to carry out their daily organisational tasks are described. Cases are distinguished as to whether they are "trouble cases", in which event the court relies heavily on its assessment of the delinquent's moral character. In the next two chapters attention shifts to the nature of the delinquent's continuing contacts with court personnel and their effects on the assessments made of his character, and almost every chapter in the book concludes with the summing up of the results and findings contained therein. While the book implicitly touches on several underlying functions of the juvenile court, Prof. Emerson, who is Assistant Professor of Sociology in the University of California, tries to be more explicit on the subjects of the juvenile court as a "back-up" institution, and as a "relevant labeller" and on the limits of judicious non-intervention.

The Appendix gives three tables, one showing the disposition of all complaints to the juvenile court under study in 1966, classified into adjudicated and non-adjudicated cases, another showing the disposition of cases found delinquent, and the third showing the types of offences. The Bibliography and Index are detailed and useful.

A description of the process by which the juvenile court judges and manages juvenile cases in U. S., the book is an initial attempt to make sociological sense out of the activities of an institution for the treatment of the 'deviant'. Social workers and others concerned with delinquency should find it quite interesting reading.

R.S.S.

HAND WRITING AND FINGER PRINT. By G. C. Veerappa, B.A., LL.B., 619 — P. II Block, Rajajinagar, Bangalore-10. With a Foreword by Dr. K. Subba Rao, LL.D., Former Chief Justice of India. 1963. pp. 103 and x. Price Rs. 18.

All kinds of transactions are now-a-days carried on by means of writing, by wills, sales, mortgages, releases, trusts, gifts, promissory notes, drafts and the like, leaving great room for forgery of every kind. We can see false cheques, withdrawal forms and hundies being presented and cashed at bank counters. As forgeries are made to commit or hide criminal acts, the identification and proof of Hand-writing and especially Signatures, become important. The study of handwriting and fingerprint being now accepted as a science, it is recognised as expert evidence which, though not always conclusive, is useful in testing the validity of other evidence; in exceptional cases, as observed in the Foreword it is even decisive. The usefulness of the subject depends upon the expert's scientific approach and its importance will continue so long as the expert is a real guide to the judge and the lawyer.

The handy publication under review describes the principles of handwriting and its characteristic features, and proceeds to deal with the subject in six Parts, entitled Movement, Inks, Case Law, Value of Expert Evidence, Terminology and Fingerprints. The author gives handwriting and fingerprint separate treatment each under relevant headings. Different types of forgery variations of the subtle movements of the hand, of peculiarities different inks, styles of handwriting and terminological oddities have all been taken note of elaborately and clearly explained. Dealing with fingerprints, he analyses finger structure and explains the various sectors and their varying impact on the prints. The author has tried to deal with the case law to some extent and to clear some wrong notions on the subject due to inappropriate citations by some commentators. The book contains a number of photographs of the cases the author has dealt with; the methods of taking them as well as some matters of procedure are also described.

According to S. 45 of the Indian Evidence Act, when the Court has to form an opinion upon the identity of any handwriting or finger impressions, the opinions upon the point by persons especially skilled in these matters are relevant facts, and these persons are taken as experts; the present author is both a practising lawyer and a handwriting expert. It has been found that comparison of specimens of handwriting and fingerprint by the Court

without the guidance of an expert is hazardous and inconclusive. On the subject whether expert evidence is to be corroborated or not however, there are conflicting decisions. On examining the specimens of handwriting the expert will send his report on whether the disputed signature or other writing and the admitted signature or writing belong to one and the same person. Besides submitting his report, the expert has to appear before the Court and subject himself to cross-examination. The expert's opinion should contain data basis and reasons. The Court will not reject the evidence of expert opinion given by studying photographs. It is noteworthy that several High Courts have held that the evidence of an expert is necessary for comparison of handwriting and finger impression. As both parties in a legal proceeding are likely to bring in their own experts it is up to the trying judge to consider the reasonings of each expert and arrive at his own conclusions.

The cross-examination of counsel on the subject of the present book in a Court of law is at times lengthy and unproductive of any result, owing to the want of a general grasp of the subject. Satisfying a felt need, therefore, the book should be of assistance to the judge, the lawyer and the investigator alike, to whom the complicated structure of the science has been presented in an interesting way with the aid of apt illustrations.

The index is useful, but the Errata is quite half as long. R.S.S.

PUBLIC SERVICE LAW THROUGH THE CASES. By Madan Bhatia, M.A. (Cantab), Bar-at-Law. Foreword by the Hon'ble Mr. Justice M. Hidayatullah, Chief Justice of India. N. M. Tripathi Private Ltd., 164 Samaldas Gandhi Marg, Bombay 2, 1969, pp. xxvi & 496. Price Rs. 30.

Before the Constitution of India came into being, the enforcement of claims by the members of the services could only be obtained through a civil suit, but the Constitution confers on them certain essential rights and provides them with some essential safeguards. Article 16 guarantees equality of opportunity to all citizens in all matters relating to employment, including equality of terms, such as scales of salary for the same or similar posts, while Art. 311 provides for security of tenure to the civil servants. While Art. 16 applies to every branch of service, civil or military and extends to employment even under public bodies like a statutory Electricity Board, Art. 311 covers only civil servants of the Union or the States. It is noteworthy

that the Supreme Court has decided that Art. 16 applies not only to initial appointment but also to all stages of employment like promotion and fixation of seniority. The same authority held that equality of opportunity is not 'absolute as such' but leaves scope for executive discretion, for it is open to the executive to say that a particular candidate was not found fit for employment after due opportunity was given to him. If there is to be any discrimination between two sets of employees it should be on a rational basis and show a nexus between such basis and the object sought to be achieved.

2. Article 311, on the other hand, holds that no one shall be dismissed or removed by an authority subordinate to that by which he was appointed, and no one shall be dismissed, removed or reduced in rank unless he has been given reasonable opportunity of showing cause against the action proposed to be taken. The Supreme Court considers these punishments, so that, if the termination of service or reduction in rank is brought about otherwise than by way of punishment, the Government servant so affected could not claim the protection of Art. 311. What, then, is this reasonable opportunity? It is no more than the observance of the principles of natural justice by the enquiring officer. Courts could consider only whether the opportunity was reasonable and not whether the evidence was sufficient or reliable or whether the 'quantum of punishment was just. In the final analysis any executive action which is mala fide is legally void, but it is difficult for allegations of malice or mala fide to succeed in Courts. The Constitution has provided the remedy of moving the High Court for an appropriate writ, direction or order, and, when fundamental rights are concerned, the Supreme Court also. A great body of case law has developed around these constitutional provisions, but, as many of them are not uniform, a comprehensive case book was called for and the present volume fills the need.

3. The author has summarised the facts of each case in his own words and reproduced paragraphs of the judgments giving the Court's comments and conclusions. The gist of the law laid down in each case is given in the form of head-notes (with a solitary exception, viz., Art. 320) and the cases are then categorized in different chapters and so arranged that variations in the application of constitutional principles could be easily grasped. The book is divided into two Parts. Part I consists of all cases decided by the Supreme Court after 1956, and Part II includes cases decided by Division Benches of the various High Courts during 1959-66 and relating to points which have not been covered in any case by

the Supreme Court, while a postscript contains Supreme Court's judgements of 1969. The topics covered by the different chapters include, inter alia, appointment, equal pay, seniority, promotion, termination, suspension and enquiry, punishment and disciplinary action, salary and limitation, probation and reduction in rank and compulsory retirement as well as Arts. 19, 22, 23, 24, 309, 312 and 314 of the Constitution. The table of cases and index are detailed and useful.

4. The author has appropriately collated the cases under the different Articles of the Constitution and included cross-references, where necessary. His selection and exposition of each case has made the comparison of one case with another easy. This study of the application of the settled principles of law by the Court to different sets of circumstances should be of guidance to lawyers and students of law as well as to the aggrieved public servant who thinks in terms of going to a law Court.

R.S.S.

PRINCIPLES OF THE LAW OF TRANSFER (with full text of the Transfer of Property Act). By S. M. Shah, Bar-at law, Sr. Advocate, Supreme Court of India, and former Judge of the Bombay High Court. 4th edition, 1969. N. M. Tripathi Private Ltd., Bombay 2, pp. xxx and 368. Price Rs. 15.

Before the passing of the Transfer of Property Act of 1882, transactions in regard to immovable property were governed by a few Regulations and the principles of justice, equity and good conscience that prevailed in England. But these Regulations covered only a few points and the principles of English law and equity could not always be made applicable to India with its peculiar social conditions. In the absence of adequate statutory provisions, the Courts, too, could not maintain uniformity of principles, the case law becoming, consequently, highly confusing and conflicting. On the enactment of the Transfer of Property Act, all those Regulations which only partially regulated the transactions regarding immovable property, were repealed; but, with the passage of time, it became clear that there was little progress towards unanimity of judicial decisions as between the different High Courts. Several *ad hoc* amendments were made from time to time, but not until the passing of the Transfer of Property (Amendment) Act of 1929 was the position stabilised to any extent. Since then further amending Acts have been passed and they have been incorporated in the text of the Act, in an appendix, in their appropriate places. The Act regulates and deals with the transfer of property only

by *set of parties*, not by operation of law. Transfers by operation of law occur in cases of testamentary and intestate succession, forfeiture, insolvency and court sales, and Government grants. The essence of the word, "transfer" is to "convey", and therefore, a transfer of property includes not only the five specific categories dealt with in the Act, viz. sale, mortgage, lease, gift and exchange, but also any transaction which has the effect of conveying any property or interest in it from one living person to another. The term "property" is not defined in the Act, but it defines "immovable property" in S. 3 by stating that it does not include "Standing timber, Growing crops or grass".

In the current edition of the book we are re-viewing, the different chapters, appearing in the form of Lectures which have been thoroughly revised and a few interesting topics have been written afresh. The conflicting views of the courts have been discussed in some detail, and cases reported till the end of 1968 have been incorporated in it, those reported from January to August 1969 have been included in the Addenda. The author begins with a discussion of the general provisions, first, regarding the transfer of both movable and immovable properties, which are contained in Ss. 6 to 37, and secondly, regarding the transfer of only immovable property, Ss. 38 to 53A of the Act. He then considers the case of a conditional transfer of property, its legal effects varying according to the nature of the conditions. The Doctrine of Notice and unconscionable transfers of immovable property, and the rights and liabilities of mortgagees are discussed in four of the chapters. As observed in Lecture 6, on sales of immovable property, the remaining provisions of the T. P. Act have to be regarded as part of the Contract Act. They supplement the provisions of the latter Act by providing how contracts of different kinds of transfer may be executed. In Lecture 8 the author proceeds to consider the various rights and liabilities of the mortgagor, after which he deals with leases of immovable property. Being concerned with it in our daily life it is important that one must be acquainted with its principles and the mutual rights and liabilities of the lessor and the lessee.

The volume has an index and a table of cases which are quite useful. R.S.S.

Gandhi Marg, Bombay 2, 1969, Price Rs. 25.

A massive spread of the banking habit entails the extensive use of the cheque and this can be facilitated if more literature is available about the advantages of the cheque as a negotiable instrument and of how it is treated in law and by banks in their day-to-day operations. The cheque is highly useful as a means of payment and plays an important role in the evolution of banking. It is a species of bill of exchange which constitutes the most important type of negotiable instruments, and a study of the law and practice of cheques presupposes a knowledge of important aspects of negotiable instruments. Defining, it may be said that a cheque is an instrument in writing, containing an unconditional order, signed by the maker, directing a specified banker to pay, on demand, a certain sum of money only to, or the order of, a certain person or to the bearer of the instrument. Being a negotiable instrument, the cheque possesses the three distinct characteristics of negotiability: it is transferable; there is a right of action in itself; and the transferee who takes it in good faith for value and without notice of any defect in the transferor's title acquires a valid title to it despite any defect in the transferor's title.

The volume under review is conveniently divided into four sections, viz., Issue and Negotiation, Payment, Collection, and certain analogous instruments. The first section describes the essentials of a cheque, incomplete cheques, endorsements and crossing. The second section deals, inter alia, with the banker's obligation to pay the cheque, protection to the paying banker, dishonoured cheques, and forgery of Drawer's signature. The duties of the collecting banker, collecting banker's negligence, drafts, pay orders, and travellers' cheques are next discussed. The book presents the legal principles and established banking practices governing cheque transactions. It deals with the several stages through which the cheque passes, the implications of different kinds of endorsements and crossing, the capacity, authority, rights and liabilities of the drawer, endorser, and the holder, the obligations of the bankers and the statutory protection available to them. As the Indian law and practice pertaining to the cheque are largely based on the English pattern, the position in England is also discussed at length and compared with that in India. To elucidate and substantiate the principles stated, about 400 important decisions of Indian, British and other Courts have been cited and certain suggestions have also been made for modification of the Banking Law and Practice in India. The author suggests that the law should be

CHEQUES IN LAW AND PRACTICE.

By M. S. Parthasarathy, B.Com. (Hons), C.A.I.B., A.I.B. (London). With a Foreword by V. C. Patef, Chairman—Custodian, Central Bank of India. N. M. Tripathi Pvt. Ltd., 164 Samaldas

amended to make endorsements unnecessary on order cheques collected for the ostensible payees; that under S. 131 of the Negotiable Instruments Act, the protection available to the banker should be extended to open cheques also; the protection provided by the Act to the bank in respect of collection and payment of bank drafts should be extended also to pay orders; at the time of opening an account the customer is asked to sign an agreement spelling out the rights and obligations of the contracting parties.

While presenting the legal principles and banking practices, the author has not forgotten allied topics like the legal position of the pass-book and the authority of the agent to bind the principal. The relevant sections of the Negotiable Instruments Act, which govern the issue, negotiation, collection and payment of cheques, have been quoted in the book, and where necessary, references have been made to the corresponding provisions of its sister enactments in England, the Bills of Exchange Act, 1882, and the Cheques Act, 1957, and excerpts from a number of judgments have been quoted. Also included in the book are a few cases decided in the Courts of Australia, New Zealand, Canada, South Africa, Ireland, Ceylon and the U. S. A.

Lucidly written by a gold medallist of the Institute of Bankers, the book should prove highly useful as an authentic reference book to bank officials, lawyers and businessmen, and as an informative text book to students of banking law. The inclusion of chapters containing factual data on the growth of the cheque habit in India and other countries and making suggestions for popularising the cheque habit would perhaps have made it still more useful. As it is, however, the index, references to statutes, table of cases cited and the bibliography are quite useful, as also the specimens of cheques, bills, drafts and pay orders. R.S.S.

SOLUTIONS TO PROBLEMS IN LAW EXAMINATIONS. By S. V. Inamdar and V. V. Prabhu. N. M. Tripathi Private Ltd., 164, Samaldas Gandni Marg, Bombay 2. 1969. Book I, Pp. vii and 189, Price Rs. 12. Book II, Pp. vii and 98. Price Rs. 7.

At the university examinations in Law, problems based on case law are said to carry substantial marks, and if these are correctly answered, with the citation of supporting case law where necessary, candidates will be assured of high marks. But they seem to find it difficult to look up text books and trace the case law that will answer the problem under study. The fact is that the basic information and

material is not readily or conveniently available, and the books under review are designed to fill that want. They bring together the various problems that have been set in university question papers in the past and give their solutions with supporting case law.

The questions and answers in Book I cover Indian Contract Act, Law of Indemnity, Bailments, etc., Law of Torts, Law of Crimes, Indian Constitution, Mahomedan Law and Indian Succession Act, while Book II deals with Hindu Law, The Transfer of Property Act, and Public International Law. The fifth chapter in Book I, on the Constitution, focuses the spotlight on twenty important cases in which the provisions of the Constitution supplied the points at issue over which the Supreme Court has given its rulings and laid down general principles. These relate, inter alia, to the fundamental right to form association, the constitutional validity of the Bombay Prohibition Act, freedom of speech and expression, the Governor's power to suspend a sentence of imprisonment (Nanavati's case), the power to take away or abridge fundamental rights enshrined in Part III of the Constitution, and the power of Parliament to cede Indian territory. In the first of these cases, a Madras Act was challenged on the ground that it violated the fundamental right to form association. Patanjali Sastri, C. J. struck down the Act on the ground that the restriction on freedom of association was not reasonable. As to freedom of speech and expression, a Bombay book-seller sold a copy of the un-expurgated edition of *Lady Chatterley's Lover*. He was convicted under S. 292, Indian Penal Code. In his appeal to the Supreme Court, he contended that the section was void because it violated the freedom of speech and expression guaranteed by Article 19 (1) (a) of the Constitution of India. The Supreme Court held that the freedom of speech and expression guaranteed by Art. 19 does not fall outside the limits of restriction permitted by Cl. (2) of the Article. In the famous Nanavati case, it was laid down that, where an order of suspension of a sentence of imprisonment, imposed on the accused by the High Court, was passed by the Governor of a State and the accused thereafter filed a petition for special leave to appeal to the Supreme Court, the order passed by the Governor could not operate when the Supreme Court had been moved. In the Golaknath case it was held that Parliament would have no power from the date of that decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined in them. In the matter of the Indo-Pakistan Agreement to transfer Berubari to the latter, the Supreme Court considered that

a part of the territory of India could not be ceded by an ordinary Act of Parliament but only by an amendment of the Constitution under Art. 368.

The present book should be of assistance to all those who are studying for the various university examinations in law, particularly for the B. G. L. and L.L. B. Examinations. It should enable a student to acquire both the fundamental knowledge and the technique of successfully answering examination questions, and also provide a solid basis for a wider range of knowledge. A firm grounding based on an authoritative text book should greatly facilitate the study of the problems and solutions contained in these books. R.S.S.

QUEST OF JUSTICE (SELECT ANTHOLOGY OF ARTICLES, SPEECHES AND ESSAYS). By the Hon'ble Mr. Justice P. Jaganmohan Reddy, Judge, Supreme Court of India. Madras Law Journal Office, Madras 4, 1970. pp. xxii and 240. Price Rs. 17-50.

It is significant of the current awakening of thoughtful minds to the inadequacies and pitfalls of present-day law, legal education, the legal profession, and the administration of justice, that more and more books have been coming out on the subject. Messrs. Bazi Reddy and Govind Das and Prof. Abel Smith have covered it from different angles, and the present author is a recent addition to the list. His "Quest of Justice" covers the entire gamut of current problems relating to the Bar and judicial administration. The ideas here presented have formed the subject-matter of interesting Addresses to various professional bodies and learned audiences.

The subjects have been arranged in five Parts—Parts I and II on the Judicial Process and the Administrative Process, consist of six chapters, each being devoted to the Role of the Judiciary; Administration of Courts, Problems of Judicial Officers, Income-tax Administration, the Philosophy of Police Functions, and the Spirit of Justice. There are four chapters in Part IV, on Legal Education, and they are devoted to the Teaching of Law, Law and Literature, the Law School, and Law and the Lawyers. Parts III and V, dealing with Law as a Profession and Legal Concepts respectively, have each five chapters devoted, inter alia, to the Problems of the Bar, Role of the Lawyer, Professional Ethics and the Forensic Art. The last part includes chapters on the Rule of Law in Ancient Indian Polity, Juristic Personality and International Law.

In Part I the author has presented the blue-print of a plan for the improvement of judi-

cial administration, in which every judicial officer will find material for useful reflection and the litigant have a much-needed insight into the working of the Courts, while the various raw spots in the area of judicial administration have also been accurately pinpointed. In the chapter on Income-tax administration, the author offers decisive solutions and efficacious remedies for meeting the numerous problems that bewilder the income-tax officers in their day-to-day work. The Philosophy of Police Functions is a frank analysis of a recurrent problem of criminal law enforcement, in which the author denounces third degree methods, inquisitorial systems and other malpractices, his plea for reorientation in the methods of criminal investigation, if adopted, should dispel the cloud of suspicion invariably resting on police evidence. Concluding this Part with the Concept of Justice the author eloquently pleads for the application of the principles of natural justice at all levels of decision-making even in administrative adjudication. Part III is devoted to the problems of the Bar, which centre round the status of the lawyer, the acceleration of the pace of justice, and the amelioration of the conditions of the junior Bar. In the chapter on the Forensic Art, the mode of marshalling facts and handling witnesses, the limits of cross-examination, and the principles of statutory interpretation are all covered in turn. In the opening chapter of the IVth Part is a vivid picture of the famous teachers of English Law. Touching upon the question whether the administration of justice could be switched over from English to regional languages, he emphasises the enduring value of a unified legal system holding sway over the entire country. The concepts of law form the subject-matter of Part V, which opens with an original appraisal of the Rule of Law in the ancient Indian polity. There is a brief index at the end of the volume, which is useful.

Is the concept of justice one of the eternal verities, constant and immutable? Or is it a dynamic concept dependent on time and space? The author, it appears, accepts the relativism of the concept of justice, which naturally raises the question of the desirability of policy-oriented decision-making. As regards the legal profession, its apathy to the socio-economic problems of the new political milieu should go and be replaced by an enthusiastic participation in the task of National reconstruction. The author's experience and attainments as teacher, judicial officer and administrator, are rich and varied. The grand theme which runs through these pages is the perennial quest of justice and the pivotal role assigned in it to the judge, the lawyer, the

administrator, and the law-teacher. "A book that could be read both for pleasure and for profit," says the blurb. That is no exaggeration. R.S.S.

QUANTUM OF PUNISHMENT IN CRIMINAL LAW IN INDIA, By Kirpal Singh Chhabra, M. A., LL.M., LL.D. Publication Bureau, Punjab University, Chandigarh, 1st edition, 1970, Pp. xvi and 251. Price Rs. 25.

Under Indian Criminal Law there are mainly five types of punishment in force, viz., death, imprisonment, whether for life or for a term, and whether rigorous, simple, or solitary confinement, forfeiture of property and fine. In the volume under review, which is a thesis approved for the LL.D. Degree of the Punjab University, Chandigarh, the author has made a scientific study of the measure of punishment prescribed under the Indian Penal Code and some other penal statutes. He has studied 5564 conviction cases of 1964 of Delhi State and has compiled and analysed All-India Crime Statistics for half a century from 1911-1961. Courts devote much time and labour to the trial of cases, but the question of the determination of punishment is generally disposed of in minutes. Short term sentences of less than six months are awarded to 87% of the prisoners and of them 71% get less than even a month. They serve no purpose, and make offenders persist in crime after learning the techniques of the trade from seniors in jail. In the author's opinion, imprisonment, when found necessary, should not be for a period less than nine months, the minimum time necessary for any effective prison programme. If the punishments are fixed perfunctorily, the objective of protecting society from crime may not be achieved, and the actual determination of punishments should be influenced by the reports of a field agency about the environmental and other circumstances of the offender.

The present study has fourteen chapters, of which the first two briefly give the quantum of punishment provided in the statutes and examine the administration of these punishments by the law Courts to see whether or not the latter have considered the prescribed punishment appropriate; there is one general trend which gives an indication of the judicial officers' mind on the provisions concerned. It is found that the Courts are not following the standards of punishment laid down in the statutes and they do not appear to be satisfied with the present distribution of punishments in the country's penal laws. The third chapter is devoted to the current idea that retribution alone, or deterrence alone, or correction

alone, cannot be the foundation of the criminal law; different bases have to be adopted for meeting different situations of crime development. In the fourth chapter the quantum of punishment with reference to general basic ideas which went into the formation of the various provisions is examined and it is found that the faith in deterrence alone is now giving place to the reformative approach. A separate chapter discusses the provision of the death penalty in Indian law, while in two other chapters the imprisonment provisions under the criminal law have been reviewed in order to see whether or not they were in accord with the present-day thinking. And in chapter nine, the author examines if the administration of the penalty of short-term sentences is actually proceeding on sound lines, or whether it requires any re-orientation. In the final chapter the author gives a summary of his observations and the steps considered desirable for the future. The author considers that the practice of awarding imprisonment in default of payment of fine should be replaced by the system of realisation of fine by making the offenders work during their leisure time, which will dissuade them from further crime, and that habitual offenders should be permanently interned in Penal Colonies, and they should be made to earn their way out of the colony. He has also prepared some broad guidelines for Courts in the matter of awarding punishment so that disparity in punishments under similar circumstances may be avoided. Members of the legal profession, the judiciary and prison administrators cannot do better than give serious consideration to the suggested changes in the law and administration of the country.

The select bibliography and index are useful. R.S.S.

B. K. MUKHERJEA ON THE HINDU LAW OF RELIGIOUS AND CHARITABLE TRUSTS, 3rd edition, 1970, By Mr. Justice P. B. Mukharji, Chief Justice, Calcutta High Court. Eastern Law House Private Ltd., Calcutta 13. pp. xxx, 389 and A 384. Price Rs. 40.

Piety and benevolence often find expression in religious and charitable gifts and in order that the object of the donor might be achieved, law provides for their proper regulation and control. Except in the last twenty years after the Independence of India and the promulgation of the Constitution there has been little statutory or legislative interference with this branch of Hindu Law. Prior to this period we had two all-India Acts, the Charitable Endowments Act, 1890, and the Charitable and Religious Trusts Act, 1920. Under the present

Constitution, the State Legislatures are given concurrent powers (Entry 28 of List III of the 7th Schedule) to legislate in the field of 'charities and charitable institutions, charitable and religious endowments and religious institutions', and this has rendered the all-India Acts obsolete in many cases, although there has not so far been any all-India enactment bearing on the subject.

But the absence of uniformity in the law owing to diversity of customs and usages has provided the stimulus for the importation of some of the principles of English equity relating to trust, adjusted of course to Indian conditions. The author of the present volume, which contains his Tagore Law Lectures delivered in 1951 under the auspices of the Calcutta University, has therefore made a critical study of the existing case law on the subject, both Indian and English, and analysed and arranged these judicial decisions properly in the context of the principles which underlie the concept of Hindu Law. But the second edition of the book, by Mr. Justice T. L. Venkatarama Ayyar, did not refer to the decisions of the English Courts on trust law and laid the emphasis on the decisions of the Indian Courts.

In order however, to preserve the continuity of the original author's tradition the latest edition includes the recent major decisions of the English Courts. Further two new chapters have been added to the book; one relates to the impact of the Indian Constitution, its different articles and the decided cases upon them (replacing what appeared as a supplement in the 2nd edition), and the other relates to the taxation of Hindu religious and charitable trusts and the impact of the taxation laws on them. Freedom of religion is recognised as a fundamental right under Arts. 25 and 28 of the Constitution, subject to the well-known limitations of public order, morality and health, and to other fundamental rights which might impinge upon it. That it is in the Concurrent List is, however, an obstacle to the formulation of one uniform code for all-India.

In the first of the eight lectures in the series, the author gives an idea of the statutes in force in the several States, outlines the fundamental ideas underlying religious and charitable trusts in the Hindu system, and proceeds, in the next two lectures, to discuss what are essentials of a valid religious or charitable trust under Hindu Law, and to explain by whom, in what manner and for what purposes such trusts could be created and the provisions of law they must conform to. Referring to the two kinds of religious trusts in Hindu society, the *Debutter* (endowment in favour of an idol), and the *Matham* (religious

establishment endowed for the benefit of certain ascetics or sadhus), the author dwells on the general features of the former and the details of their management and administration in the next two lectures. After describing the essential characteristics of a Manager's or Shebaiti right, the author proceeds to discuss the privileges and duties of a Shebait. The next lecture deals with *Mutts* or *Mathams*, their administration, legal status, rights, duties and powers of the *Mehant* or *Mathadhipathi*, after which the author proceeds to discuss the remedies for breaches of trust which are available to beneficiaries or to persons interested in the different forms of religious and charitable trust or which are enforceable by the State by virtue of its special jurisdiction as protector of all properties devoted to religious and charitable uses in the country.

About a half of the volume consists of Appendices which include the texts of the Charitable and Religious Trusts and Endowments Acts of the different States. The Table of Cases and Index are also highly useful.

In the volume under review the author has endeavoured to reconcile and harmonise the various judicial decisions from the point of view of general principles, but expects that sooner or later it will become necessary to codify the whole law on the subject. While retaining the academic character of these lectures, the volume should be of assistance to members of the Bench, the Bar, and others interested in this branch of the law. R.S.S.

CRIMINAL COSTS AND LEGAL AID.

By Graham J. Graham-Green, T. D., assisted by A. J. Townsend, M. C., & E. J. T. Mathews, T. D. Butterworth & Co. (Publishers) Ltd., London (Sole Selling Agents, Eastern Law House Private Ltd., Calcutta). 2nd edition, 1962. Pp. xxv and 309, Price Rs. 81.

As observed in the Foreword to the present publication by Rt. Hon. Lord Parker, the Lord Chief Justice of England, the increasing volume of criminal proceedings has brought with it added interest and anxiety concerning the costs involved. Moreover, the system of Legal Aid in England has undergone complete reorganisation with the enforcement of the Criminal Justice Act, 1967, which has not only brought together, from diverse sources, provisions for legal aid in the great majority of criminal proceedings, but has also introduced important new principles. The mass of legislation, in the form of statute and rule, that has affected criminal costs and legal aid since 1st January 1965 has been incorporated in the second edition. Particularly in the matter of

legal aid, it is believed that, in this period in the history of criminal law, the most far-reaching revocations, amendments or substitutions have taken place. The present work sets out and examines in detail the successive stages in the grant and remuneration of legal aid, and all the statutory provisions.

The changes in the law since the last edition have necessitated a complete revision and reorganisation of certain chapters. Chapter 3 now deals comprehensively with the method and effect of a grant of legal aid, whether in the form of a legal aid order under the Criminal Justice Act, 1967 or of a civil aid certificate under the Legal Aid and Advice Act 1949. Chapter 4 deals with all remuneration under a legal aid order, though the House of Lords is specifically exempted from the Legal Aid in Criminal Cases (Fees and Expenses) Regulations, 1968. Chapter 5 is now restricted to taxation matters in a Magistrate's Court when order for costs has been made under the Costs in Criminal Cases Act, 1952. The appendix has been considerably enlarged; it includes Part IV of the Criminal Justice Act 1967 as well as the whole of, or extracts from, 19 other statutes and 14 sets of rules and regulations, indispensable for reference on costs and on legal aid. Among the new material are the Legal Aid in Criminal Cases (Complaints Tribunal) Rules, 1968. The regulations for criminal proceedings in the Court of Appeal and the House of Lords appear in full. The Appendix also includes some 21 precedents including the recent Practice Directions as to Review of Taxation of Costs. The Procedural Table sets out the procedure on review of taxation, step by step, and should be of assistance to the taxing authorities and the practitioners. The law has been presented as at 1st March 1969.

There are 11 chapters in the book, of which the first one deals with costs awarded by the Court under the heads of power of the Court to award costs, exercise, of that power, method of payment and enforcement of orders. The chapter on Legal Aid in all Courts has three parts each dealing respectively with legal aid pursuant to the Criminal Justice Act, 1967, legal aid pursuant to the Legal Aid and Advice Act 1949, and other Aid. The other chapters deal, *inter alia*, with legal aid remuneration pursuant to a legal aid order. Costs out of local funds and *Inter Partes* in Magistrate's Courts, Costs at Assizes and Quarter Sessions, Costs in the Queen's Bench Division, and Costs in the Court of Appeal and the Court-Martial Appeal Court. Taxation of costs in the House of Lords, Costs before the Judicial Committee of the Privy Council, and Principles and Practice of Taxation are the titles of three other chapters.

Besides the Index and the Table of Rules and Regulations, there is a table of statutes, where the references are to Halsbury's Statutes and a table of cases in which references are given where applicable to the English and Empire Digest. Statutes, Rules and Regulations, Precedents and Comparative Table are the different sections of the Appendix, an invaluable adjunct to the volume. The book should be of assistance and guidance to practising lawyers in England and the Courts which administer the criminal law, both in presenting the statutory provisions as to costs and in outlining the principles to be applied.

R.S.S.

PRINCIPLES AND PRACTICE OF VALUATIONS (LAND AND HOUSES). By John A. Parks, F.S.I., Formerly Chief Valuer, Calcutta Improvement Trust, Fourth edition, 1970, by B. P. Chatterjee, Formerly Government Advocate, Calcutta Improvement Tribunal. Eastern Law House Private Ltd., 54 Ganesh Chunder Avenue, Calcutta 13, Pp. xi and 319. Price Rs. 25.

In the present publication the author has set out in a simple manner the principles and application of making a valuation of land and buildings and has dealt with many aspects which have not been discussed before. In the latest, and fourth, edition, Mr. Chatterjee has added more decisions showing the approach of the Supreme Court and the High Courts in the matter of valuation of lands acquired under the Land Acquisition Act and other similar Acts; the case law on the subject of valuation has been brought up-to-date, and the reader's attention has been drawn to the Supreme Court's decision in *State of Gujarat v. Shanvilal* (AIR 1969 S C 634), which overruled its own earlier decision in *Union of India v. Metal Box* (AIR 1967 S C 637).

The value of anything means its worth or utility as also the qualities inherent in the thing on which its utility or worth depends, and the valuation of anything is an estimate of the value of that thing in terms of money, these being discussed in the first of the twelve chapters which make up this book. In the third chapter it is pointed out that any method of arriving at a valuation of a property should be supported by evidence regarding other similar premises similarly situated in the same area. When land is fully developed by buildings erected thereon, when these are let at a rent from which the fair rent can be ascertained and when the rent has been proved and is likely to be maintained for years to come, then the rental method of valuation is applied

to determine the market value of the premises and, as chapter 4 mentions, it has been approved in several High Court cases; the principles laid down in these cases have been noted and the method has been clearly explained. When, however, the land is not developed by the buildings erected on it, the method that is usually adopted is to value by the Land and Building Method described in Chapter 5, while the next one discusses the Belting Method used for the comparison of the value of one plot of land fairly accurately with another plot of known value. A separate chapter discusses in detail the various facts which will have to be ascertained for the valuation of the leasehold interests of the Lessor and Lessee in respect of a property subject to a lease, and Chapter 9 is devoted to the construction, application, and use of life tables, because a knowledge of the Mortality Tables, Expectation of Life Tables, and the Year's Purchase for Life Tables, is necessary when a valuer has to value a property which is subject to a life interest of one or more persons. The valuation of easements, an easement being the right to receive a reasonable amount of light across another owner's property, is discussed in chapter 10, while the other chapters of the book deal with hypothetical building schemes and the valuation of land subject to restrictions as to use and valuation for various purposes and different statutes.

The appendices to the volume give the texts or the relevant sections of the Land Act, 1894, the Calcutta Improvement Trust Act, 1911, the Calcutta Municipal Act 1951, the Requisition and Acquisition of Immovable Property Act and the Defence of India Act, 1962. A table showing Bengal Land Measure, table of cases, index and valuation tables complete the usefulness of this eminently practical volume.

The English Valuation text books deal mainly with conditions not applicable to India and while in many cases the principles may be identical, their practical method of application varies. The principles governing a simple, straightforward valuation should be within the reach of experts whose valuation was recognised by the Supreme Court in AIR 1959 SC 429. The book should be of practical assistance to students, lawyers and the many valuers whose duty it is to decide valuation matters.

R.S.S.

India; N. M. Tripathi Private Ltd., Bombay 2). Pp. clxxxiv and 1510, Price Rs. 157-50.

Published originally nearly a hundred and fifty years ago, the previous edition of the present volume appeared in 1966, and since then England has witnessed far-reaching changes in criminal law and practice. In 1967, for instance, the Criminal Law Act finally abolished the difference between felonies and misdemeanours, with the result that much of the law relating to principals and accessories has become obsolete. The Act also abolished many offences which had virtually become obsolete, but extended the law of receiving which, since the Theft Act, 1969, is referred to as 'handling stolen goods'. The Theft Act, which has revolutionised the old law of larceny and kindred offences, has necessitated the omission of a large section from the present volume, but the authors have found it possible to add to the text of the Act a few brief comments and have retained some of the old decisions which seem likely still to be applicable.

2. There have been other changes in the English scene since the last edition appeared. The law relating to sexual offences has been substantially altered, while the Road Safety Act 1967 has considerably strengthened the law relating to persons who drive motor vehicles while under the influence of alcohol. The most comprehensive new legislation was, however, embodied in the Criminal Justice Act, 1967 which, inter alia, introduced a new and less cumbersome procedure for committal for trial, majority verdicts, requirements for early disclosure of defences of alibi, and the possibility of admissions in criminal trials. In 1969 a consolidating Criminal Appeal Act re-enacted the wider facilities for appeal introduced by the Act of 1966.

3. The volume under review consists of Books I and II, the former dealing with pleading, practice and evidence generally and the latter, in particular cases. Indictment, Trial, and Punishments are covered in the first three chapters of Book I, while Costs, Rewards and Compensation, Title to and Restitution of Property and Criminal Appeal are the titles of the next four chapters. What allegations must be proved and the manner of proving the matters put in issue are dealt with in the two chapters which make the second part of Book I. There are five Parts in Book II, the first one dealing with offences against individuals, their persons and property, and the next one covering offences of a public nature, such as those against the Crown and Government, against religion and public worship, against public justice, against the public peace,

ARCHBOLD: PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES, 37th Edition, by T. R. Fitzwalter Butler, of University College, Oxford, & Marston Gorsia, of Merton College, Oxford. Sweet and Maxwell, 11 New Fetter Lane, London, 1969. (In

against public trade, and against public morals, order and policy. Conspiracy, incitement and attempt to commit crime; principals, accessories and abettors; and persistent offenders and habitual drunkards from the subject of the last three Parts. Each chapter is divided into appropriate sections, and the paragraphs in each section are duly numbered, there being over 4000 such numbered paragraphs.

4. The text sets out the law as it had developed upto January 1, 1969; some further references on proof were added upto the beginning of March 1969, and a supplement was issued on 11th September 1969. It is understood that the supplemental service to this edition will be issued three times a year. It comprises a Cumulative Supplement and a Special Noter-up Section printed on one side of the page only, which is supplied to those readers who wish to cut out and paste into their copies of the volume the relevant annotations to the page to which they relate. The Noter-up contains useful instructions as to how the supplemental slips should be pasted on the relevant pages; both the Supplement and the Noter-up, which contains the abbreviated versions of the annotations in the Supplement, are automatically supplied together to subscribers to the volume. The other notable features are the insertion of over 70 blank pages, perforated at the margin, towards the end of the book, for the convenience of the subscriber, and the silk ribbon book-marker.

5. The table of cases and index are exhaustive, and the appendix gives a table of indictable offences. In the table of statutes references are given to the paragraph in which the text of an enactment is printed or in which the form of indictment under the section is printed. The authors confidently expect developments on the lines of the Theft Act, 1968 in the near future in relation to other offences also, in which case parts of the book may become outdated before long and a future edition may be given the opportunity of discussing the law from a wider angle. R.S.S.

MANUAL OF THE COUNCIL OF EUROPE (Structure, Functions and Achievements). By A Group of Officials of the Secretariat. With Foreword by Peter Smithers, Secretary-General. Stevens & Sons Ltd., London, 1970, pp. ix & 322. Price Rs. 99.

The Council of Europe is one of the chief forces working for unity in contemporary Europe, its most distinctive feature being its Consultative Assembly, in which members of parliament from eighteen countries work

together in the formulation of European policies and make elaborate plans for European co-operation. It was created in 1949 with the mission of promoting greater unity among its members; among its achievements have been the European Convention on Human Rights, the European Cultural Convention, the European Social Charter and, in all, over sixty conventions and agreements on a variety of topics.

2. The Manual under review explains to the reader how the Council has developed in a manner somewhat different from that envisaged by those who first nurtured it in the early days. It is divided into two Parts, the first giving an account of the structure and functions of the Council and the second describing its principal activities during the last twenty years. The first Part has chapters on membership, the Council of Ministers and the Consultative Assembly, the statutory provisions, the programme of work and external relations. An appendix to the chapter gives a list of international non-Governmental organisations which have consultative status with the Council of Europe. The second Part contains chapters on political work and economic questions, social questions and public health, environment and natural resources, human rights, and municipal and regional affairs; the chapter on education and culture has an appendix which gives a list of publications on education in Europe, modern languages and cultural subjects.

3. The aims of the Council of Europe in the legal field are the 'harmonisation of national laws with a view to the fulfilment of the statutory aims of the Council; the establishment of a better legal order between Member States and the highest possible degree of equality before the law for citizens of a Member State on the territory of another State; consultation on impending legislation; joint preparation of laws; common measures for the prevention of crime and the treatment of offenders'. A separate chapter, Chapter 13, describes the achievements of the Council of Europe in the legal field, the special organs set up to deal with questions of a legal character, and work in progress in 1969. During the first ten years of the Council's existence a number of conventions and agreements were concluded on different subjects of European interest, and the 'European Committee on Legal Co-operation' (CCJ) was started in 1963 to establish a better co-ordinated legal programme. This Committee consolidated and expanded the work already done by the conclusion of several conventions and agreements in international, civil and commercial law, and these are briefly described.

ed in this chapter. Regarding crime problems and criminology, the Council of Ministers set up the European Committee on Crime Problems (ECOP) and gave it a mandate to implement a European policy in this field. The subcommittees appointed by the ECOP examine subjects either with a view to drawing up a text for a draft convention or to establishing principles or guidelines for action. A second body concerned with criminological research was also set up in 1962, called the Conference of Directors of Criminological Research Institutes, which serves as a forum for an exchange of ideas on European criminological problems and for considering ways and means of intensifying collaboration in research work. These conferences have, *inter alia*, examined the administration and organisation of research, research strategy, the prison community, the forecasting of criminality, and the relationships between the types of treatment and types of offenders. The present publication gives particulars of the conventions and recommendations of the Council in the field of international criminal law and criminology. Reference must be made also to two other legal activities of the Council; they are the biennial Conferences of the European Ministers of Justice, which exchange views on political questions and reviews together the legal work accomplished, and the Conference of Deans of European Law Faculties, the theme of which was the teaching of European law and the law of European States in law faculties.

4. There are two appendices and index to the volume under review: the first appendix reproduces the statute of the Council of Europe and the second lists the agreements and conventions concluded between the Member States of the Council of Europe. R.S.S.

JUDICIAL REMEDIES IN THE EUROPEAN COMMUNITIES (A Casebook).

By L. K. Brinkhorst, Prof. of Law, University of Groningen and H. G. Schermers, Prof. of Law, University of Amsterdam. Stevens & Sons Ltd., London. (In India: N. M. Tripathi Ltd., Princess Street, Bombay 2). 1969, pp. xxii and 275. Price Rs. 81.

The new order of the European Communities, built up in the last twenty years, has given rise to an intricate pattern of legal relationships. They are communities of law, with political and economic objectives but with legal methods to achieve them; but this new legal structure does not fit into the traditional dichotomy of international and municipal law.

In this context an adequate system of legal safeguards becomes important. Where rights are conferred and duties imposed and obedience to rules of law is required, legal remedies are a paramount necessity. Practising lawyers have to be familiar with the possibilities of legal redress when Community law is violated. Further, many of the legal problems of the Communities are problems common to any supranational organization, and any student of international institutional law should benefit from a study of these remedies: many of them can be regarded as resulting from the long Continental development of administrative law.

2. In the European Communities the settlement of disputes between member States and between a member and the Organisation is entrusted to the Court of Justice. Not only disputes concerning the treaties but all disputes which are connected with the object of the Communities can be brought before the Court, disputes about the interpretation or application of the treaties may not even be submitted to another method of settlement. The first two chapters of the volume under review are entirely devoted to this court, in its capacity as an international court and in its capacity as an administrative court. The Court of Justice cannot always offer judicial remedies; where Community law forms part of the municipal legal systems, its application is ensured by the latter, and the authors have accordingly begun chapter three with a short survey of the municipal court systems of member States, in which their attitude to international and Community law is discussed. The problems are illustrated with excerpts from court decisions, and, in order to distinguish them from the decisions of the Court of Justice, national decisions are given names starting with the nationality of the court concerned. Chapter four is devoted to the delimitation of the respective jurisdiction of the Court of Justice and municipal courts. Although this book is not a study of the European Court of Justice, that is the main focus of attention and the next two chapters, 5 and 6, consider separately the law which it applies and its basic rules of procedure.

3. The book is the result of the authors' experience over many years of teaching in this field of law. They have sought to combine the advantage of the American Casebook method with those of the traditional European method of systematic exposition. The book therefore is a careful blending of extracts from decisions — both of the European Court of Justice and the municipal Courts — with essential comment by the authors. The main issues have been given introductions which offer a guide to the student to the problems

involved. Relevant passages of court decisions have been quoted. Where the decisions are inconsistent or if not all the problems are dealt with in a single case, more than one case is referred to. Where a problem has not been sufficiently treated in court decisions, extracts are given from the writings of qualified publicists. The authors have tried to group together the most important excerpts on each case, but in order to understand an entire case, it should of course be read in its entirety. To facilitate further research under each head, the pages from which the excerpts have been taken are given and, where possible, the pages where the texts translated were originally published in Dutch, French and German. At the end of the book there is a list of questions for use, which gives sufficient opportunity to discuss all important aspects of the subject.

4. The first three of the four appendices to the volume give particulars of cases submitted to the Court of Justice, analysed first according to subject-matter, according to the type of case (EEC Treaty) and also by type (ECSC Treaty), and a fourth appendix gives particulars of decisions by domestic courts concerning Community law. Further useful features are the table of citations to Treaty Articles, the table of cases, both alphabetical and by number, and the index. This systematic exposition of the authors should enable the reader to grasp in principle and detail the Judicial remedies in the European Communities.

R.S.S.

TAX AND THE FAMILY BUSINESS.

By Milton Grundy, M. A., Bar-at-Law.
Sweet and Maxwell Ltd., 11 New Fetter Lane, London, 1970, 4th Edition.
(In India : N. M. Tripathi Private Ltd., Bombay). pp. viii and 173. Price Rs. 28.80.

The present handy publication first appeared in 1956 under the title *Tax Problems of the Family Company*. After the 1965 Act and the introduction of the corporation tax and capital gains tax, there has been a wider scope for "syphoning off" corporate profits and the family company still looks more attractive. But the author has chosen to prefer the new title, because he does not want to suggest any *prima facie* preference for the company as the appropriate medium. The most significant change in the English law on this subject since the last edition of this book (1966) is the abolition of the limitation of the amount of directors' remuneration deductible for corporation tax, which removes the principal disadvantage of the corporate structure for the family business. The author considers that what matters to a particular business is not

whether the tax level is too high or too low in a general sense, but whether the tax level of that business is comparatively high or low, so as to affect the competitive standing of the business. Whether high domestic taxes make export prices uncompetitive also depends greatly on the extent to which the revenue is expended by the State in ways which result in business being more efficient. Referring to the Tax Gloom which seems to affect many, he thinks it is due to the complexity of the legislation, which seems to get more difficult every year. The amount of statutory material has doubled since the first edition, apart from the usual flow of judicial decisions, exchange control regulations and a host of other laws and regulations; what the author has attempted to do is to present an outline of the principal direct taxes currently in force in England.

2. The book is divided into two Parts, the first one consisting of four chapters covering, respectively, Income Tax, Corporation Tax and Shareholder's Tax, Capital Gains Tax and Estate Duty. They deal *inter alia* with trading profit, trustees, directors and employees, reliefs, dividends and other distributions made, group income, basic concepts of the Capital Gains Tax, partnerships, the family company, and assets valuation. In Appendix G is given a list of some important provisions of the Income Tax Act and the various Finance Acts to help the reader to pursue in more detail some of the statements made in this Part. Among the topics covered by these provisions are patent and know-how, scientific research, entertaining expenses, personal reliefs, interest, market value and assets value. The five chapters in Part II on tax planning are entitled, The Choice of Business Medium, The Effects of Change, The Fruits of Labour, The Business and the Family, and Retirement. In the fifth chapter attention is focussed upon the person minded to set up a new business and facing the choice of a number of media through which it could be carried on, and the next one is concerned with a person already carrying on a business who contemplates a change of medium. Chapter 7 deals with the tax payer who is unable to visualise how the fruits of his labour may be translated into simple expendable cash. The last chapter considers the question of dispersing the family's wealth, first from the point of view of income, as it affects income tax, surtax and corporation tax, and then from the view point of capital, as it affects capital gains tax and estate duty.

(3) The appendices to the present volume deal with the tax year, the schedules, reliefs, rates of tax and duty, dates for payment, and a short list of standard books recommended

for further reading. Short and readable, the book gives one a bird's-eye view of the subject.

R.S.B.

FISHER AND UNDERWOOD'S LAW OF MORTGAGE. EIGHTH EDITION, 1969, By E. L. C. Tyler, M. A. (Oxon), Butterworths, London (Sole Selling Agents: Eastern Law House Private Ltd, Calcutta). pp. cxxxvi and 697, Price Rs. 153.

The volume under review is the eighth edition of a "monument of care and learning", which first appeared so far back as 1856 and has since been freely quoted by the Courts in England. The object of the original work was to "explain the nature of the different kinds of securities, the rights and remedies of the persons who make, and of those who are entitled to the benefit of them, and the manner and circumstances attending their discharge". As revised and extended by subsequent editors, the sixth edition of 1910 had swollen to a volume of 1024 pages of text and many more of tables and index. The property legislation of 1925 gave the editor of the seventh edition, in 1931, an opportunity to reduce the size of the book to 820 pages of text and a further 800 pages of tables and index. A further reduction in size has been made in the present edition by the omission of a detailed discussion of pledges and liens and by limiting the book to mortgages and charges in particular, rather than to securities generally; owing to pressure of space the discussion of bills of lading and shipping mortgages has also been reduced. Since 1931 there have been considerable developments in both case and statute law affecting mortgages and these changes have been incorporated in the present edition.

The present volume is divided into eleven parts, the first six dealing with Mortgages and Charges, Parties to Mortgages, Void or Imperfect Securities, Transfer and Devolution of Mortgages, the Mortgagee's Remedies, and Priorities of Mortgages. Incidence of the Mortgage Debt, Discharge of the Mortgage, Accounts and Costs, the Option Mortgage Scheme, and Stamp Duties are the titles of the next five chapters. The index and table of statutes are quite exhaustive, while in the table of cases references are given where applicable to the English and Empire Digest. In the Appendix have been included a number of basic conveyancing and Court forms helpful to the practitioner, the conveyancing forms being intended for use in simple private mortgage transactions and illustrating points made in the text.

The volume in question has long been quo-

ted as an authority in England and the editor of the present edition has therefore been chary in the handling of the text and has in general followed the order of treatment of the previous edition and retained its content. Considerable re-writing has still been necessary, some matters no longer relevant have been omitted, and new material has been added. Topics like merger and waiver may seem unimportant, but they still raise live issues, and the Editor has therefore had to condense them rather than omit them altogether. R.S.B.

THE LAW OF INTERNATIONAL INSTITUTIONS. By D. W. Bowett, M. A., LL. B., Ph. D., Bar-at-Law, some time member of the United Nations Office of Legal Affairs, Stevens & Sons, 11 New Fetter Lane, London E.C. 4 (In India: N. M. Tripathi Private Ltd., Bombay), 2nd edition, 1970, pp. xviii and 384, Price Rs. 36.

Published under the auspices of the London Institute of World Affairs, the present publication is No. 60 in the Library of World Affairs. It provides an up-to-date and accurate account of various international organisations and their activities. The reforms in the United Nations in recent years have been fully covered as well as those in a number of specialised agencies and regional organisations, for, since the publication of the 1st edition in 1964, many developments have occurred in the field of international organisation. The Section on the European Communities of the Six, for example, has been re-written to take account of the unification of the High Authority and the two Commissions into a single Commission, and of the three Councils into a single Council. The section on Africa has been transformed as the result of the establishment of the OAU. More emphasis has been placed on the problem of the relationship between regional organisations and the United Nations and a new section on GATT has been added, and there is also a fuller discussion of the responsibilities of international organisations.

The volume, which opens with a historical introduction, is divided into four Parts, Part I being devoted to Global Institutions, themselves being subdivided into Organisations of General Competence, like the United Nations, and Organisations of limited competence, like the Specialised Agencies and GATT. Classified on the same basis, Part II deals with Regional institutions, and in the section devoted to Asia and the Far East, we have a treatment of the Colombo Plan for Co-operative Economic Development in South and South-East Asia.

while judicial institutions come under Part III. The problem of solving disputes between States had led to the creation of a wide range of procedures including negotiation, good offices, enquiry, mediation, conciliation, arbitration and judicial settlement. The book concentrates on the 'judicial' procedures such as arbitration and judicial settlement in which, in general, one finds an adjudication according to the law, resulting in an award binding on the parties. In this Part are covered the Permanent Court of Arbitration, the Permanent Court of International Justice, and the International Court of Justice; the last mentioned Court has been dealt with under the heads of Composition, Access to the Court, the Jurisdiction of the Court, the Law Applicable, and the Institutional role of the Court. There is, of course, no single, comprehensive body of law to govern the transactions and activities of these international organisations. As regards the International Court of Justice, the law applicable is set out in Art. 38 and constitutes a statement of the primary sources of international law. Art. 38(c)—'the general principles of law recognised by civilised nations'—is a refutation of the notion that *lacunae* exist which may make a dispute 'non-judicial'. The reference in Art. 38(2) to 'judicial decisions' as 'subsidiary means for the determination of rules of law' enables the Court to utilise the advantage of its own permanence by looking to its own previous decisions as evidence of what the law is. A certain consistency of special respect for its own decisions can be discerned in its judgments. Part IV discusses the various problems which are common to most institutions.

Interspersed through the volume are six charts to illustrate the structure of the U. N. Security Council, the General Assembly, the United Nations and Related Agencies, the Council of Europe, the European Communities of the Six, and the Organisation of American States. The bibliography and index are useful.

Here is a single informative text book which gives useful guidance on the more complex problems of international organisations. Designed primarily for teachers and students of the law of international organisations, it should also be of assistance to students of international relations, those actually involved in the work of international organisations, and international lawyers and diplomats.

R.S.S.

INSTALMENT CREDIT. British Institute of Studies in International and Comparative Law, No. 4. Editor: A. L. Diamond, LL.M. (Lond.), Professor of Law in the University of London. Stevens & Sons Limited, London. 1970. (In India: N. M. Tripathi Ltd., Princess Street, Bombay 2). pp. xxiii and 239. Price Rs. 79.20.

How can due payment in instalment credit best be enforced and can extra money be received to cover the costs of giving credit and the risks of loss? What form shall the transaction take? What are the parties' rights and against whom? Are legal controls necessary and, if so, how should they be formulated? These and other questions which face all those concerned in the finance and practice of hire-purchase are discussed in the present publication, which focuses attention on the archaic legal structure in England which impedes the normal business transactions of finance companies.

2. Contributed by different writers, there are six chapters in the book, entitled: Instalment Credit; An introductory Survey: the Policies of Instalment Credit Law; An Appraisal from the view-point of the finance houses: the Legal Regulation of Lending; A Modern Instalment Sales Law; a Comparative Survey: Legal Impediments to the Financing of Dealers' Stock and Accounts Receivable: the Economic Regulation of Instalment Credit in the United Kingdom.

3. In England the form of hire-purchase has come to dominate the field of instalment credit, but in a comprehensive review of the law, other countries' experience must be taken into account. The six chapters in the present book are based on the papers read at a Cambridge Conference (July 1968) of lawyers, economists, representatives of the Bank of England, Treasury and the Board of Trade, and others actively interested in the financing of hire-purchase. The idea of splitting the price into several equal parts and arranging for regular monthly payments has now achieved some degree of respectability; it is now thoroughly acceptable to one whose major asset is his earning capacity rather than land or investments. Hire-purchase has been adopted in England as the usual form of instalment credit, because it avoids the disadvantages of other forms. It steers clear of the Factories Act, 1899 and the Sale of Goods Act, 1893, the Bills of Sale Acts and the Moneylenders Acts. New forms of control, however, have been created, viz., the Hire-Purchase Acts and the Board of Trade's economic controls. The book describes three forms of secured instalments sales, the sale,

lease, and loan forms, obtaining respectively in the United States of America, England and France, which, though apparently different in appearance, perform more or less the same function. The latest revision in England in the regulations for economic control of hire-purchase came too late for inclusion in the text. It is enough to remember that the Order now in force is the Hire-Purchase and Credit-Sale Agreements (Control) Order, 1969.

4. The second chapter in the book outlines the difficulties created for finance houses by an out-of-date legal structure, and the next one is an appraisal of the English lending law, which propounds a more rational and satisfactory system than the present one. The English law being inadequate to meet the legitimate needs of stock and accounts receivable financing, a separate chapter makes detailed proposals for remedying the defects, while the last chapter outlines the main forms of economic regulation of instalment credit in the U. K.

5. There are three appendices to the volume. Appendix A gives selected statutory materials, which include the U. K. Agricultural Credits Act, 1928 and Advertisements (Hire-Purchase) Act, 1967, the U. S. Uniform Commercial Code, Uniform Consumer Credit Code, Consumer Credit Protection Act and the Canada Personal Property Security Act, (1967) Ontario. Appendix C furnishes interesting biographical notes about the contributors, Chairmen and commentators at the Cambridge Conference and other participants at the Conference, while there is a useful bibliography in Appendix B. The list of tables, the list of cases, the table of statutes, the table of cases, and index are useful features of this book, which should stimulate discussion and put forward a selection of different possibilities of reform. The recent appointment (July 1968) of the Crowther Committee to make a wide-ranging review of consumer credit should present a suitable opportunity to work out a new system.

R.S.S.

BOOKS RECEIVED

CAN THE STATE KILL ITS CITIZEN.

By K. G. Subrahmanyam, Advocate. With an introduction by S. Mohan Kumaramangalam, Bar-at-law, Madras. Published by Madras Law Journal Office, Madras, Pages 70. Price Rs. 2/-.

TAXPAYERS' GUIDE (INCOME-TAX, WEALTH TAX, GIFT TAX AND ESTATE DUTY ACT) 1st EDITION.

By H. K. Sen Gupta, Advocate, Calcutta High Court and Tax Consultant. Published by T. K. Sen Gupta, Knowledge, 14-A, Lake Temple Road, Calcutta-29, Pages 102, Price Rs. 5.00.

BAILMENTS and PLEDGE. By A. B. Majumdar, Advocate. Published by B. C. Oe, Eastern Law House Private Ltd., 54, Ganesh Chunder Avenue, Calcutta-13. Pages 122. Price Rs. 6.00.

CARRIERS ACT (III of 1865) WITH CRITICAL AND EXHAUSTIVE COMMENTARY. By Rasiklal N. Oza, B.A., LL.B., Advocate. Published by New Order Book Co., Ellis Bridge, Ahmedabad-6, pp. 64, Price Rs. 10.00.

THE INDIAN LEGAL HISTORY (IN FOUR PARTS). By Shri Bakshish Singh, B.Sc., M.A., LL.M., (Advocate) of N. A. S. College, Meerut, 1969 Edition.

Published by the Editor, International Journal of Legal Research, Lalkurti, Meerut Cantt. (U. P.), India, Pages 138, Price Rs. 6.50.

THE INTERNATIONAL JOURNAL OF LEGAL RESEARCH, Vol. 4 No. 1, WITH FREE INDIAN LAW SUPPLEMENT TO SUBSCRIBERS EDITED AND PUBLISHED. By Bakshish Singh, B.Sc., M.A., LL.M., Advocate, Law Department, N. A. S. College, Meerut, Pages 72, Annual Subscription India: Rs. 15.00.

THE LAW OF LAND REFORMS IN KERALA (with Supplement) By A. Gangadharan, B. A. B. L., Published in 1970—Distributors: The Travancore Law House, Chittinor Road, Ernakulam, Cochin-11, pp. 268, Supplement Pp. 116. Price Rs. 12.

INAUGURAL ADDRESS OF HON'BLE JUSTICE SRI. O. CHINNAPPA REDDY OF THE ANDHRA PRADESH HIGH COURT (delivered at the Tenth Annual West Godavari District Bar Federation Meeting held on 26-4-1970 at Bhimavaram). Published by West Godavari District Bar Federation, Bhimavaram, pp. 8, Price Nil.

on an existing route has characteristics similar to that of a new route. In Civil Appeals No. 2356 and 2357 of 1969 two additional permits on the existing route were decided upon by the Regional Transport Authority pursuant to the note of the Regional Transport Authority asking for increase. Applications were invited on that basis. In all these appeals, a notification was issued under S. 57 (2) of the Act inviting applications for permit. Thereafter notifications were made under Section 57(3) of the Act inviting representations in connection with the applications for grant of permit. Each applicant claimed for permit pursuant to notification issued under Section 57 (2) of the Act. Furthermore, introduction of an additional bus on the existing route was made as a result of intensive traffic survey conducted prior thereto and recommendation of the Secretary for increase of an additional bus and the approval by the Regional Transport Authority of the proposal of the Secretary. The notification under Section 57 (2) of the Act inviting applications for permit is to be judged in the background of these features. Therefore, in the facts and circumstances of these appeals, it is just and proper to hold that there was a valid order under Section 47 (3) of the Act in each case.

37. All these appeals are allowed and the cases are remanded to the State Transport Appellate Tribunal for dealing with the appeals on merits. Civil Appeals Nos. 2378-2380 of 1969.

38. These three appeals relate to new routes. The State Transport Appellate Tribunal held that there was no valid order under Section 47 (3) of the Act. The High Court also took the same view. In all these appeals there was a notification under Section 57 (2) of the Act for the grant of a permit on each of the routes mentioned in these appeals. A notification under Section 57(2) of the Act inviting applications for one permit on each new route, in our opinion, indicates that there was an order under Section 47(3) of the Act. These appeals are therefore allowed and the cases are remitted to the State Transport Appellate Tribunal to be dealt with on merits.

Civil Appeals Nos. 2409, 2452, 2453-2457 of 1969.

39. In Civil Appeals No. 2409 and 2456 of 1969 a new route was opened
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in each case with permits for two buses. There was first intensive traffic survey under the authority of the Regional Transport Officer. Thereafter, the Regional Transport Authority issued notifications under Section 57(2) of the Act inviting applications for the grant of two stage carriage permits to run on each route forming the subject matters of these appeals. These notifications inviting applications for two permits on new routes in each case, in our opinion, show that there has been compliance with Section 47(3) of the Act and in the facts and circumstances of the case there was a valid order under Section 47(3) of the Act in each case.

40. In Civil Appeal No. 2452 of 1969 there was a traffic survey by the Regional Transport Officer who put up a note to the Regional Transport Authority and suggested introduction of four additional buses. The Regional Transport Authority agreed and directed that the concurrence of the Regional Transport Authority, North Arcot, be obtained because a portion of the route lay within the latter's jurisdiction. The Regional Transport Authority, North Arcot granted concurrence for two permits. Applications were thereafter called for two permits. We have already said that the terms of Section 47(3) of the Act will not apply to inter-regional permits. In the case of inter-regional permits a decision of the limit of number of permits is established by the concurrence of two Regional Transport Authorities in that behalf. In this appeal that was done and thereafter a notification under Section 57(2) of the Act inviting applications for grant of two permits was made. We are of opinion that the notification under Section 57(2) of the Act in the context of the features mentioned amounts to a valid order fixing the number of permits.

41. In Civil Appeal No. 2453 of 1969 there were public representations to open a new route between Cheyyar to Brahamadesam covering a distance of 18 miles. The Regional Transport Authority thereafter invited applications under Section 57(2) of the Act. The State Transport Appellate Tribunal held that there was no valid order under Section 47(3) of the Act. The High Court also took the same view. The High Court gave an additional reason that it did not appear that the Regional Transport Authority took into

consideration matters mentioned in clauses (a) to (f) of Section 47(1) of the Act. This is a new route. The notification under Section 57(2) of the Act considered in that background establishes that there was a valid order under Section 47 (3) of the Act. Unless the order gives reasons it is not possible to rip it open to find out what weighed with the Regional Transport Authority.

42. In Civil Appeals Nos. 2454 and 2455 of 1969 there was in each case an additional permit on the existing route. In Civil Appeal No. 2454 of 1969 the Secretary of the Regional Transport Authority, North Arcot after traffic survey proposed to the Regional Transport Authority, North Arcot, for the grant of an additional stage carriage permit on the route. The Regional Transport Authority, North Arcot approved the proposal and as the route was partly in South Arcot, the concurrence of the Regional Transport Authority of South Arcot was obtained. Thereafter the Regional Transport Authority, North Arcot, invited applications for the grant of an additional permit. The High Court held that there was no valid order under Section 47 (3) of the Act because it could not be predicated that the Regional Transport Authority had considered all the matters mentioned in clauses (a) to (f) of Section 47 (1) of the Act. It is not possible to find reference to consideration of the matters in the order. Suffice it to say that the two Regional Transport Authorities concurred in the proposal of an additional permit and thereafter applications were invited under Section 57(2) of the Act. We are of opinion that there was a valid order under Section 47 (3) of the Act.

43. In Civil Appeal No. 2455 of 1969 the appellant made an application to the Regional Transport Authority, Salem in September, 1963 for the grant of a stage carriage permit on the route Kaveripatnam to Tirupethur. That application was treated as a proposal under Section 47 (1) of the Act and representations were invited. Thereafter, the Regional Transport Authority rejected the proposal. An appeal was made to the State Transport Appellate Tribunal. The appeal was allowed. The State Transport Appellate Tribunal held that there was a need for the grant of a stage carriage permit and remanded the matter for

fresh consideration. Thereafter an application was made to the High Court against the order of the State Transport Appellate Tribunal. The High Court dismissed the petition observing that the Regional Transport Authority should satisfy itself about the condition of the roads and that the appellant should be granted the permit in accordance with law. The matter then came up before the Regional Transport Authority and it granted the permit to the appellant. There was an appeal against the grant of permit to the appellant and refusal of permit to the respondent. The State Transport Appellate Tribunal held that there was no valid order under Section 47(3) of the Act. The High Court agreed with the State Transport Appellate Tribunal. We are of opinion that there was a decision of the State Transport Appellate Tribunal to the effect that there was need for grant of a stage carriage permit. The High Court also held that view. The Regional Transport Authority satisfied itself about the condition of the roads in accordance with the directions of the High Court and then dealt with the matter of grant of permit. All these features considered along with the facts that this was a new route and there was also notification under Section 57(2) of the Act establish that there was a valid order under Section 47(3) of the Act.

44. In Civil Appeal No. 2457 of 1969 the State Transport Appellate Tribunal held that there was no valid order under Section 47(3) of the Act and the High Court upheld that view. The Regional Transport Authority invited applications under Section 57(2) of the Act for the grant of a stage carriage permit on a new route. This notification in the facts and circumstances of the case indicates that there was an order under Section 47 (3) of the Act for the grant of a stage carriage permit on the new route.

45. These appeals in this group are allowed and the cases are remitted to the State Transport Appellate Tribunal to be dealt with on merits.

Civil Appeals Nos. 2478-2479 of 1969.

46. Civil Appeal No. 2478 of 1969 relates to what is described as inter-State route between Madras and Pondicherry. The State Transport Appellate Tribunal held that there was no valid order under Section 47 (3) of the Act. The High Court upheld that

view. We have already held that Section 47 (3) of the Act does not apply to inter-State permits. If however any determination of the limit of number of permits in regard to inter-State permits is necessary it is to find out whether the two States have concurred in the proposal for a new route or an additional bus on the route as the case may be. This appeal relates to a new inter-State route. The two State authorities agreed and thereafter notification under Section 57 (2) of the Act was made inviting applications for the grant of permit on the new route. We are of opinion that there was a valid order for the grant of permit.

47. In Civil Appeal No. 2479 of 1969 the Regional Transport Authority, South Arcot granted a permit to the appellant on the route Pondicherry to Mylam. The Transport Commissioner, Madras Region, wrote to the State Transport Authority, Pondicherry that the Regional Transport Authority, South Arcot had approved the proposal for opening of a new route from Pondicherry to Mylam via Thiruchitram and asked for concurrence in the proposal in pursuance of the principles of agreement for sharing the permits by both the States. The State Transport Authority, Pondicherry granted concurrence. Thereafter, the Regional Transport Authority, South Arcot invited applications under Section 57 (2) of the Act.

48. Apart from the consideration that Section 47(3) of the Act does not apply, it is abundantly clear that the two States agreed to the grant of a permit in each appeal. Both appeals relate to inter-State permits. The appeals are allowed and the cases are remitted to the State Transport Appellate Tribunal to be dealt with on merits.

Civil Appeals Nos. 2485 and 2486 of 1969

49. The High Court upheld the view of the State Transport Appellate Tribunal that there was no valid order under Section 47(3) of the Act in each case. The Regional Transport Authority was of the view that there was need for opening a new route and a notification under Section 57(2) of the Act was made inviting applications. This being a new route, we hold that there was a valid order under Section 47(3) of the Act. The appeals are allowed and the cases are remitted to the State Transport Appellate Tribunal to be dealt with on merits.

Civil Appeals Nos. 2518-2520 and 2523 of 1969.

50. In these appeals the High Court held that there was no valid order under Section 47(3) of the Act and upheld the view of the State Transport Appellate Tribunal. Civil Appeal No. 2518 of 1969 relates to an additional stage carriage permit. There was a notification under Section 57(2) of the Act inviting applications for an additional stage carriage permit. This notification in the context of facts and circumstances of the case indicates that there was a decision under Section 47 (3) of the Act for an additional stage carriage permit. Civil Appeals Nos. 2519, 2520 and 2523 of 1969 relate to new routes. In each case there was a notification under S. 57 (2) of the Act inviting applications. We are of opinion that there was a valid order under Section 47(3) of the Act in each case. The appeals are therefore allowed and the cases are remitted to the State Transport Appellate Tribunal to be dealt with on merits.

Civil Appeals Nos. 2524 and 2532 of 1969.

51. In these two appeals the High Court upheld the view of the State Transport Appellate Tribunal that there was no valid order under Section 47(3) of the Act. In Civil Appeal No. 2524 of 1969 the Regional Transport Officer asked for the introduction of an additional bus because of heavy traffic. The Regional Transport Authority approved the proposal and thereafter invited applications under S. 57(2) of the Act. The High Court held that the Regional Transport Authority did not "pay attention to all the matters" mentioned in S. 47(1) of the Act. Civil Appeal No. 2532 of 1969 relates to a new route. There was a proposal of the Secretary, Regional Transport Authority to open the new route. The Regional Transport Authority approved the proposal and thereafter invited applications under Section 57(2) of the Act. There was a valid order under Section 47(3) of the Act in the facts and circumstances of each case. These appeals are therefore allowed and the cases are remitted to the State Transport Appellate Tribunal to be dealt with on merits.

Civil Appeals Nos. 2575, 2576 and 2584 of 1969.

52. Civil Appeal No. 2575 of 1969 relates to a stage carriage permit on a

new route. The State Transport Appellate Tribunal held that there was no valid order under Section 47(3) of the Act. The High Court upheld that view. The Regional Transport Authority, North Arcot invited applications for the stage carriage permit on the route Perampattu to Perampattu via Vishamangalam, Tiruppathur, Vengalapuram and Kuralispattu, covering a distance of 19 miles 2 furlongs. The route was opened because of representations by the public. The Secretary, Regional Transport Authority examined the question and put up a proposal before the Regional Transport Authority to open the route. The Regional Transport Authority, North Arcot approved the proposal of the Secretary. Notification under Section 57(2) of the Act invited applications for one permit. We are of opinion that there was a valid order under Section 47(3) of the Act in the facts and circumstances of the case.

53. Civil Appeal No. 2576 of 1969 relates to a stage carriage permit on an existing route. The State Transport Appellate Tribunal as well as the High Court was of the view that there was no valid order under Section 47(3) of the Act. There was a notification under Section 57(2) of the Act inviting applications for a stage carriage permit. The Regional Transport Authority further first fixed the limit of number of permits and thereafter dealt with the permit. We are of opinion that in the facts and circumstances of the case, there was a valid order under Section 47(3) of the Act.

54. Civil Appeal No. 2584 of 1969 relates to a new route. The High Court upheld the view of the State Transport Appellate Tribunal that there was no valid order under Section 47(3) of the Act. There was an application for permit. The Secretary, Regional Transport Authority, North Arcot invited applications under Section 57(2) of the Act. Thereafter application was published and representations were asked for under Section 57(3) of the Act. We are of opinion that there was a valid order under Section 47(3) of the Act.

55. These appeals are allowed and the cases are remitted to the State Transport Appellate Tribunal to be dealt with on merits on the footing that there was a valid order under Section 47(3) of the Act.

Civil Appeal No. 2608 of 1969.

56. This appeal relates to an additional stage carriage permit on the route Periakulam to Madurai. The High Court upheld the view of the State Transport Appellate Tribunal that there was no valid order under Section 47(3) of the Act. There was traffic survey of the route. The Secretary, Regional Transport Authority invited applications for the grant of permit under Section 57(2) of the Act. We are of opinion that there was a valid order under Section 47(3) of the Act in the facts and circumstances of the case. The appeal is allowed and the matter is remitted to the State Transport Appellate Tribunal to be dealt with on merits.

Civil Appeal No. 8 of 1970.

57. This appeal relates to an additional bus on the existing route. The High Court upheld the view of the State Transport Appellate Tribunal that there was no valid order under Section 47(3) of the Act. The Secretary, Regional Transport Authority made traffic survey, and thereafter submitted a proposal for the introduction of an additional bus on the route. The Regional Transport Authority approved the proposal and published notifications under Section 57(2) of the Act inviting applications for the grant of a stage carriage permit. We are of opinion that there was a valid order under Section 47(3) of the Act. The appeal is therefore allowed and the case is remitted to the State Transport Appellate Tribunal to be dealt with on merits.

Civil Appeal No. 248 of 1970.

58. This appeal relates to an additional bus on the existing route. The position is similar to that of Civil Appeal No. 8 of 1970 and for the same reasons we are of opinion that there was a valid order under Section 47(3) of the Act. The appeal is therefore allowed and the matter is remitted to the State Transport Appellate Tribunal to be dealt with on merits.

59. In these appeals, the State Transport Appellate Tribunal was of the view that there was no valid order under Section 47(3) of the Act. The High Court upheld that view. In some cases the absence of a formal order under Section 47(3) of the Act was held to be an infraction of Section 47(3) of the Act. We have held that it is not the form but the substance of the order which will have to be found out by

looking into the facts and circumstances of each case. Judged by that test we have found that where the Regional Transport Authority approves a proposal of the Secretary, Regional Transport Authority to open a new route or to have an additional permit on an existing route and thereafter notifications under Section 57(2) of the Act are made in respect of grant of a permit on a new route or an additional permit on an existing route it can be reasonably held in the totality of facts and circumstances that there has been a valid order under Section 47(3) of the Act. Similarly, in the case of inter-State and inter-regional permits where the two regions have agreed to open a new route or an additional bus and applications are accordingly invited for the grant of permit apart from our decision that Section 47(3) of the Act does not apply to these inter-State and inter-regional routes, we are of opinion that it can be reasonably held that there has been by agreement of different States or regions, as the case may be, an order deciding upon the number of permits before granting the same.

60. The next question is as to the effect of the notification under Section 57(2) of the Act. This Court in *Abdul Mateen's case*, (1963) 3 SCR 523 = (AIR 1963 SC 64) (supra) held that an advertisement under Section 57(2) of the Act inviting applications for a new route would indicate a decision of the Regional Transport Authority under Section 47(3) of the Act that the number specified in the advertisement would be the limit fixed. This decision has not been noticed by the State Transport Appellate Tribunal. In the same case this Court held that in the case of advertisement in respect of an old route it would not necessarily mean that that was the number fixed. The instance of an additional bus on an existing route was not considered in *Abdul Mateen's case*, (1963) 3 SCR 523 = (AIR 1963 SC 64) (supra). In our opinion a notification under Sec. 57(2) of the Act inviting applications for the grant of a permit for an additional bus on existing routes in the background of entire facts and circumstances of the present appeals indicates that the Regional Transport Authority had in each case arrived at a decision under Section 47(3) of the Act as to the limit of number of permits as mentioned in the notification.

61. Before the State Transport Appellate Tribunal as well as in the High Court there was some doubt as to the point of time when an order under Section 47 (3) of the Act would have to be made, namely, whether it would be before applications are made for grant of permit or whether it could be valid if it were made before grant of a permit. Section 57 (2) of the Act in relation to stage carriage permits specifies that applications shall be made for the grant of a permit not less than six weeks before the date on which it is desired that the permit shall take effect. In such a case it will not be possible for the Regional Transport Authority to fix the limit of number of permits before applications are made. On the other hand, where the Regional Transport Authority appoints dates for the receipt of applications as contemplated in Section 57 (2) of the Act it may be justifiable to hold that the Regional Transport Authority before publishing the dates for the receipt of such applications for grant of stage carriage permit will decide the number of stage carriage permits to be granted.

62. This Court in *M/s. Jaya Ram Motor Service case*, Civil Appeal No. 95 of 1965, dated 27th October 1967 (S C) (supra) said that the Authority has first to fix the limit and after having done so it will consider the applications or representations in connection therewith in accordance with the procedure laid down in Section 57 of the Act. In that decision there is another observation that the Regional Transport Authority having fixed the limit publishes the applications under Section 57(3) of the Act. Before the State Transport Appellate Tribunal and the High Court it was contended that this Court in *R. Obliswami Naidu's case*, (1969) 1 SCR 730 = (AIR 1969 SC 1130) (supra) referred to two independent steps in connection with the grant of a permit the first being the determination by the Regional Transport Authority under Section 47(3) of the Act for the number of stage carriages for which permits might be granted and the second being that "thereafter applications for stage carriage permits should be entertained" and therefore it would mean that before applications could be received there should be a determination under Section 47(3) of the Act. That position is made clear by the following ob-

servations of this Court in *Obliswami Naidu's case*, (1969) 1 SCR 730 = (AIR 1969 SC 1130) (supra):

"The question for determination is whether the determination as to the number of stage carriages required on a route should be done at a stage anterior to that of entertaining applications for stage carriage permits or that it could be done at the time it considers applications made by operators, for stage carriage permits in that route. The R. T. A. has proceeded on the basis that that question can be decided while considering the applications made to it for permits by operators whereas the Appellate Tribunal and the High Court have taken a contrary view. Sub-section (3) of Section 47 of the Act if read by itself does not throw any light on the controversy before us but if Ss. 47 and 57 of the Act are read together it appears to us to be clear that the view taken by the Appellate Tribunal and the High Court is the correct view".

63. It is in this context that this Court said in *Obliswami Naidu's case*, (1969) 1 SCR 730 = (AIR 1969 SC 1130) (supra) that the limit could not be fixed at the time of consideration of applications because thereby public interest might not gain the dominant consideration and on the contrary the decision of the Regional Transport Authority might be influenced by personal consideration or predilection for the applicants. There should not be any room for elasticity of the number of permits at the time of consideration of applications for the grant. It is in the scheme of the Act that limit should be fixed before the grant of permit and proper effect can be given to these provisions by deciding upon the limit of number of permits before applications for grant of permits are invited under Section 57(2) of the Act and in other cases before applications for grant of permits are published under S. 57(3) of the Act to enable persons to make representations. The central idea is that applicants and those who will make representations should all know the limit of number of permits to be granted in order to ensure free and fair competition.

64. In some of the present appeals, the High Court held that where order under Section 47(3) of the Act was made at a sitting on the same day on which the Regional Transport Authority considered the applications for grant of

permits, there was not sufficient space of time between the order under Section 47(3) of the Act and the order for the grant of permit and thereby persons aggrieved by order under Section 47(3) of the Act could not prefer any appeal. We have already pointed out that the provision for appeal against an order under S. 47(3) of the Act is an adequate answer. Furthermore in some of the present appeals all parties competed for the grant and never challenged the proceedings on the ground that there was no order under section 47 (3) of the Act and were allowed by the State Transport Appellate Tribunal to question the want of a valid order of limit of number of permits. Therefore in these cases the matter is of no importance. These are special features in some of the present appeals. These will not happen when the Regional Transport Authority will decide the limit before notification under section 57 (2) or publication of application under section 57 (3) of the Act as the case may be.

65. In our opinion, the provisions of the Act in regard to stage carriage permits have the following consequences. If the Regional Transport Authority were to appoint a date for the receipt of applications for the grant of stage carriage permits, the Regional Transport Authority should fix the limit of the number of permits which might be granted and then notify the same under section 57 (2) of the Act. If, on the other hand, applications were sent by persons *suo motu* for the grant of permit the applications would have to be published and the representations would have to be asked for. The proviso to section 57 (3) of the Act furnishes the answer that if the grant of any permit in accordance with the application would have the effect of increasing the number of permits beyond the limit fixed under section 47 (3) of the Act, the Regional Transport Authority might summarily refuse the application without following the procedure laid down in S. 57 of the Act. In other cases, the proper stage for fixing the limit under S. 47 (3) of the Act would be after applications are received and before the same would be published under section 57 (3) of the Act asking for representations. If however the Regional Transport Authority would not increase or modify the number of permits which

already exist, the grant of an application would mean transgressing the limit fixed, and the procedure laid down in section 57 (3) of the Act need not then be followed. On the other hand, if the Regional Transport Authority on receipt of applications would decide upon the limit of permits and the grant thereof would be within the limit prescribed then the procedure laid down in section 57 (3) of the Act would be followed. Though this scheme of the statute which is outlined here has not been followed in all the appeals in the present case, we have found that the Regional Transport Authority in some cases fixed the limit of number of permits before it actually considered the applications for grant of permit and all parties competed for the grant on that basis and no one expressed any grievance at that time. The contention as to validity of order under section 47 (3) of the Act was raised subsequently at the time of hearing of appeal against refusal of permit. We have found that there was notification under section 57 (2) of the Act and we have held in the facts and circumstances of the case that there was a valid order under section 47 (3) of the Act. In few cases it was said that the order of fixing the limit was done at the same sitting along with the hearing but in the facts and circumstances of those particular cases we have found that there was a notification under section 57 (2) of the Act inviting applications for the grant of permits on new routes or additional bus on existing routes, and it could therefore be held in those cases that there was a valid order under section 47 (3) of the Act.

66. The parties in all the appeals will bear their own costs because of the special features in these cases. First, no appeal was preferred against any order under section 47 (3) of the Act. Secondly, the point was canvassed before the State Transport Appellate Tribunal without specific ground in that behalf. Thirdly, all parties competed for the permit on the basis of the limit fixed by the Regional Transport Authority and the decision in that behalf was conveyed to all the parties. Finally, the State Transport Appellate Tribunal did not deal with the merits of the appeals pending before the said Authority and the matters are remitted to that Authority.

In other cases where either the appeal has been allowed or the matter is remitted to the High Court, the parties will bear their own costs.

Appeals allowed.

AIR 1970 SUPREME COURT 1559 (V 57 C 328)

[From Calcutta: (1965) 58 ITR 149]
J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

The Star Co. Ltd., Appellant v. The Commissioner of Income-tax (Central) Calcutta, Respondent.

Civil Appeals Nos. 1204 and 1205 of 1968, D/- 29-4-1970.

Income Tax Act (1922), S. 23A (i)—
Explanation — Company in which
public are substantially interested —
Proof — (1965) 58 ITR 149, Reversed.

Where it is proved that the shares of the company carrying not less than 25 p.c. of the voting power have been allotted unconditionally to or is acquired unconditionally by the public, the company can be deemed to be a company in which public are substantially interested provided it is further proved that either (a) any such shares have in course of the previous year been the subject of dealing on any stock exchange, or (b) that the shares are in fact freely transferable by the holders to other members of the public. Since conditions in (a) and (b) are alternative, proof of any of the conditions is only necessary. (1965) 58 ITR 149, (Cal) Reversed.

(Paras 2, 4)

The following Judgment of the Court was delivered by

SHAH, J.: Explanation to S. 23A (i) of the Indian Income-tax Act, 1922 before it was amended by Finance Act 1955 (in so far as it is material for the purpose of these appeals) provided:

"A company shall be deemed to be a company in which the public are substantially interested if the shares of the company. . . carrying not less than 25 p.c. of the voting power had been allotted unconditionally by and are at the end of the previous year beneficially held by the public (not including a company to which the provision of this section applies), and if any such shares have in course of any previous year been the subject of deal-

ings of any stock exchange in the taxable territories or are in fact freely transferable by the holders to other members of the public."

2. For a company to be deemed a company in which the public are substantially interested, two conditions must co-exist, (1) the shares of the company carrying not less than 25 p. c. of the voting power must have been allotted unconditionally to or acquired unconditionally by the public, and (2), (a) that any such shares have in course of the previous year been the subject of dealings on any stock exchange, or (b) that the shares are in fact freely transferable by the holders to other members of the public.

3. It is common ground that condition (1) is satisfied in this case. In respect of condition (2) there was controversy and this Court by order dated February 11, 1969 directed the Income-tax Appellate Tribunal to submit a supplementary statement of case on the following four points:

(i) whether the shares were quoted in the Calcutta Stock Exchange in the "cash section" or the "forward section";

(ii) whether the heading of the bulletin of the Calcutta Stock Exchange represents the actual transactions which have already taken place;

(iii) whether there was any fluctuation in the price of the shares; and

(iv) the number of quotations in the two years of account.

4. The Tribunal has submitted a statement of case that (1) that the shares were quoted in the "cash section", (2) that the heading in the bulletin represents actual transactions which have taken place, (3) that there were fluctuations in the price of the shares, and (4) that transactions in share took place daily. In view of these findings it must be held that the first part of condition (2) is satisfied. Since the two parts of condition (2) are alternative, it is unnecessary to consider whether the second part of condition (2) is satisfied in this case. In the view we take, both the conditions, on the satisfaction of which a company may be deemed a company in which the public are substantially interested, are satisfied.

5. The appeals must therefore be allowed and the question submitted by the Tribunal will be answered in the negative. The Commissioner will pay

the costs of the company in this Court. One hearing fee.

Appeals allowed.

AIR 1970 SUPREME COURT 1560 (V 57 C 329)

(From: Calcutta)

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

Commissioner of Income-tax, West Bengal-II. Appellant v. Rajasthan Mines Ltd., Calcutta, Respondent.

Civil Appeals Nos. 1627 and 1628 of 1968, D/- 5-5-1970.

(A) Income Tax Act (1922), S. 9 — Income from property — Assessee Company under conveyance acquiring proprietary right in leased out lands with the right to realise and recover arrears of rent and royalties — Assessee not having any right in property prior to conveyance in its favour — Assessee entitled to arrears of rent and royalty as purchaser of those rights and not as owner of the property — Sums receivable by assessee as arrears of rent and royalty not assessable as income of assessee. Decision of Calcutta High Court Affirmed.

(B) Income Tax Act (1922), S. 66 — Reference to High Court — Finding of fact by Tribunal that purchase and sale of lands were in course of business of assessee — Finding based on inference from primary facts found by Tribunal — High Court can examine the correctness of inferences drawn by Tribunal. AIR 1959 SC 359 Relied on.

(Para 9) Cases Relferred: Chronological Paras (1959) AIR 1959 SC 359 (V 46) = 35 ITR 594, G. Venkata Swami Naidu and Co. v. Commr. of I. T.

Following Judgment of the Court was delivered by

HEGDE, J.: This appeal by certificate arises from the decision of the Calcutta High Court rendered in a reference made to it by the Income Tax Appellate Tribunal, 'B' Bench, Calcutta under S. 66 (1) of the Indian Income-tax Act, 1922 (which will hereinafter be referred to as the 'Act'). Along with its statement of case, the tribunal submitted two questions to the High Court for its opinion. They are:

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"(1). Whether on the facts and in the circumstances of the case, the sums of Rs. 2,55,733/- and Rs. 3,00,332/- receivable by the assessee as arrears of royalty and rent were assessable as the income of the assessee for the assessment years 1948-49 and 1950-51 respectively? and

(2) Whether on the facts and circumstances of the case the sum of Rupees 2,80,000/- being the surplus derived by the assessee on sale of property was assessable as the income of the assessee for the assessment year 1950-51."

2. The facts set out in the statement of the case, in brief, are as follows:

The assessee, M/s. Rajasthan Mines Ltd. is a public limited Company incorporated on January 23, 1947. The Raja of Ramgarh was the landlord of the North and South Karanpura fields covering about 312 villages. Those tracts of lands were rich in coal and fireclay. M/s. Karanpura Development Co. Ltd., held coal mining licence in about 14 of those villages. It also held fireclay leases in about 8 villages and leases of other minerals in portions of two villages. That Company had also a prospecting licence for the coal in the said fields with the option to take further coal mining leases. The leases were also held by three other parties namely South Karanpura Development Ltd., Janab Mohammad Kamruddin and Jagdish Prasad Bhagat in respect of other parcels of land, in these fields. By an indenture dated December 22, 1947 (registered on the 26th of February, 1948), in pursuance of agreements dated September 20, 1945 and August 7, 1947, the assessee acquired from the Raja of Ramgarh proprietary interest in all those leased out lands, more fully specified in the schedule appended to the said indenture. By the said indenture, the Raja of Ramgarh also transferred and assigned to the assessee his right to receive the arrears of rent and royalty from the lessees with effect from September 1, 1946. The consideration paid by the assessee for the acquisition of the proprietary rights with the right to realise and recover the arrears of rent and royalties was Rs. 5 lacs.

3. For the assessment year 1948-49, the Income-tax Officer assessed the entire amount of arrears of rent and royalty receivable from the said lessees, from September 1, 1946 upto the

date of conveyance namely December 22, 1947, as the assessee income for the previous year ended on the 31st March, 1948. The net amount included in the assessment under that head was Rs. 2,55,733/-.

4. In the previous year ended on December 31, 1949 relevant for the assessment year 1950-51, the assessee purchased another lot of villages from the Raja of Ramgarh as per the conveyance dated January 24, 1949, in pursuance of the agreements already referred to for a consideration of Rs. 2 lacs with all arrears of rent and royalty which on December 31, 1948 amounted to Rs. 3,00,332/-. On August 13, 1949, the assessee sold away his right, title and interest in the major portion of the villages acquired under the aforesaid deeds of conveyance dated December 22, 1947 and January 24, 1949 to Sirka Valley Coal Co. Ltd. and three other parties for a total sum of Rupees 7,50,000/-. The Income-tax Officer treated the entire arrears of rent and royalty amounting to Rs. 3,00,332/- as revenue receipts of the assessee taxable during the assessment year 1950-51. He also treated the sale of the lands by the assessee as a business transaction and taxed a sum of Rupees 2,20,000/- as the net profit of the assessee arising from the sale, which profit was recomputed by the Appellate Assistant Commissioner at Rupees 2,80,000/-. The Income-tax Appellate Tribunal agreed with those conclusions.

5. The High Court of Calcutta differing from the conclusions reached by the Income-tax Officer, Appellate Assistant Commissioner and the Tribunal came to the conclusion that the sums of Rs. 2,55,733/- and Rs. 3,00,332/- receivable by the assessee as arrears of royalty and rent were not assessable as the profits of the assessee for the assessment years 1948-49 and 1950-51 respectively. It also disagreed with the conclusions reached by the Income-tax Officer, Appellate Assistant Commissioner and the Tribunal that profit made by the assessee by the sale of the properties purchased from Raja of Ramgarh was assessable as the income of the assessee for the assessment year 1950-51. Aggrieved by that order, the Commissioner of Income-tax, West Bengal has come up in appeal to this Court.

6. We are in agreement with the High Court that the purchase of the right to collect arrears of rent and royalty cannot be considered as an income. It is true that the assessee purchased the lessor's right from the Raja of Ramgarh in pursuance of the agreements entered into by the Raja of Ramgarh with third parties whose rights had been acquired by the assessee. The assessee company had been incorporated, as seen earlier, on January 23, 1947. Therefore it could not have got any right in the property prior to the conveyance in its favour on December 22, 1947. As per the terms of the said conveyance, the assessee became entitled to the arrears of rent and royalty as a purchaser of those rights. It had no right to collect those arrears of rent and royalty as the owner of the property. It may be that in determining the price payable under the conveyance, the arrears of rent and royalty were not taken into consideration. But that does not change the nature of the right acquired by the assessee. Hence we agree with the High Court that the first question referred to earlier must be answered in favour of the assessee.

7. Now coming to the second question, according to the assessee, it purchased the tracts of land in question with a view to win mines but for want of finance, it was compelled to sell the same. The primary facts found by the tribunal are: (1) the assessee was heavily indebted to Raja of Ramgarh but there was no evidence to show that the Raja was pressing for the payment of the amount due to him; (2) the memorandum of association of the assessee gave it power to acquire, sell and dispose of and deal with mines and mining properties; (3) as a major part of the land purchased by the assessee was in the possession of the other mining Companies, it was not possible for the assessee to undertake any large scale and profitable mining operations; (4) the assessee sold the lands purchased by it for a profit and (5) the properties purchased were sold very soon after they were purchased.

8. The above findings did not afford any basis to the tribunal to come to the conclusion that the purchases made by the assessee and the subsequent sale were in the nature of a trading adventure. The circumstance that the memorandum of associa-

tion of the assessee permitted the assessee to acquire, and sell and dispose of and deal with mining properties is an inconclusive one. It is not shown that the assessee had acquired or sold any other property. The fact that the assessee sold property purchased by it for profit is not decisive in finding out whether the sale was effected in the course of the business of the assessee. From the fact that the assessee could not undertake large scale and profitable mining in the area which was in its possession, no inference may be drawn that lands were acquired with a view to sell later on, nor the circumstance that the properties were sold very soon after they were purchased affords any basis for the conclusion that the sale in question was effected in the course of the business. The primary facts found either individually, or collectively could not have afforded a basis for arriving at the conclusion that the transaction in question was an adventure in trade.

9. It was urged on behalf of the Revenue that the finding of the tribunal that the purchase and sale of lands were made in the course of business being a finding of fact, it was not open to the High Court to interfere with that finding. But as observed by this Court in *G. Venkataswami Naidu and Co. v. Commissioner of Income-tax*, 35 ITR 594 = (AIR 1959 SC 359). If the finding of fact is based on an inference from the primary evidentiary facts proved in the case, its correctness or validity is open to challenge in reference proceedings within narrow limits. It is open to the parties to challenge a conclusion of fact drawn by the tribunal on the ground that it is not supported by any legal evidence or that the impugned conclusion drawn from the relevant facts is not rationally possible. If such a plea is established, the Court has to consider whether the conclusion in question is not perverse and should not, therefore, be set aside. On the facts of this case the High Court was justified in examining the correctness of the inference drawn by the Tribunal on the basis of the primary facts found by that Tribunal.

10. For the reasons mentioned above, we agree with the High Court that the second question referred to it for its opinion must also be answered in favour of the assessee.

11. In the result these appeals fail and they are dismissed.

Appeals dismissed.

AIR 1970 SUPREME COURT 1563
(V 57 C 330)

(From: Patna (1966) 61 ITR 236)

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

India Machinery Stores (P) Ltd., Appellant v. C. I. T. Bihar and others, Respondents.

Civil Appeal No. 376 of 1967, D/- 6-5-1970.

Income Tax Act (1922), S. 66A (2)—Certificate under — Question of law to be decided must be set out in certificate.

The right to obtain a certificate under S. 66A (2) arises only when in the proposed appeal a question of great public or private importance arises. It cannot be held that because a question of law alone may be referred to the High Court under Section 66 in the proposed appeal a question of law of great public or private importance necessarily arises. (Para 12)

In certifying the case under S. 66A (2) as fit for appeal to the Supreme Court the High Court must set out the question of law which the Supreme Court has to decide. The certificate or the order certifying the case must disclose that some substantial question of public or private importance arises in the case, and on that account the case is certified to be fit for appeal. Case law discussed. (Para 13)

Cases Referred: Chronological Paras (1932) AIR 1932 PC 178 (V 19)=

59 Ind App 290, Commr. of I. T. Central Provinces and Berar v. Sir S. M. Chitnavis 10

(1927) AIR 1927 PC 242 (V 14)= 54 Ind App 421, Delhi Cloth and General Mills Co. Ltd. v. Income Tax Commr. Delhi 6

(1921) AIR 1921 PC 25 (V 8)= 48 Ind App 31, Radhakrishna Ayyar v. Swaminath Ayyar 9

(1901) 28 Ind App 11=ILR 23 All 227 (PC), Banarasi Parshad v. Kashi Krishna Narain 17

(1901) 28 Ind App 182 = ILR 23 All 415 (PC), Radha Krishn Das v. Rai Krishn Chand 8

Following Judgment of the Court was delivered by

SHAH, J.: This appeal is filed with certificate granted by the High Court of Patna under S. 66A (2) of the Indian Income-tax Act, 1922.

2. The India Machinery Stores (P) Ltd. is a private company incorporated with the object of taking over the business carried on by the India Machinery and Mills Stores — hereinafter called 'the vendors'. By an agreement dated August 2, 1956, the Company agreed to purchase all the assets of the vendors, goodwill and the "book-debts and other liabilities and claims against the Company" as on the date of transfer in consideration of allotment of 260 fully paid-up shares of the Company of the nominal value of Rs. 2,60,000/-. It was provided by cl. 4 of the agreement:

"That all assets of the vendors in respect of all its business shall be taken over at the book value standing in the books of accounts of the vendors as on the 1st August One Thousand Nine Hundred Fifty-six."

3. In a proceeding for assessment to tax for 1958-59, the Income-tax Officer found that in the books of the vendors the "value of stock" as on August 1, 1956 was Rs. 1,77,285/- while in the books of the Company the opening stock taken over by the Company was valued on the same day at Rupees 2,10,285/-. The Income-tax Officer held that the valuation by the Company of the opening stock was in "clear violation of the terms of agreement between the vendors and the Company" and added a sum of Rs. 33,000/- representing the difference between the value of the closing stock in the books of account of the vendors and the opening stock in the books of account of the Company. The order was confirmed in appeal by the Appellate Assistant Commissioner and by the Income-tax Appellate Tribunal.

4. The High Court of Patna recorded their answer in the affirmative on the following question referred by the Tribunal:

"Whether on the facts and circumstances of the case and upon a construction of the agreement of 2nd August, 1956, the Tribunal was justified in holding that the sum of Rupees 33,000/- forms part of the assessable profits of the assessee Company?"

A Division Bench of the High Court

certified the case under S. 66A (2) of the Act as fit for appeal to this Court, observing:

"That the case fulfils all the requirements of S. 66A (2) of the Indian Income-tax Act, 1922, and is a fit case for appeal to the Supreme Court."

5. At the hearing of the appeal on behalf of the Commissioner of Income-tax, it is contended that the appeal is incompetent, since the High Court is certifying the case as fit for appeal to this Court did not set out the question of law which this Court has to decide. It was urged that the certificate or the order certifying the case must disclose that some substantial question of public or private importance arises in the case, and on that account the case is certified to be fit for appeal. In our judgment, the contention must be accepted.

6. Section 66A of the Indian Income-tax Act, 1922, which was added by the Indian Income-tax (Amendment) Act 24 of 1926 by sub-s. (2) provides:

"An appeal shall lie to the Supreme Court from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to the Supreme Court."

The phraseology of sub-s. (2) of S. 66A of the Income-tax Act is substantially the same as used in S. 109 (c) of the Code of Civil Procedure, 1908, Art. 133 (1) (c) and Art. 134 (1) (c) of the Constitution. The Judicial Committee in *Delhi Cloth and General Mills Company Ltd. v. Income-tax Commissioner, Delhi*, 54 Ind App 421 = (AIR 1927 PC 242) observed:

"... it will be noticed that the appeal thereby given is by sub-s. (2) confined to a case which the High Court certifies "to be a fit one for appeal to His Majesty in Council". These words are textually the same as the concluding words of S. 109 (c) of the Code of Civil Procedure, and coupled with the carefully limited referential words to the Code of Civil Procedure in sub-s. (3) suffice, in their Lordships' judgment, to exclude from any right of appeal cases which fall within the requirements of S. 110 of the Code, and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council."

7. In *Banarsi Parshad v. Kashi Krishna Narain* (1901) 28 Ind App 11 (PC) the Judicial Committee explained that

the expression "certifies to be a fit one for appeal" in the Code of Civil Procedure is clearly intended to meet special cases — such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion, evinced by a fitting certificate.

8. In *Radha Krishn Das v. Rai Krishn Chand*, (1901) 28 Ind App 182 (PC) a Division Bench of the Allahabad High Court had issued a certificate stating that "though the valuation of the case was below Rs. 10,000/- yet as regards the value and nature of the case it fulfilled the requirements of Section 596 of Act No. XIV of 1882 (Code of Civil Procedure)". In that case the value of the subject-matter was less than Rs. 10,000/- and the Judicial Committee observed that even though S. 596 was referred to there was nothing to show that the Judges who had issued the certificate "had exercised their judicial discretion upon the matter in deciding whether, in order to comply with S. 595 (c) and S. 600 the case was a fit one for appeal to Her Majesty in Council." On that ground the appeal was dismissed as incompetent.

9. In *Radhakrishna Ayyar v. Swaminath Ayyar*, 48 Ind App 31 = (AIR 1921 PC 25) the High Court granted a certificate in a case in which the claim was Rs. 4,560/- due as rent. The certificate recited:

"It is hereby certified that, as regards the value of the subject matter and the nature of the question involved, the case fulfils the requirements of Ss. 109 and 110 of the Code of Civil Procedure, and that the case is a fit one for appeal to His Majesty in Council."

The Judicial Committee observed that where any certificate is granted certifying a case, it is of the utmost importance that the certificate should show clearly upon which ground it is granted. In dealing with the argument that the case covered by Section 109 (c) of the Code of Civil Procedure, 1908, their Lordships observed:

"There is no indication in the certificate of what the nature of the ques-

tion is that it is thought was involved in the hearing of this appeal, nor is there anything to show that the discretion conferred by S. 109 (c) was invoked or was exercised. Their Lordships think x x that these certificates are of great consequences, that they seriously affect the rights of litigant parties, and that they ought to be given in such a form that it is impossible to mistake their meaning upon their face."

10. Again, the Judicial Committee observed in *Commr. of I. T. Central Provinces and Berar v. Sir S. M. Chitnavis* 59 Ind App 290 = (AIR 1932 PC 178) that when a certificate is granted under S. 66A of the Income-tax Act it must be on a question affecting not only a particular assessee and depending upon the state of the evidence in a particular case, but a question of great public importance affecting assesses generally and depending upon general principles.

11. In granting the certificate the High Court merely observed that it was "a fit case for appeal to the Supreme Court"; they did not indicate the grounds which persuaded them to hold that it was a fit case for appeal to this Court. It would be conducive to better administration of justice if in certifying a case under Section 66A (2) of the Indian Income-tax Act as a fit case for appeal, the High Court sets out the question of law which they regard as of great public or private importance which falls to be decided by this Court.

12. Mr. Chagla contended that the rules laid down by the Judicial Committee applicable to a certificate issued under Section 109 (c) of the Code of Civil Procedure, 1908, and under S. 596 of the Code of 1882, in regard to appeals in civil matters have no bearing in determining the meaning of S. 66A (2), for the High Court exercises advisory jurisdiction on a reference on questions of law and on that account even if the question of law which in the view of the High Court arises is not stated in the certificate, it may be presumed when the High Court has certified a case to be fit for appeal, that a substantial question of law is involved, and the technical defect in the certificate may be ignored. We are unable to accept that argument. It is true that under S. 66 (1) and (2) of the Indian Income-tax Act, 1922, only a

question of law may be referred to the High Court for opinion, but the right to obtain a certificate under S. 66A (2) arises only when in the proposed appeal a question of great public or private importance arises. It cannot be held that because a question of law alone may be referred to the High Court under S. 66 of the Indian Income-tax Act, in the proposed appeal a question of law of great public or private importance necessarily arises. Any other view, would make every opinion of the High Court in a reference under S. 66 appealable to this Court. In our view, the certificate granted by the High Court was defective.

13. It was also urged that a practice is fairly common in some of the High Courts to certify a case under S. 66A (2) without recording any reasons or the grounds for certifying the case, and we may not penalise the Company when we are enunciating the true rule for the first time. But the practice, in our judgment, was laid down many years ago by the decisions of the Judicial Committee that a certificate under S. 66A (2) which does not set out precisely the grounds or raise a question of great public or private importance does not comply with the requirements of the Act. The jurisdiction of this Court to entertain an appeal from the opinion recorded under the Indian Income-tax Act arises only when a certificate is properly issued by the High Court or when this Court grants special leave under Art. 136 of the Constitution.

14. In our judgment, there is again no merit in the appeal. By cl. 4 of the agreement dated August 2, 1956, it was expressly provided:

"That all assets of the vendors in respect of all its business shall be taken over at the book value standing in the books of accounts of the vendors as on the 1st August One Thousand Nine Hundred Fifty-six."

It is undisputed that the stock-in-trade was entered in the books of account of the vendors on the date of transfer of the undertaking at Rs. 1,77,285/- and the Company valued the stock-in-trade at Rs. 2,10,285/-. It is true that to the deed of transfer is annexed a Schedule of the assets and liabilities taken over by the Company and in the Schedule the value of stocks at Patna, Muzaffarpur and Purnea is shown at Rs. 2,10,285.87. No attempt

was made to explain the discrepancy between the operative part of the agreement and the valuation shown in the Schedule. The Income-tax Officer was of the view that the Company had inflated the opening stock so as to reduce the ultimate profits. That view was confirmed by the Appellate Assistant Commissioner and by the Tribunal. No question of law arose out of the order of the Tribunal. The reference itself was incompetent.

15. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1566
(V 57 C 331)

(From: Punjab)

A. N. RAY AND I. D. DUA, JJ.

Tapinder Singh, Appellant v. State of Punjab and another, Respondents.

Criminal Appeal No. 244 of 1969, D/- 7-5-1970.

(A) Criminal P. C. (1898), S. 154 — First information reports — What constitutes — Anonymous telephone message at police station that firing had taken place at a taxi stand — Mere fact that this information was first in point of time does not by itself clothe it with character of first information report. (Para 4)

(B) Criminal P. C. (1898), S. 162(2) — Dying declaration — Falls within S. 32 (1) Evidence Act and is outside prohibition in Section 162 (1) and is relevant. (Para 4)

(C) Constitution of India, Article 136 — Appraisal of evidence by Supreme Court — Evidence given by eye-witnesses believed by High Court — Supreme Court will not ordinarily examine evidence afresh for itself — Original document missing from record — Case being of a serious nature Supreme Court undertook to examine evidence in respect of the document. Criminal Appeal No. 120 of 1963, D/- 10-8-1965 (SC), Rel. on. (Para 4)

(D) Evidence Act (1872), Section 32 — Dying declaration — Admissibility — Duty of Court — Conviction on its basis.

A dying declaration is admitted in evidence on the principle of necessity. The fact that it is not tested by cross-examination on behalf of the accused

FN/FN/C384/70/DH2/P

merely serves to put the Court on its guard by imposing on it an obligation to scrutinize all the relevant circumstances. If the dying declaration is acceptable as truthful then even in the absence of other corroborative evidence the Court can act upon it and convict the accused. AIR 1958 SC 22 and AIR 1962 SC 439, Rel. on.

(Para 5)

(E) Penal Code (1860), Section 302 — Sentence — Offence committed deliberately and pre-planned — Capital sentence held not excessive.

(Para 8)

Cases Referred: Chronological Paras

(1965) Criminal Appeal No. 120 of 1963, D/- 10-8-1965 (SC), Ishwarlal Nanilal v. State of Gujarat 4

(1964) AIR 1964 Punj 508 (V 51) = 1964 (2) Cri LJ 718, Saroop Singh v. State of Punjab 4

(1962) AIR 1962 SC 439 (V 49) = 1962 Supp (1) SCR 104, Harbans Singh v. State of Punjab 5

(1958) AIR 1958 SC 22 (V 45) = 1958 SCR 552 = 1958 Cri LJ 106, Khushal Rao v. State of Bombay 5

The following Judgment of the Court was delivered by

DUA, J. — In this appeal by special leave the appellant challenges his conviction and sentence under Section 302, I. P. C. for the murder of his brother-in-law (husband of his wife's sister). The occurrence is stated to have taken place on Sunday October 8, 1968 at about 4.45 p. m. near the clock tower in Ludhiana City. It is not disputed that on August 13, 1968 the appellant Tapinder Singh, a business man and a Municipal Commissioner, had lodged a first information report (Ex. PR) with the police station, Sadar, Ludhiana against Kulwant Singh, deceased whom he described as his Sandhu (his wife's sister's husband) and one Ajit Singh, alleging that on the pretext of consulting him they had taken him in their car to the canal near the Agricultural College and after getting down from the car, when they had walked about 150 paces on the banks of the canal, the deceased Kulwant Singh, saying that he would teach the appellant a lesson, whipped out a clasp-knife and attacked him. Ajit Singh also shouted that the appellant should not be allowed to escape. The appellant rais-

ed alarm and tried to run away. While endeavouring to ward off with his right hand the knife blow by Kulwant Singh the appellant's right hand palm got wounded and started bleeding. Just at that moment Gurmel Singh, Sarpanch and Shamsheer Singh, Lambardar, happened to pass that way in a car. They stopped the car. In the meantime Kulwant Singh and Ajit Singh got into their car and went away. Pursuant to this report admittedly a criminal case was pending against the deceased when the occurrence in question took place. Kulwant Singh, deceased, who had been arrested pursuant to that report, in a case under S. 307/324, I. P. C., was actually on bail on the date of the occurrence. According to the prosecution Gurdial Singh (P. W. 7), father of the deceased Kulwant Singh is employed as Works Manager in the Ludhiana Transport Company, which is a private concern and which plies buses on different routes in Ludhiana District. Gurdial Singh is also a share-holder of this Company. The workshop, the office and the taxi stand of this Company are located in Sarai Bansidhar which faces the clock tower. Gurdial Singh, in addition, owns two taxis which he runs on hire. He also owns two private cars which are used both for personal requirements and as taxis. The deceased used to look after these four vehicles. The father and the son used to live together in Model Town. The two taxis used to remain at the Taxi Stand about 100 yards away from the clock tower whereas the other two cars used to be parked at Gurdial Singh's business premises. On August 8, 1968 at about 4.45 p.m. the deceased was sitting on a Takhat posh at the Taxi Stand. It being a Sunday the shops in the neighbourhood were closed. Shersingh (P. W. 9) was standing close to the Takhat posh. Harnak Singh, the driver of one of the taxis and Gurdial Singh were also present. At the taxi stand there was at that time only one taxi belonging to Gurdial Singh. The appellant came from the side of the railway station and fired at the deceased five shots from his pistol. After receiving three shots the deceased dropped down and the remaining two shots hit him when he was lying. The persons present there raised an alarm, shouting 'Don't kill; don't kill'. The appellant, after firing the shots, briskly walked back towards the railway

station. The deceased who was bleeding profusely was taken in the taxi by Gurdial Singh, his father and Harnak Singh, the driver, to Dayanand Hospital where they were advised to take the injured to Brown's Hospital because his condition was serious. It is in evidence that some person had telephoned to the City Kotwali, Ludhiana on the day of the occurrence at about 5.30 p.m. informing the police authorities that firing had taken place at Taxi Stand, Ludhiana. The person, giving the information on telephone, did not disclose his identity; nor did he give any further particulars. When the police officer receiving the telephone message made further enquiries from him he disconnected the telephone. This report was entered in the daily diary at 5.35 p.m. The Assistant Sub-Inspector, Hari Singh, along with Assistant Sub-Inspectors Amrik Singh, Jagat Singh and Brahm Dev and constables Prakash Singh, Harbhajan Singh and Harbans Lal, left the police station in a government jeep for the Taxi Stand, Ludhiana near Jagraon Bus Stand on the Grand Trunk Road, about a furlong and a half away from the City Kotwali Police Station. From there Hari Singh learnt that the injured man had been removed by some persons to Dayanand Hospital. As it was rumoured at the place of the occurrence that the appellant Tapinder Singh had shot at the deceased, Hari Singh deputed Amrik Singh and Brahm Dev to search for him. Hari Singh himself, along with Sub-Inspector Jagat Singh and the police constables left for Dayanand Hospital. From there they went to the Civil Hospital and then they proceeded to C. N. C. Hospital at about 6.30 p.m. On enquiry they were informed that Kulwant Singh had been admitted there as an indoor patient. Hari Singh went upstairs in the Surgical Ward and obtained the report (Ex. PH/13) prepared by Dr. B. Pothan who was in the Surgical Ward where Kulwant Singh was lying. The statement of Kulwant Singh (Ex. PH) was also recorded by him at about 6.50 p.m. in that ward and the same after being read out by him was thumb marked by Kulwant Singh as token of its correctness. That statement was forwarded to the police station, City Kotwali for registration of the case under S. 307, I. P. C. Exhibit PM was also attested by Dr. Sandhu, House Surgeon. Hari

Singh deputed Assistant Sub-Inspector, Jagat Singh to arrange for a Magistrate for recording Kulwant Singh's dying declaration in the hospital. The statement of Gurdial Singh, father of the deceased was also recorded there at about 7.20 p.m. Jagat Singh, A. S. I. brought Shri Sukhdev Singh, P. C. S., Judicial Magistrate, First Class, to the Hospital at about 7.30 p.m. The dying declaration was, however, recorded at about 8.30 p.m. because Kulwant Singh was not found to be in a fit state of health to make the statement earlier. Kulwant Singh died at the operation theatre the same midnight. Pursuant to Ex. PH/13 first information report was registered and the appellant committed to stand his trial for an offence under S. 302, I. P. C.

2. The learned Additional Sessions Judge, believing Gurdial Singh (P. W. 7), Sukhdev Singh, Judicial Magistrate (P. W. 10) and Mukhtiar Singh, H. C. (P. W. 6) held proved the motive for the crime viz. that the appellant suspected illicit intimacy between his wife and the deceased who was married to her elder sister. According to the trial Judge the appellant for this reason bore a grudge against the deceased. The three eye-witnesses, Gurdial Singh, (P. W. 7), Harnak Singh (P. W. 8) and Sher Singh (P. W. 9) were held to have given a true and correct account of the occurrence and being witnesses whose presence at the place of occurrence was natural their evidence was considered trustworthy, which fully proved the case against the accused. The dying declaration was also found to be free from infirmity and being categorical and natural the court considered it sufficient by itself to sustain the conviction. The circumstantial evidence, including that of the recovery of blood-stained earth from the place of occurrence, the recovery of blood-stained clothes of the deceased, the fact of the accused having absconded and the recovery of the pistol and cartridges were also held to corroborate the prosecution story. Omission on the part of the prosecution to produce a ballistic expert was considered to be immaterial and it was held not to weaken or cast a doubt on the prosecution case because the oral evidence of eye-witnesses to the commission of the offence impressed the court to be trustworthy and acceptable. The trial

court also took into consideration the allegations contained in an application presented by Gurdial Singh (P. W. 7) in the course of the committal proceedings in the court of Shri Mewa Singh Magistrate, on Nov. 20, 1968 to the effect, inter alia, that an attempt was being made on behalf of the accused to tamper with the prosecution witnesses. The trial court convicted the accused under S. 302, I. P. C. and imposed capital sentence.

3. On appeal the High Court rejected the criticism on behalf of the accused that the occurrence had not taken place at the spot and in the manner, deposed to by the eye-witnesses. On a detailed and exhaustive discussion of the arguments urged before the High Court it came to this conclusion.

"... that there was motive on the part of the appellant to commit this crime, that the three eye-witnesses produced by the prosecution are reliable, they were present at the time of the occurrence and have given a correct version of the incident and that the medical evidence fully supports the prosecution and no suspicion is attached to it. The deceased made more than one dying declaration and we are satisfied that they were not induced and that the deceased gave a correct version of the incident. The suggestion made that Tapinder Singh has been roped in on suspicion is not correct because implicit in such an argument is the suggestion that the crime was committed by somebody else. It was broad day light, the assailant must have been identified and consequently we are satisfied that the offence has been fully brought home to the appellant. The place of the occurrence does not admit of any doubt because there is good deal of evidence on the record that blood was recovered from where the Takhat posh was kept by Gurdial Singh and there is no suggestion that the blood was found from anywhere else.

The learned counsel has then urged that the offence does not fall under section 302, Indian Penal Code, but no reasons have been given as to why this is not an offence punishable under section 302, Indian Penal Code.

Learned counsel urged that something must have happened which induced Tapinder Singh to commit this crime. There is nothing on the record, not even a suggestion, that anything

happened. Tapinder Singh came armed with a pistol and fired as many as five shots at Kulwant Singh, two of which he fired on his back when Kulwant Singh had fallen on the ground. The appellant, therefore, does not deserve the lesser penalty contemplated by law. Consequently, we uphold the conviction and sentence imposed upon Tapinder Singh. The appeal is dismissed and the sentence of death is confirmed."

4. On appeal in this Court under Art. 136 of the Constitution, Mr. Nuruddin Ahmed, learned advocate for the appellant, addressed elaborate arguments challenging the conclusions of the courts below on which they have sustained the appellant's conviction. He started with an attack on the F. I. R. based on the dying declaration. According to the counsel, the information in regard to the offence had already been conveyed to the police by means of a telephone message and the police had actually started investigation on the basis of that information. This argument was, however, not seriously persisted in and was countered by the respondents on the authority of the decision in Sarup Singh v. State of Punjab, AIR 1964 Punj 508. The telephone message was received by Hari Singh, A. S. I., Police Station, City Kotwali at 5.35 p.m. on September 8, 1969. The person conveying the information did not disclose his identity, nor did he give any other particulars and all that is said to have been conveyed was that firing had taken place at the taxi stand, Ludhiana. This was, of course, recorded in the daily diary of the police station by the police officer responding to the telephone call. But prima facie this cryptic and anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as first information report. The mere fact that this information was the first in point of time does not by itself clothe it with the character of first information report. The question whether or not a particular document constitutes a first information report has, broadly speaking, to be determined on the relevant facts and circumstances of each case. The appellant's submission is that since the police authorities had actually proceeded to the spot pursuant to this information, however exiguous it may appear to the court, the dying declaration is hit by S. 162,

Cr. P. C. This submission is unacceptable on the short ground that S. 162 (2) Cr. P. C. in express terms excludes from its purview statements falling within the provisions of S. 32 (1), Indian Evidence Act. Indisputably the dying declaration before us falls within S. 32 (1), Indian Evidence Act and as such it is both relevant and outside the prohibition contained in S. 162 (1), Cr. P. C. The counsel next contended that the dying declaration does not contain a truthful version of the circumstances in which Kulwant Singh had met with his death and, therefore, it should not be acted upon. This argument is founded on the submission that the deceased did not meet with his death at the spot sworn by the prosecution witnesses and that none of those witnesses actually saw the occurrence because they were not present at the place and time where and when the deceased was shot at. We are far from impressed by this contention. The trial court and the High Court have both believed the three eye witnesses and have also relied on the dying declaration. Normally, when the High Court believes the evidence given by the eye witnesses this Court accepts the appraisal of the evidence by that Court and does not examine the evidence afresh for itself unless, as observed by this Court in Brahmin Ishwarlal Manilal v. State of Gujarat, Criminal Appeal No. 120 of 1963, D/- 10-8-1965 (SC):

"It is made to appear that justice has failed for reason of some misapprehension or mistake in the reading of the evidence by the High Court."

It was added in that judgment:

"There must ordinarily be a substantial error of law or procedure or a gross failure of justice by reason of misapprehension or mistake in reading the evidence or the appeal must involve a question of principle of general importance before this Court will allow the oral evidence to be discussed."

In the present case it was contended that the original document embodying the dying declaration is missing from the judicial record and it is suggested that the mysterious disappearance of this important document during the committal proceedings was intended to remove from the record the evidence which would have shown that this dying declaration could not legal-

ly constitute the basis of the F. I. R. and thereby frustrate the plea of the accused that S. 162, Cr. P. C. operated as a bar to its admissibility. The bar created by S. 162 (1), Cr. P. C., as already noticed is inapplicable to dying declarations. But, as the original dying declaration has somehow disappeared from the judicial record and the case is of a serious nature, we undertook to examine the evidence in respect of the dying declaration. The evidence of Shri Sukhdev Singh, Judicial Magistrate, as P. W. 10, is clear on the point. The witness has repeated in court the statement made to him by Kulwant Singh which was recorded by the witness in Punjabi in his own hand. An attempt was made by Mr. Nuruddin to persuade us to hold that Shri Sukhdev Singh's statement is not trustworthy. It was argued that there was no cogent reason for the Magistrate to permit the police officers to make a copy of the dying declaration. This, according to the counsel, shows that the Magistrate acted in a manner subservient to the demands of the police officers and, therefore, his statement should not be taken on its face value. We do not agree. The Magistrate, as observed by the High Court, is quite clear as to what the deceased had told him. He has repeated the same in his statement in court. Exhibit PJ has been proved by him as a correct account of the dying declaration recorded by him. It is not understood how the fact that the Investigating Officer was allowed to make a copy of the dying declaration would go against the Magistrate. The dying declaration could legitimately serve as a guide in further investigation. It was not argued that the dying declaration being a confidential document had to be kept secret from the Investigating Officer. Our attention was drawn by the respondents to the application dated November 20, 1968 (Ex. PZ) filed by Gurdial Singh in the court of Shri Mewa Singh, Magistrate, for expeditious disposal of the commitment proceedings. In that application it was suggested that the defence had got removed the dying declaration and statements under section 164, Cr. P. C. which had presumably been destroyed. According to the respondent's suggestion it was the accused who was interested in the disappearance of the original dying declaration from the record. In this

connection we may point out that on October 27, 1968 Shri Mewa Singh, Magistrate, had lodged a report with the police under Ss. 379/409/201, I. P. C. alleging theft of the F. I. R., the dying declaration and statements of witnesses recorded under Section 164, Cr. P. C. in the case, State v. Tapinder Singh. For the disposal of this appeal it is unnecessary for us to express any opinion as to who is responsible for the disappearance of the dying declaration. That question was the subject matter of a criminal proceeding and we have not been informed about its fate.

5. The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant under S. 32 (1) of the Indian Evidence Act in a case in which the cause of that person's death comes into question. It is true that a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing its reliability, by imposing on it an obligation to closely scrutinise all the relevant attendant circumstances. This Court in *Kushal Rao v. State of Bombay*, 1958 SCR 552 at pp. 568-569 = (AIR 1958 SC 22 at pp. 28-29) laid down the test of reliability of a dying declaration as follows: "On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is

a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Hence in order to pass the test of reliability a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the

court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case".

This view was approved by a Bench of five Judges in Harbans Singh v. State of Punjab, (1962) Supp 1 SCR 104 = (AIR 1962 SC 439). Examining the evidence in this case in the light of the legal position as settled by this Court we find that the dying declaration was recorded by the Magistrate within four hours of the occurrence. It is clear and concise and sounds convincing. It records:

"Today at 4.45 p.m. my Sandhu (wife's sister's husband) Tapinder Singh fired shots with his pistol at me in the presence of Harnek Singh, Sher Singh and Gurdial Singh at the taxi stand. He suspected that I had illicit relations with his wife. Tapinder Singh injured me with these fire shots."

Considering the nature and the number of injuries suffered by the deceased and the natural anxiety of his father and others present at the spot to focus their attention on efforts to save his life we are unable to hold that he had within the short span of time between the occurrence and the making of the dying declaration been tutored to falsely name the appellant as his assailant in place of the real culprit and also to concoct a non-existent motive for the crime. It is unnecessary for us to refer to the earlier declarations contained in Ex. PM, Ex. DC and Ex. PH/13 because the one recorded and proved by the Magistrate seems to us to be acceptable and free from infirmity. If the dying declaration is acceptable as truthful then even in the absence of other corroborative evidence it would be open to the court to act upon the dying declaration and convict the appellant stated therein to be the offender. An accusation in a dying declaration comes from the victim himself and if it is worthy of acceptance then in view of its source the Court can safely act upon it. In this case, however, we have also the evidence of eye witnesses Gurdial Singh, (P. W. 7), Harnek Singh (P. W. 8) and Sher Singh (P. W. 9) whose testimony appears to us to be trustworthy and unshaken. No convincing reason has been urged on behalf of the appellant why these three witnesses and parti-

cularly the father of the deceased should falsely implicate the appellant substituting him for the real assailant. It is not a case in which, along with the real culprit, someone else, with whom the complainant has some scores to settle, has been added as a co-accused. The only argument advanced on behalf of the appellant was that the deceased was shot at somewhere also and not at the place where the prosecution witnesses allege he was shot at. It was emphasised that these three witnesses were not present at the place and time where the occurrence actually took place. This submission is, in our view, wholly unfounded and there is absolutely no material in support of it on the existing record. The probabilities are clearly against it. The fact that Hari Singh, A. S. I. (P. W. 2) went to the place of occurrence and from there he learnt from someone that the injured person had been taken to Dayanand Hospital clearly negatives the appellant's suggestion. The fact that the A. S. I. did not remember the name of the person who gave this information would not detract from its truth. On the contrary it appears to us to be perfectly natural for the A. S. I. in those circumstances not to attach much importance to the person who gave him this information. And then, the short duration within which the injured person reached the hospital also shows that those who carried him to the hospital were close-by at the time of the occurrence and the suggestion that Gurdial Singh (P. W. 7), Harnek Singh (P. W. 8) and Sher Singh (P. W. 9) must have been informed by someone after the occurrence does not seem to us to fit in with the rest of the picture. We are, therefore, unable to accept the appellant's suggestion that the deceased was shot at somewhere else away from the place of the occurrence as deposed by the eye witnesses.

6. Some minor points were also sought to be raised by Mr. Nuruddin. He said that the pair of shoes belonging to the deceased were left at the spot but they have not been traced. The takhat posh on which the deceased was sitting has also not been proved to bear the marks of blood nor are the blood marks proved on the seats of the car in which the deceased was taken to the hospital. The counsel also tried to make a point out of the omission by the prosecution to prove blood stains on the clothes of Gurdial Singh (P. W.

7), and Harnek Singh (P. W. 8) who had carried Kulwant Singh from the place of the occurrence to the hospital. Omission to produce a ballistic expert was also adversely criticised. These according to the counsel, are serious infirmities and these omissions militate against the prosecution story. In our opinion, the criticism of the counsel assuming to be legitimate, which we do not hold, relates to matters which are both insignificant and immaterial on the facts and circumstances of this case. They do not in any way affect the truth of the main elements of the prosecution story. On appeal under Art. 136 of the Constitution we do not think it is open to this Court to allow such minor points to be raised for the purpose of showing defects in appraisal of the evidence by the High Court and for evaluating the evidence for ourselves so as to arrive at conclusions different from those of the High Court. The eye witnesses having been believed, those points lose all importance and cannot be pressed in this Court.

7. Considerable stress was laid on behalf of the appellant on the submission that according to the folder Ex. DC one Trilochan Singh was present in the hospital as a friend or relation of the injured person. From this it was sought to be inferred that Gurdial Singh, father of Kulwant Singh, had not accompanied his son to the hospital and that this would show that the eye witnesses are not telling the truth. The argument seems to us to be without any basis and is misconceived. In the first instance the name of Trilochan Singh on the folder has not been proved. It is the contents of Ex. DC which have been proved by Dr. E. Potahan (P. W. 1 at the trial) who had appeared as P. W. 10 in the Court of the Committing Magistrate. Secondly in this document as we have verified from the original record Gurdial Singh is actually mentioned as the father of the injured person. We are, therefore, not impressed by the submission that Ex. DC goes against the testimony of the eye witnesses. Incidentally, Ex. DC also contains the precise information which was the subject matter of the dying declaration. It appears that in order to discredit Ex. DC with respect to the information about the appellant being the assailant, the name of one Trilochan Singh (whose identity still remains unknown) was somehow made

to appear on the folder but as it has not been legally proved and not referred to by any witness we need say nothing more about it. This argument thus also fails. The submission that the medical evidence contradicts the version given by eye witnesses also remains unsubstantiated on the record.

8. As a last resort it was contended that if the motive alleged by the prosecution is accepted, then the sentence imposed would appear to be excessive. In our view, the manner in which the five shots were fired at the deceased clearly shows that the offence committed was deliberate and pre-planned. We are unable to find any cogent ground for interference with the sentence. The appeal accordingly fails and is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 1573
(V 57 C 332)

(From: Delhi)

M. HIDAYATULLAH, C. J., J. C. SHAH, K. S. HEGDE, A. N. GROVER, A. N. RAY AND I. D. DUA, JJ.

Tej Kiran Jain and others, Appellants v. M. Sanjiva Reddy and others, Respondents.

Civil Appeal No. 2572 of 1969, D/- 8-5-1970.

(A) Constitution of India, Art. 105 (2) — "In respect of anything said. . . in Parliament" — Meaning — Speech whether must be relevant to business of Parliament.

Once it is proved that Parliament was sitting and its business was being transacted anything said during the course of that business is immune from proceedings in any Court. It is not necessary that what was said was relevant to the business of Parliament.

(Para 8)

(B) Constitution of India, Art. 133 — Appeal — Notice of lodgment of appeal to respondents — Non-appearance of respondents — Effect.

An appeal under Art. 133 has to be lodged after the certificate is granted and a notice of lodgment of the appeal is taken out by the appellants to inform the respondents. The notice is only an intimation of the fact of the lodgment of appeal and not a summons to appear before the Court. Even if the

respondents do not appear the Court has to proceed with the appeal albeit ex parte against the absent respondent. (Para 10)

Cases Ref: Chronological Paras
(1965) AIR 1965 SC 745 (V 52) =

1965-1 SCR 413, In the matter of Art. 143 of Const. of India 7

The following judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This is an appeal from the order, August 4, 1969, of a Full Bench of the High Court of Delhi, rejecting a plaint filed by the six appellants claiming a decree for Rs. 26,000 as damages for defamatory statements made by Shri Sanjiva Reddy (former Speaker of the Lok Sabha), Shri Y. B. Chavan (Home Minister) and three members of Parliament on the floor of the Lok Sabha during a Calling Attention Motion. The High Court held that no proceedings could be taken in a court of law in respect of what was said on the floor of Parliament in view of Art. 105(2) of the Constitution. The High Court, however, certified the case as fit for appeal to this Court under Art. 133(1)(a) of the Constitution and this appeal has been brought.

2. Notice of the lodgment of the appeal was issued to the respondents in due course but they have not appeared. The Union Government which joined, at its request, as a party in the High Court alone appeared through the Attorney General. We have not considered it necessary to hear the Union Government.

3. The facts of the case, in so far as they are relevant to our present purpose, may be briefly stated. The appellants claim to be the admirers and followers of Jagadguru Shankaracharya of Goverdan Peeth, Puri. In March 1969 a World Hindu Religious Conference was held at Patna. The Shankaracharya took part in it and is reported to have observed that untouchability was in harmony with the tenets of Hinduism and that no law could stand in its way and to have walked out when the National Anthem was played.

4. On April 2, 1969 Shri Narendra Kumar Salve, M. P. (Betul) moved a Calling Attention Motion in the Lok Sabha and gave particulars of the happening. A discussion followed and the respondents execrated the Shankaracharya. According to the appellants, the respondents

"gave themselves up to the use of language which was more common-

place than serious, more lax than dignified, more unparliamentary than sober and jokes and puns were bandied around the playful spree, and his Holiness Jagadguru Shankaracharya Ananta Shri Vibushit Swami Shri Niranjan Deva Teertha of Goverdhan Peeth, Puri, was made to appear as a leperous (sic) dog."

The appellants who hold the Shankaracharya in high esteem felt scandalised and brought the action for damages placing the damages at Rs. 26,000. The plaint was rejected as the High Court held that it had no jurisdiction to try the suit.

5. Article 105 of the Constitution, which defines the powers, privileges and immunities of Parliament and its Members, provides:

"105 (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, and at the commencement of this Constitution.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any Committee thereof as they apply in relation to members of Parliament."

6. The High Court held that in view of clause (2) of the Article no proceedings could lie in any court in respect of what was said by the respondents in Parliament and the plaint must, therefore, be rejected.

7. Mr. Lekhi in arguing this appeal drew our attention to an observation of this Court in Special Ref. No. 1 of

1964, 1965-1 SCR 413 at p. 455 = (AIR 1965 SC 745 at p. 767) where this Court dealing with the provisions of Article 212 of the Constitution pointed out that the immunity under that Article was against an alleged irregularity of procedure but not against an illegality, and contended that the same principle should be applied here to determine whether what was said was outside the discussion on a Calling Attention Motion. According to him the immunity granted by the second clause of the one hundred and fifth article was to what was relevant to the business of Parliament and not to something which was utterly irrelevant.

8. In our judgment it is not possible to read the provisions of the article in the way suggested. The article means what it says in language which could not be plainer. The article confers immunity *inter alia* in respect of "anything said in Parliament". The word "anything" is of the widest import and is equivalent to 'everything'. The only limitation arises from the words 'in Parliament' which means during the sitting of Parliament and in the course of the business of Parliament. We are concerned only with speeches in Lok Sabha. Once it was proved that Parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceedings in any court. This immunity is not only complete but is as it should be. It is of the essence of parliamentary system of Government that people's representatives should be free to express themselves without fear of legal consequences. What they say is only subject to the discipline of the rules of Parliament, the good sense of the members and the control of proceedings by the Speaker. The courts have no say in the matter and should really have none.

9. Mr. Lekhi attempted to base arguments upon the analogy of an Irish case and another from Massachusetts reported in May's Parliamentary Practice. In view of the clear provisions of our Constitution we are not required to act on analogies of other legislative bodies. The decision under appeal was thus correct. The appeal fails and is dismissed but there shall be no order about costs.

10. Before we leave the case we wish to refer to the notice of the lodgment of the appeal. The suit was for

Rs. 26,000 and the certificate was granted under Art. 133 of the Constitution by the High Court. Under the Rules of this Court an appeal has to be lodged after the certificate is granted and a notice of lodgment of the appeal is taken out by the appellants to inform the respondents so that they may take action considered appropriate or necessary. After service of notice this Court treats the appeal as properly lodged and can proceed to hear it when time can be found for hearing. Without the notice the case cannot be brought to a hearing. The notice which is issued is not a summons to appear before the Court. It is only an intimation of the fact of the lodgment of the appeal. It is for the party informed to choose whether to appear or not. Summonses issue to defendants, to witnesses and to persons against whom complaints are filed in a criminal Court. If a summons issues to a defendant and he does not appear the Court may take the action to be undefended and proceeding *ex parte* may even regard the claim of the plaintiff to be admitted. This consequence does not flow from the notice of the lodgment of the appeal in this Court. The Court has to proceed with the appeal albeit *ex parte* against the absent respondent. If a summons is issued to a witness or to a person complained against under the law relating to crimes, and the witness or the person summoned remains absent after service a warrant for his arrest may issue. We hope that these remarks will serve to explain the true position.

Appeal dismissed.

AIR 1970 SUPREME COURT 1575

(V 57 C 334)

(From Calcutta)

**J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.**

The Commissioner of Income Tax, Calcutta, Appellant v. Padamchand Ramgopal, Respondent.

Civil Appeals Nos. 2570-2574 of 1966,
D/- 20-4-1970.

Income-tax Act (1922), S. 23(4) —
Best judgment assessment made for five assessment years — Insignificant mistakes found in accounting of one year — I. T. O. arbitrarily adding to total income returned the half the

amount of gross receipts shown by assessee as interest during each year as escaped income — No reasons given to reject accounts relating to other years — Method adopted for determining escaped income held capricious — Addition to income held illegal.

(Para 2)

The following judgment of the Court was delivered by

HEGDE J. : These appeals by certificate arise from the decision given by the High Court of Calcutta in five references made by the Income-tax Appellate Tribunal, Bench 'B', Calcutta under Section 66(2) of the Indian Income-tax Act, 1922. The High Court has answered the questions referred to it in favour of the assessee. In support of the return made by him, the assessee, a Hindu Undivided Family carrying on business in various items including money lending produced his account books. The Income-tax Officer rejected those accounts as unreliable and assessed the assessee on the basis of best judgment by adding to the income returned by him various sums ranging from Rs. 17,951 for the assessment year 1956-57, to Rs. 21,536 for the assessment year 1954-55. The five assessment years with which we are concerned in this case are 1953-54, 1954-55, 1955-56, 1956-57 and 1957-58. The Income-tax Officer in his order did not give any reason for not relying on the accounts submitted. On appeal, the Appellate Assistant Commissioner after going through the notes prepared by the Income-tax Officer found that in his investigation, the Income-tax Officer had found that one of the items of interest received by the assessee during the accounting year relating to the assessment year 1953-54 had not been brought to account and another entry relating to the receipt of income during that year was not correct. Neither the Appellate Assistant Commissioner nor the Income-tax Officer found any mistake in the accounts relating to other accounting years. The two mistakes noticed by the Appellate Assistant Commissioner are insignificant mistakes. Further they afforded no basis for rejecting the accounts for the other years. Both the Income-tax Officer as well as the Appellate Assistant Commissioner arbitrarily added to the total income returned half the amount of gross receipts shown

by the assessee under the head "interest" during each year as escaped income. The tribunal did not examine the facts of the case afresh. It just adopted the findings of the Appellate Assistant Commissioner. The questions referred to the High Court was whether upon the facts admitted or found by the Appellate Tribunal, it was justified in holding that the Income-tax Officer had rightly added an income of Rs. 18050 in the assessment year 1953-54, Rs. 21536 in the assessment year 1954-55, Rs. 18321 in the assessment year 1955-56 and Rs. 17951 in the assessment year 1956-57 and Rs. 20547 in the assessment year 1957-58.

2. We are in agreement with the High Court that on the facts found by the tribunal, it was not justified in holding that the additions made by the Income-tax Officer were in accordance with law. Those additions were arbitrarily made. No reasons were given to reject the accounts relating to the assessment years 1954-55, 1955-56, 1956-57 and 1957-58. Further the method adopted for determining the escaped income appears to be highly capricious.

In the result these appeals fail and the same are dismissed. Respondent was ex parte. No costs.

Appeals dismissed.

AIR 1970 SUPREME COURT 1576 (V 57 C 334)

(From Himachal Pradesh)

J. C. SHAH AND K. S. HEGDE, JJ.

Lt. Governor of Himachal Pradesh and another, Appellants v. Sri Avinash Sharma, Respondent.

Civil Appeal No. 514 of 1957, D/- 28-4-1970.

Land Acquisition Act (1894), Ss. 17 (1), 48 — Land acquired vesting in Government — Government cannot withdraw from acquisition.

After possession has been taken pursuant to a notification under S. 17(1) the land is vested in the Government, and the notification cannot be cancelled under S. 21 of the General Clauses Act, nor can the notification be withdrawn in exercise of the powers of the Land Acquisition Act under S. 48. When possession of the land is taken under

S. 17(1), the land vests in the Government. There is no provision by which land statutorily vested in the Government reverts to the original owner by mere cancellation of the notification. AIR 1966 SC 1593, Rel. on.

(Para 7)

Cases. Refs: Chronological Paras (1966) AIR 1966 SC 1593 (V 53) =

(1966) 3 SCR 557, State of Madhya Pradesh v. Vishnu Prasad Sharma

7

The following judgment of the Court was delivered by

SHAH, J.: The Deputy Commissioner, Mahasu, apparently acting on the request of the Air Force authorities took possession on December 23, 1963, of an area of land in village Galu Chak. That area included 8-14-0 bighas belonging to the respondent. The record does not disclose the authority under which possession of the land was taken and delivered over to the Air Force. There was correspondence between the Air Force Authorities and the State of Himachal Pradesh in regard to the land occupied by the Air Force and ultimately on March 31, 1964, a notification under S. 4 of the Land Acquisition Act, 1894, was published notifying that the area of land (including the land of the respondent) was likely to be needed by the State Government for a public purpose. By a composite notification under Section 6 and Section 17(1) and (4) dated May 16, 1964, the State of Himachal Pradesh declared that the land was needed for a public purpose, that since it was required urgent, the enquiry under Section 5-A of the Act was dispensed with, and that possession of the land will be taken under Section 17(1) of the Act after the expiry of fifteen days from the publication of the notice under S. 9(1) of the Act. The Collector of Mahasu then served notices under S. 9 of the Land Acquisition Act in June 1964. On October 5, 1965, the Government of Himachal Pradesh published an order cancelling the notification dated March 31, 1964, and May 16, 1964, for acquisition of land for a public purpose.

2. The respondent then presented a petition before the Judicial Commissioner, Himachal Pradesh, for a writ quashing the notification dated, October 5, 1965, withdrawing and cancelling the previous notifications and for a writ of mandamus directing the authorities of the State Government to

act according to law and discharge the duties cast by law upon them in the matter of determination of compensation for compulsory and urgent acquisition. The petition was granted by the Judicial Commissioner. In the view of the Judicial Commissioner when the notification under S. 17(1) and (4) was issued, and possession was taken by the State Government, the land vested in the Government and it was not competent to the State Government thereafter to withdraw the notifications in exercise of the power under S. 48 of the Land Acquisition Act. Against the order of the Judicial Commissioner, this appeal has been preferred with special leave.

3. The Solicitor-General appearing on behalf of the State contended that under S. 21 of the General Clauses Act the State has the power to cancel the notifications at any time, and that S. 48 of the Land Acquisition Act did not trench upon that power. Under the Land Acquisition Act a notification under S. 4 of the Act may be issued by the appropriate Government that any land is needed or is likely to be needed for a public purpose. Unless the inquiry under S. 5-A is dispensed with, any person interested in the land notified may object to the acquisition of the land, or of any land in the locality. On the objections made, the Collector holds an inquiry after giving the objector an opportunity of being heard, and makes a report. The appropriate Government may, if satisfied, after considering the report, if any, of the Collector under S. 5-A (2), make a declaration that the land is needed for a public purpose. The declaration is conclusive evidence that the land is needed for a public purpose. Then follows an inquiry as to the amount of compensation payable to the owner of the land and to the other claimants. If the land is waste or arable, the Government may in case of urgency dispense with the inquiry under Section 5-A and direct that possession may be taken on the expiration of fifteen days after publication of the notice under S. 9 (1) of the Act even though no award of compensation is made by the Collector. When possession is taken the land vests exclusively in the Government free from all encumbrances.

4. In the present case a notification under S. 17 (1) and (4) was issued by

the State Government and possession which had previously been taken must, from the date of expiry of fifteen days from the publication of the notice under S. 9 (1), be deemed to be in the possession of the Government. We are unable to agree that where the Government has obtained possession illegally or under some unlawful transaction and a notification under S. 17 (1) is issued the land does not vest in the Government free from all encumbrances. We are of the view that when a notification under S. 17 (1) is issued, on the expiration of fifteen days from the publication of the notice mentioned in S. 9 (1), the possession previously obtained will be deemed to be the possession of the Government under S. 17 (1) of the Act and the land will vest in the Government free from all encumbrances.

5. It is true that the notification issued by the State of Himachal Pradesh under S. 17 (1) & (4) does not recite that the land notified was "waste or arable." But it was not contended before the Judicial Commissioner that the Government issued the notification under S. 17 (1) & (4) without authority. Power under sub-sections (1) & (4) of S. 17 may be only exercised when the land is waste or arable, and the Government having issued the notification, it will not be open to them to contend for the first time at this stage that the land of the respondent was not waste or arable and the notifications were unauthorised.

6. Section 48 of the Land Acquisition Act by the first sub-section provides:

"Except in the case provided for in section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken."

Power to cancel a notification for compulsory acquisition is, it is true, not affected by S. 48 of the Act: by a notification under S. 21 of the General Clauses Act, the Government may cancel or rescind the notifications issued under Ss. 4 & 6 of the Land Acquisition Act. But the power under S. 21 of the General Clauses Act cannot be exercised after the land statutorily vests in the State Government.

7. In State of Madhya Pradesh v. Vishnu Prasad Sharma, 1966-3

SCR 557 = [AIR 1966 SC 1593] on which reliance was placed, the only question which fell to be considered by the Court was whether a notification under S. 4 (1) may be followed by successive notifications under section 6 for small parts of the land comprised in one notification issued under S. 4. The Court rejected the contention that the State was invested with such a power. In considering the argument the Court referred to the power to cancel the notification under S. 21 of the General Clauses Act, apart from the power conferred by S. 48 of the Land Acquisition Act. The Court observed:

"Section 48 (1) is a special provision for those cases where proceedings for acquisition have gone beyond the stage of the issue of notice under section 9 (1) and it provides for payment of compensation under Section 48 (2) read with Section 48 (3). We cannot x x accept the argument that without an order under Section 48 (1) the notification under Section 4 must remain outstanding. It can be cancelled at any time by Government under Section 21 of the General Clauses Act and what Section 48 (1) shows is that once Government has taken possession it cannot withdraw from the acquisition. Before that it may cancel the notification under Sections 4 and 6 or it may withdraw from the acquisition under Section 48 (1). If no notice has been issued under Section 9 (1) all that the Government has to do is to pay for the damage caused as provided in S. 5; if on the other hand a notice has been issued under Section 9 (1), damage has also to be paid in accordance with the provisions of S. 48 (2) and (3)."

But these observations do not assist the case of the appellant. It is clearly implicit in the observations that after possession has been taken pursuant to a notification under S. 17 (1) the land is vested in the Government, and the notification cannot be cancelled under S. 21 of the General Clauses Act, nor can the notification be withdrawn in exercise of the powers under S. 48 of the Land Acquisition Act. Any other view would enable the State Government to circumvent the specific provision by relying upon a general power. When possession of the land is taken under S. 17 (1), the land vests in the Government. There is no provision by which land statutorily vest-

ed in the Government reverts to the original owner by mere cancellation of the notification.

8. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1578 (V 57 C 335)

(From: Allahabad)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Purtabpore Company, Ltd. Appellant v. The State of Uttar Pradesh, Respondent.

Civil Appeals Nos. 1192 and 1276 of 1966, D/- 28-4-1970.

U. P. Agricultural Income Tax Act (1948), S. 6 (2) (b) (iv)—Expenses "for raising crops" — Include expenses incurred for management, supervision, organisation etc. — Such expenditure is allowable. Decision of Allahabad High Court Reversed.

What has to be essentially determined under S. 6 (2) (b) (iv) is whether the expenses were incurred on or for the purpose of the entire work and operations involved in raising the crops, making the same fit for marketing and the transportation of the produce to the market. The words "raising the crop" cannot be confined simply to the ploughing of the land, sowing the seed and cutting the harvest. It must be emphasised that S. 6 (2) (b) (iv) is not to be construed in a narrow and pedantic sense and must be given its full effect in the background of modern large scale farming and the organization required for it. (Para 11)

Hence the amount claimed by an assessee as expenses incurred for the management, supervision, organisation, technical knowledge and assistance and other allied matters for the purpose of the raising of crops, their marketing and transportation, is allowable as expenses of cultivation under S. 6 (2) (b) (iv). Decision of Allahabad High Court Reversed. (Para 13)

Cases Referred: Chronological Paras (1957) AIR 1957 SC 768 (V 44) = (1957) 32 ITR 466, Commr. of Income-tax West Bengal, Calcutta v. Benoy Kumar Sahas Roy

(1955) AIR 1955 SC 74 (V 42)=

(1955) 27 ITR 1, Mrs. Bacha F.

Guzedar, Bombay v. Commr.

of Income Tax, Bombay

9

The following Judgment of the Court was delivered by

GROVER, J.: These appeals by special leave arise out of a common judgment of the Allahabad High Court in two references made under the United Provinces Agricultural Income Tax Act, 1948 (hereinafter called the Act).

2. As the points are common the facts in appeal No. 1276 of 1966 may be briefly stated:

3. The appellant is a sugar factory to which is attached a sugarcane farm. The appellant carries on agricultural farming on a large scale in District Deoria and had several farms. According to the case of the appellant it engages on each farm a Manager with necessary technical, clerical and menial staff to assist him. These persons are also provided accommodation and facilities for medical treatment and are given certain other necessary allowances. It is claimed that the whole establishment is maintained exclusively for the purposes of the farm.

4. The appellant opted to be assessed u/s 6 (2) (b) of the Act for the assessment year 1357F; the Assessing Income Tax Officer (Collector) assessed the appellant to Agricultural Income Tax after disallowing expenses on the management charges of European Establishment etc, miscellaneous expenses, salary of European staff, rent, inspection, repairs of bungalows and offices as not being 'admissible under the rules. This Order was upheld by the Agricultural Income Tax Commissioner mainly on the ground that the number of persons employed and their salary was not given and it was therefore not possible "to determine whether those persons were at all necessary when the assessee had too many other servants or labourers or the like." He disallowed the expenses on management and establishment and on the subscription on periodicals, on postage and telegram, printing and stationery, medicine etc. In his opinion these could not be regarded as costs of cultivation. A revision was filed before the Agricultural Income Tax Board which was dismissed on the ground that the aforesaid expenses could not strictly be called expenses of cultivation and were

not permissible u/s 6 (2) (b) (iv) of the Act. The appellant filed an application under Section 24 (2) for reference to the High Court. The Agricultural Income Tax Board stated the following question of law:

"Whether the amount claimed by the assessee as expenses of management, miscellaneous expenses, detailed above can be allowed as expenses of cultivation u/s 6 (2) (b) (iv) of the Act".

The items which had been disallowed and with regard to which the reference was made are given below:

Senior Staff Establishment	Rs. 3,180/-
Indian Establishment	Rs. 4,021/15/3
Indian Menial Staff	Rs. 6,825/6/-
Travelling Expenses	Rs. 833/6/3
Staff Allowance	Rs. 207/7/6
Garden Maintenance	Rs. 1,062/2/3
Motor Car Maintenance	Rs. 360/-
Lighting Plant Expenses	Rs. 1,844/11/-
Firm Contribution to Provident Fund	Rs. 574/1/-
Agency Allowance	Rs. 1,800/-/-

5. The assessee had showed certain other expenses as miscellaneous expenses. They too were disallowed. They were as follows:

Subscription & Periodicals	Rs. 159/-
Postage & Telegrams	Rs. 189/5/-
Printing & Stationery	Rs. 79/14/-
Medicines & Medicals	Rs. 1,529/3/8
Sundries	Rs. 2,838/3/8

6. The High Court relied largely on certain decisions of this Court in which the meaning of 'agricultural' and 'agricultural purpose' was considered with reference to the provisions of the Income Tax Act, 1922. It was held by the High Court that the expenses which were claimed to be deductible could not possibly be said to be directly or approximately connected with the raising of the crops, nor for making it fit for market or for transporting it to the market. These expenses at best could only be said to be remotely connected with the business side of marketing the produce and had no connection with the raising of the crops. The question was therefore answered in the negative and against the assessee.

7. The Act was enacted to impose tax on agricultural income in the United Provinces. Section 2 (1) defines 'agricultural income'. It is first stated that this expression has the same meaning as has been assigned to it in the

Indian Income Tax Act, 1922. In its adapted form, it is reproduced below:

(a) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in (Uttar Pradesh) or is subject to a local rate or cess assessed and collected by an officer of the (State Government);

(b) Any income derived from such land by—

(i)

(ii)

(iii)

(c) any income derived from any building

7a. Section 3 provides for the charge of agricultural income-tax, Section 4-A for computation, of agricultural income, Section 5 for determination of such income and Section 6 gives an option to the assessee to have the computation of income done in accordance with its provisions. Sub-section (2) (b) says that the income shall be the gross proceeds of sale of all the produce of the land subject to the following deductions:

(i)

(ii)

(iii)

(iv) the expenses incurred in the previous year in raising the crop from which the agricultural income is derived, in making it fit for market and in transporting it to market, including the maintenance or hire of agricultural implements and cattle required for these purposes;

(v)

(vi)

(vii) any expenses incurred in the previous year on the maintenance of any capital asset if such maintenance is required for the purpose of deriving the agricultural income;".

8. The provisions of Section 6 (2)

(b) (iv) came up for consideration before the Allahabad High Court in Agricultural Income-Tax Reference No. 366 of 1953 decided on 11th May, 1956. In that case also the income was derived from large scale farming. It had been found by the Agricultural Income Tax Board that the farm had been run under the supervision of a Manager and all the figures relating to receipts and expenditure had been properly checked and scrutinized. A number of items were involved which were of an identical nature as are to be found in the present case and with

regard to which deductions had been claimed u/s 6 (2) (b). The Provident fund which represented the Company's contribution was allowed by the High Court on the ground that the employees were engaged at the farm and the contribution to their provident fund was in a way remuneration or salary paid to them. The expenses on the maintenance and repairs to the Asstt. Manager's bungalow were allowed u/s 6 (2) (b) (vii). Similarly the expenditure incurred on repairs to quarters allowed to black-smiths, watchmen, carpenters and clerks—all connected with cultivation was allowed under the aforesaid provision. The expenses incurred on the maintenance of a lorry used for transporting the harvest and the car which was provided to the managerial staff to ensure proper supervision of the farm were also allowed by the High Court. It was considered that this expenditure was necessary for the purpose of deriving the agricultural income. As regards the payments made to Directors, Managing Agents and expenses incurred on a general Office and the General Manager's commission, the position taken up on behalf of the assessee was that all this expenditure had been incurred on controlling operations in the organisation for the cultivation of land, raising, transporting and marketing of the crops etc. The High Court was of the view that all this expenditure which represented only 1/5th of the total expenditure of the Company was deductible as it had been incurred for the purposes of the farm. As regards Manager's salary, his travelling expenses, leave and passage allowance and clerical salaries, the High Court felt that unless there be reasons for holding that the expense was so unreasonable as to justify a finding that it did not relate to the agricultural activities of the company, the assessing authority could not substitute its own views of prudent management for the actual management by the Board of Directors of the Company. The following observations may be referred to:

"The actual raising of the crop is certainly done by the coolies who work on the farm but the brains that direct and guide the operations, protect the crops and arrange for its collection and disposal, are by no means to be ignored and if payment is made

by the company to secure such assistance we do not find any justification for holding that the expense is not incurred in raising the crops".

The above case was not followed by the High Court in the present case.

9. In *Mrs. Bacha F. Guzedar, Bombay v. Commr. of Income Tax, Bombay*, (1955) 27 ITR 1 = (AIR 1955 SC 74) the questions which fell for determination were of a different nature altogether. The assessee there was a shareholder in certain tea companies 60 p. c. of whose income was exempt from tax as agricultural income under s. 4 (3) (viii) of the Indian Income-tax Act, 1922. The assessee claimed that 60 p. c. of the dividend income received on those shares would also be exempt from tax as agricultural income. It was held that the dividend income was not agricultural income but was income assessable under Section 12 of the aforesaid Act. According to that decision, the object underlying section 2 (1) of the Income-tax Act was not to subject to tax either the actual tiller of the soil or any other person getting land cultivated by others for deriving benefit therefrom, but to say that the benefit intended to be conferred upon such persons should extend to those into whose hand that revenue fell, however remote the receiver of such revenue might be, was hardly warranted.

10. In the other case, *Commr. of Income tax West Bengal, Calcutta v. Benoy Kumar Sahas Roy*, (1957) 32 ITR 466 = (AIR 1957 SC 768) the question was whether income derived from the sale of sal and piyasal trees in the forest owned by the assessee which was originally a forest of spontaneous growth "not grown by the aid of human skill and labour" but on which forestry operations described in the statement of case had been carried on by the assessee involving considerable amount of expenditure of human skill and labour was agricultural income within the meaning of section 2. (1) of the Indian Income-tax Act, 1922. It was in this connection that observations were made with regard to the primary sense in which the word 'agriculture' was used and what the meaning of 'agricultural operation' was. It was said that the term 'agriculture' could not be extended to all activities which had some rela-

tion to the land and were in any way connected with the land. For instance the application of the term 'agriculture' to denote such activities in relation to the land including horticulture, forestry, breeding and rearing of live-stock, dairying butter and cheese-making and poultry farming was unwarranted distortion of the term.

11. The above two decisions relied upon by the High Court, with respect, have no bearing on the question which arose in the present case. It is well known that modern agricultural farming which has become mechanised involves a high degree of organisation, technical skill etc. in the same way as a well-run industry. If agricultural production has to be obtained with optimum results it is necessary that there should be a proper supervisory and other staff as also the employment of such means as would be conducive to maximum production and proper marketing of the produce. It is axiomatic that the staff would require residential accommodation which will have to be kept in a proper state of repairs. The staff will also need medical attention and other amenities which are normally afforded to employees nowadays. The benefit of provident fund can hardly be denied to them when it has become the accepted and normal feature in all forms of employment in modern times. If any motor vehicle is being maintained for enabling the supervisory or other staff to look after the farm the expenses incurred thereon cannot be regarded as foreign to farming operations. The expenditure incurred on postage, telegrams, printing and stationery for the purpose of and in connection with farming would also be allowable. If certain periodicals are being subscribed to for obtaining technical knowledge and up-to-date information in the matter of agricultural farming it is difficult to see how that could be disallowed. It is not necessary to refer to all other items the details of which have been given before. What has to be essentially determined under S. 6 (2) (b) (iv) is whether the expenses were incurred on or for the purpose of the entire work and operations involved in raising the crops, making the same fit for marketing and the transportation of the produce to the market. The words "raising the crop" cannot be confined simply to

the ploughing of the land, sowing the seed and cutting the harvest. It must be emphasised that section 6 (2) (b) (iv) is not to be construed in a narrow and pedantic sense and must be given its full effect in the background of modern large scale farming and the organization required for it. We are generally in agreement with the views expressed in the previous unreported decision of the Allahabad High Court referred to before.

12. It would appear that the authorities concerned have not considered the items in dispute from the correct angle and it would have to be decided with regard to each item whether it was partly or wholly expended for the purposes mentioned before. An apportionment may become necessary if it is determined that the entire expense was not incurred strictly for those purposes.

13. The correct answer to the question referred would be: The amount claimed by the assessee as expenses on management and miscellaneous expenses detailed before can be allowed u/s 6 (2) (b) (iv) if and to the extent it is determined that they were incurred for the management, supervision, organisation, technical knowledge and assistance and other allied matters for the purpose of the raising of crops, their marketing and transportation, in the light of the observations made by us in this judgment.

14. The appeals are allowed with costs in this court and the judgment of the High Court is set aside. One hearing fee.

✓ Appeal allowed.

AIR 1970 SUPREME COURT 1582 (V 57 C 336)

(From: Madhya Pradesh)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Chandroji Rao, Appellant v. The
Commissioner of Income Tax M. P.
Nagpur, Respondent.

Civil Appeals Nos. 505 to 508 of
1967, D/- 28-4-1970.

(A) Interpretation of Statutes — Marginal note to section — Scope — Marginal note cannot control the interpretation of the words of the Section, particularly when language of the Section is clear. (Para 4)

(B) Tenancy Laws — Madhya Bharat Abolition of Jagir Act (28 of 1951), S. 8 (2) — Compensation payable to Jagirdar — Interest payable under S. 8 (2) if part of compensation — (Income Tax Act (1922), S. 4).

The interest payable to the Jagirdar under S. 8 (2) was given to him for being kept out of the compensation amount for the period of the years as provided in section 15. It did not form part of the compensation money and could not be held to be capital receipt and cannot be excluded from the income of the Jagirdar-assessee. AIR-1964 SC 1870, Relied on.

(Para 4)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 1878 (V 51) =

53 ITR 151, Dr. Sham Lal Narula v. Commr. of I. T., Punjab, J. & K., Himachal Pradesh and Patiala 4

The following Judgment of the Court was delivered by

GROVER, J.: These appeals by special leave from a common judgment of the Madhya Pradesh High Court arise out of references made by the Income tax Appellate Tribunal relating to the assessment years 1956-57, 1957-58, 1958-59 and 1961-62.

2. The appellant who is the assessee was a jagirdar of the erstwhile Gwalior State. By the Madhya Bharat Abolition of Jagir Act, 1951, hereinafter called the "Act", the jagirs were abolished with effect from December 4, 1952. Under section 8 of the Act compensation was payable to him in accordance with the principles laid down in Schedule I. Under sub-s. (2) of that section the compensation payable became due as from the date of the resumption of the jagir. Simple interest was payable at the rate of 2½ per cent per annum from that date upto the date of payment on the amount of compensation which was payable within a period of ten years in annual instalments. The assessee maintained that the amount of interest formed part of the compensation and constituted a capital receipt. The Income-tax Officer held against the assessee and included the interest in his income. The appellate Assistant Commissioner took the same view. The appellate tribunal, however, held that the amount of interest was a capital receipt and could not be included in the assessee's income. The following

question was referred to the High Court by the tribunal:

"Whether on the facts and in the circumstances of the case the interest that was received on the amount of compensation paid for resumption of the assessee's jagir was a capital receipt?"

The High Court answered the question in the negative and against the assessee.

3. The relevant provisions of the Act may be noticed. Section 3 (1) provided that the Government shall, by notification, appoint a date for the resumption of all jagir lands in the State. Section 4 gave the consequences of the resumption of jagir land. Chapter III headed "compensation" commenced with S. 8 which reads:

"Duty to pay compensation — Subject to other provisions of this Act the Government shall be liable to pay to every Jagirdar whose Jagir-land has been resumed under Section 3, such compensation as shall be determined in accordance with the principles laid down in Schedule I.

(2) Compensation payable under this section shall be due as from the date of resumption and shall carry simple interest at the rate of $2\frac{1}{2}$ per cent per annum from that date up to the date of payment:

Provided that no interest shall be payable on any amount of compensation which remains unpaid for any default of the Jagirdar, his Agent or his representative-in-interest."

Under S. 12 every jagirdar whose jagir land had been resumed under S. 3 had to file in the prescribed form a statement of claim for compensation before the Jagir Commissioner within two months from the date of resumption. On receipt of a statement of claim the Jagir Commissioner was to determine the amount of compensation payable to the Jagirdar under S. 8 as also the amounts recoverable from him under S. 4 (1) (e) and other matters mentioned in the section 13. Under S. 14 the amount recoverable from a Jagirdar was to be deducted from the compensation payable to him under section 8. Section 15 provided for payment of compensation money. According to sub-section (1) after the amount of compensation payable to a Jagirdar under S. 8 had been determined and the amount deducted from it under

S. 14, the balance was to be payable in maximum ten annual instalments. Under sub-section (4) payment of compensation money to a Jagirdar etc. was to be a full discharge of the Government from the liability to pay compensation in lieu of resumption of the jagir lands.

4. The argument on behalf of the assessee was based principally on the marginal heading of Section 8 which is "duty to pay compensation." It has been contended that the interest payable formed part of the compensation money. It has further been pointed out that Sections 13, 14 and 15 of the Act did not make any distinction between the payment dealt with by sub-s. (1) and sub-s. (2) of Section 8 and described both these payments as compensation payable to a jagirdar. Similarly under Section 15 (4) it was the payment of compensation money which included interest that operated as a full discharge of the liability of the Government to pay compensation. In our opinion the High Court rightly rejected these contentions. Section 8 (2) clearly provided that compensation shall be due as from the date of resumption. Thus the amount of compensation became ascertained and payable from the date of resumption. The provision for interest was made simply because the compensation was to be paid in ten annual instalments. A clear distinction has been made between the compensation payable under sub-s. (1) and the interest which is payable under sub-s. (2). The compensation has to be determined in accordance with the principles laid down in Schedule I. That Schedule indicates that the determination of compensation had nothing to do with the payment of interest. The marginal heading cannot control the interpretation of the words of the section particularly when the language of the section is clear and unambiguous. This court has held in *Dr. Sham Lal Narula v. Commr. of Income-tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala*, 53 ITR 151 = (AIR 1964 SC 1878) that the statutory interest paid under S. 34 of the Land Acquisition Act 1894 on the amount of compensation awarded for the period from the date the Collector has taken possession of the land compulsorily acquired is interest paid for the delayed payment of the compensation and is,

therefore, a revenue receipt liable to tax under the income-tax Act. As has been pointed out in that decision the legislature has expressly used the word 'interest' with its well-known connotation in the relevant statutory provision and it is therefore reasonable to give that expression the natural meaning it bears. The same principle would be applicable to the present case. It is apparent that under S. 8 of the Act the compensation amount as determined in accordance with the principles laid down in Schedule I became due to the jagirdar from the date of resumption. Since the entire amount was not to be paid on the date of the resumption but was to be paid by instalment extending over ten years a provision had to be made for the payment of interest in sub-s. (2). The amount of interest was thus given to the jagirdar for being kept out of the compensation amount for the aforesaid period. The legislature being well aware of the distinction between compensation and interest thereon employed clear language which leaves no room for doubt that under sub-s. (2) interest was payable in its well-known and well-understood sense and it could never form a part of the compensation money.

5. There is no merit in these appeals which are dismissed with costs. One hearing fee.

Appeals dismissed.

of 1947), Ss. 5 (7), 7, 10AA) — AIR 1965 Bom. 263, Reversed.

Amount of educational cess is recoverable by the landlord from the tenant under S. 10AA of the Rent Act. Section 7 of the Rent Act does not prohibit the recovery of the increase to which landlord may be entitled under the provisions of the Act in addition to the standard rent. Sections 5 (7), 9, 10 and 10AA of the Rent Act indicate that permitted increase becomes part of the rent. The building can well be said to be reasonably expected to be let at the figure arrived at by adding the permitted increase to the standard rent. The valuation has therefore, to be arrived at after taking into account the amount of educational cess levied by the Corporation. Even if it leads to some kind of inconvenience of variation in valuation at frequent intervals that can be no consideration for not giving full effect and meaning to the provisions of the Act of 1888 and the Rent Act. AIR 1965 Bom 263, Reversed.

(Para 6)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 1742 (V 50) =

(1964) 2 SCR 608, Patel Gover-

dhan Das Hargovind Das v.

Municipal Commr. Ahmedabad 6

(1962) AIR 1962 SC 151 (V 49) =

1962-3 SCR 49, Corp'n. of Cal-

cutta v. Smt. Padma Devi 6

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal from a judgment of the Bombay High Court in the matter of valuation of the premises belonging to the respondent made under the provisions of the Bombay Municipal Corporation Act 1888, hereinafter called "the Act of 1888."

2. For the years 1957-58 and 1958-59 the rateable valuation of the building was fixed by the Municipal Corporation at Rs. 1,66,410. On April 1, 1952 an additional tax known as educational cess was imposed by the Municipal Corporation at the rate of 1½ per cent of the rateable value on all properties within its limits. This was done under Section 140 of the Act of 1888. As the landlord became entitled to increase the rent recoverable from the tenant to the extent of the increase in the tax payable to the Corporation under the provisions of Section 10-AA of the Bombay Rents,

AIR 1970 SUPREME COURT 1584
(V 57 C 337)

(From Bombay: AIR 1965 Bom. 263)

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

The Bombay Municipal Corporation, Appellant v. The Life Insurance Corporation of India, Bombay, Respondent.

Civil Appeal No. 402 of 1967, D/- 21-4-1970.

Municipalities — Bombay Municipal Corporation Act (3 of 1888), Ss. 154 (1), 140 — Rateable value of building — Fixation — Amount of educational cess levied by Corporation under Section 140 can be added to standard rent for purpose of valuation — (Houses and Rents — Bombay Rents, Hotel and Lodging House Rates (Control) Act (57

FN/GN/C841/70/MLD/P

Hotel and Lodging House Rates Control Act, 1947 (Act No. LVII of 1947) hereinafter called the Rent Act, the Assessor and Collector of the Corporation served a notice on the respondent proposing to increase the rateable value of the building in question to Rs. 1,68,585. The respondent objected to the above increase. The Assessor and the Collector, however, raised the rateable value to Rs. 1,66,180. The amount thus fixed was at a lesser figure than the one for the year 1958-59 but that was by reason of certain other deductions which had been claimed by the respondent and which were allowed. The claim of the respondent for non-inclusion of the amount of educational cess in the rent was disallowed. The matter was taken in appeal to the court of Small Causes at Bombay which was dismissed. The respondent preferred an appeal to the High Court. The High Court held that the rateable value could be fixed only on the basis of the standard rent provided by the Rent Act and the amount of permitted increases could not be included in rent for the purposes of valuation. It was not disputed by the respondent before the High Court that the rents of the tenants had been increased by it to the extent of the educational cess but the contention that was put forward and which prevailed was that the same was not being recovered as a part of the rent.

3. The controversy between the parties is a narrow one. According to the appellant the amount of educational cess which is recoverable by the landlord under the Rent Act from the tenants should be deemed to be a part of the annual rent for which the building might reasonably be expected to be let from year to year within the meaning of S. 154 (1) of the Act of 1888. On the other hand the respondent has maintained throughout that the educational cess levied under section 140 of the aforesaid Act cannot be included for the purpose of valuation under S. 154 (1) in the annual rent.

4. We may now notice the relevant provisions of the Act of 1888 and the Rent Act. Section 140 of the Act of 1888 provides for imposition of property tax on buildings and lands in Greater Bombay. Section 154 (1) provides that in order to fix the rateable value of any building or land assessable

to property tax there shall be deducted from the amount of the annual rent for which such land or building might reasonably be expected to let from year to year a sum equal to ten per centum of the said annual rent and the said deduction shall be in lieu of all allowances for repairs on or any other account whatever. Section 5 (10) of the Rent Act gives the definition of "standard rent". There is no reference or mention of any permitted increase in the definition. The expression "permitted increase" is defined by S. 5 (7) to mean an increase in rent permitted under the provisions of the Act. Section 5 (3) defines the word "landlord" as meaning any person who is for the time being receiving or entitled to receive rent in respect of any premises etc. Section 5 (11) gives the meaning of the word "tenant". According to that meaning a tenant would be any person by whom or on whose account rent is payable for any premises and includes such persons as are specifically mentioned in sub-cl. (a), (aa) and (b). Section 7 provides for increase in rent on account of improvements or structural alteration of the premises which have been made with the consent of the tenant and such increase is not to be deemed an increase for the purpose of S. 7. Under S. 10 a landlord can increase the rent on account of payment of rates, cess or taxes imposed and levied by a local authority. Such an increase again is not to be deemed to be an increase for the purpose of S. 7. Similarly under section 10AA the landlord can increase the rent on account of payment of enhanced rates etc. permitted after certain date in particular areas. Any increase in this section cannot be deemed to be an increase for the purpose of S. 7.

5. The High Court was alive to the fact that the mention of increase in Ss. 10, 10A and 10AA referred to increases in rent but it was felt that the section in express terms provided that such an increase shall not be deemed to be an increase in rent under Section 7. According to the High Court it followed that what was allowed to the landlord in addition to the standard rent was not an increase in the rent but a provision was made in a specified way for the transfer of the burden of the tax to the tenants because of the rigours of the Rent Act.

The other factor which weighed with the High Court was that if the increase in rates was to be treated as a part of the rent which would enable the Municipal Corporation to increase the valuation on every occasion when there was increase in rates and taxes this would "land us again into a cycle of increments every year from figure to figure never intended by the framers either of the Rent Act or of the Municipal Act."

6. It is necessary to set out Section 7 of the Rent Act at this stage:—

"Except where the rent is liable to periodical increment by virtue of an agreement entered into before the first day of September 1940, it shall not be lawful to claim or receive on account of rent for any premises any increase above the standard rent, unless the landlord was, before the coming into operation of this Act, entitled to recover such increase.....
.....under the provisions of this Act."

It is quite clear that Sec. 7 does not prohibit the recovery of the increase to which landlord may be entitled under the provisions of the Act in addition to the standard rent. The obvious implication of the definition of "permitted increase" in Section 5 (7) is that such an increase becomes a part of the rent. The language which has been employed in Sections 9, 10 and 10-AA seems to indicate that the Legislature treated the permitted increase as a part of the rent which the landlord would be entitled to receive from the tenant. In *Corpn. of Calcutta v. Smt. Padma Devi*, 1962-3 SCR 49 = (AIR 1962 SC 151) the question arose whether the Municipal Corporation had the power to fix the annual valuation on a figure higher than the standard rent. It was held that on a reading of the provisions of Section 127 (a) of the Calcutta Municipal Act 1923 the rental value could not be fixed higher than the standard rent under the Rent Control Act. It was further held that the words "gross annual rent at which the land or buildings might at the time of assessment reasonably be expected to let from year to year" in Section 127 (a) implied that the rent which the landlord might realize if the house was let was the basis for fixing the annual valuation of the buildings. Thus the criterion was the rent realizable by

the landlord and not the valuation of the holding in the hands of the tenant. Even applying that criterion the rent realizable, in the present case, would be the standard rent together with the permitted increase on account of the levy of educational cess. As observed in *Patel Gordhandas Hargovindas v. Municipal Commr., Ahmedabad*, 1964-2 SCR 608 = (AIR 1963 SC 1742) there are three modes of determining the annual or rateable value of lands or buildings. The first is the actual rent fetched by the land or buildings where it is actually let. The second is rent based on hypothetical tenancy where it is not let and the third is by valuation based on capital value from which the annual value has to be found by applying a suitable percentage, where either of the first two modes is not available. In the present case admittedly the actual rent of the building in question which is being fetched comprises the standard rent and the permitted increase. The building can well be said to be reasonably expected to be let from year to year at the figure arrived at by adding the permitted increase, to the standard rent. The valuation had, therefore, to be arrived at after taking into account the amount of educational cess which was levied by the Corporation. Even if such a conclusion leads to some kind of inconvenience of variation in valuation at frequent intervals that can be no consideration for not giving full effect and meaning to the provisions of the Act of 1883 and the Rent Act under consideration.

7. In the result the appeal is allowed and the judgment of the High Court is set aside and that of the Court of the Small Causes is restored with costs.

Appeal allowed.

AIR 1970 SUPREME COURT 1586,
(V 57 C 338)

(From: Patna)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER JJ.

Commissioner of Income Tax, Bihar
and Orissa, Appellant v. M/s. Kirkand
Coal Co., Respondent.

Civil Appeal No. 522 of 1967
D/- 21-4-1970.

FN/FN/C843/70/YPB/D

(A) Income Tax Act (1922), Section 10 (2) (xv) — Revenue Expenditure — Coal mining business—Expenditure for stowing operations is revenue expenditure.

The sum spent for stowing operations by the assessee who was carrying on coal mining business is a revenue expenditure as it is necessary for the purpose of extraction of coal and as such is deductible as permissible allowance under Section 10 (2) (xv). Judgment of Patna High Court, Affirmed.

(Paras 4, 6)

(B) Income Tax Act (1922), Section 66-A (2) — Interference with findings of fact — Finding of Appellate Tribunal that stowing is an operation carried out in process of extraction of coal and that unless it is carried out extraction of coal is not possible irrespective of the fact whether depillaring has been done or not, is finding of fact and is binding not only on High Court but also on Supreme Court.

(Para 4)

Cases Referred: Chronological Paras (1965) AIR 1965 SC 1201 (V 52) =

(1965) 1 SCR 770, Bombay

Steam Navigation Co. v.

Commr. of Income-tax, Bombay 5

The following Judgment of the Court was delivered by .

HEGDE J.:—This is an appeal by certificate from the judgment of the High Court of Patna in a reference under Section 66 (1) of the Indian Income-tax Act, 1922 (in short the Act). At the instance of the Commissioner of Income Tax, Bihar and Orissa the Income Tax Appellate Tribunal (Patna Bench) referred the following question of law to the High Court for its opinion.

"Whether the sum of Rs. 21,911 claimed as stowing expenses is capital expense or revenue expense."

2. The High Court answered that question in favour of the assessee. It held that it was a revenue expenditure.

3. The facts of this case lie within narrow compass. The assessee M/s. Kirkand Coal Co. is a firm carrying on coal mining business. During the accounting year ending on December 31, 1956, that company spent a sum of Rs. 21,911 for stowing operations. The department of Mines required the assessee to stow certain galleries near the pitmouth as a condition precedent for working the colliery during the

accounting year. The assessee claimed that the said expenditure was a revenue expenditure coming within Section 10 (2) (xv) of the Act. The Income-tax Officer as well as the Appellate Assistant Commissioner overruled the contention of the assessee. They considered that expenditure as capital expenditure and hence not deductible as a permissible allowance. But on a further appeal, the Appellate Tribunal came to the conclusion that:

"Stowing is an operation carried out in the process of extraction of coal and unless it is carried out extraction of coal is not possible irrespective of the fact whether depillaring has been done or not, in this year. This expenditure, is, in our opinion, a revenue expenditure, as it is necessary for the purpose of extraction of coal."

4. On the basis of that finding, it allowed the assessee's appeal and allowed the expenditure in question as a permissible deduction. The High Court has accepted the conclusion of the Tribunal. The finding of the Appellate Tribunal that stowing is an operation carried out in the process of extraction of coal and unless it is carried out, extraction of coal is not possible irrespective of the fact whether depillaring has been done or not is a finding of fact. That finding was binding on the High Court. It is equally binding on us. In view of that finding, the High Court was justified in holding that the expenditure in dispute is a revenue expenditure.

5. This Court had in various decisions laid down the principles to be applied in distinguishing revenue expenditure from capital expenditure. In *Bombay Steam Navigation Co. v. Commr. of Income-tax, Bombay*, (AIR 1965 SC 1201) this Court observed:

"Whether a particular expenditure is revenue expenditure incurred for the purpose of business must be determined on a consideration of all the facts and circumstances, and by the application of Principles of Commercial Trading. The question must be viewed in the larger context of business necessity or expediency. If the outgoing or expenditure is so related to the carrying on or conduct of the business, that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character, the possession of which

is a condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure."

6. On the facts found by the Tribunal it is quite plain that the expenditure in question is a revenue expenditure.

7. In the result this appeal fails and the same is dismissed with costs.
Appeal dismissed.

AIR 1970 SUPREME COURT 1588
(V 57 C 339)

(From: Allahabad)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

The Commissioner of Income-Tax,
U. P., Appellant v. M/s. J. P. Kanodia
and Co., Respondent.

Civil Appeal No. 193 of 1967, D/- 28-4-1970.

(A) Income Tax Act (1922), S. 23 (5),
(6) — Registered firm — Assessment
— Powers of Income-tax Officer to inquire whether a partner represented some other person.

Once the Income-tax Officer has granted registration of a firm, he must allocate the profits in accordance with the deed of partnership registered by him and to the persons admitted to the benefits thereof according to their respective shares. He cannot proceed to inquire whether the share allocated to a partner is beneficially held by some other person or entity. (Para 6)

(B) Income Tax Act (1922), S. 24 (1), first proviso — Set off of loss against profit — Assessee is not entitled to set off speculative losses against profits from other business activities of the same year. AIR 1965 All 94 held, overruled by AIR 1969 SC 209. Judgment of Allahabad High Court Reversed. (Para 7)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 209 (V 56) =
(1969) 71 ITR 296, Commr. of
Income tax, U.P. v. Jagannath
Mahadeo Prasad

(1965) AIR 1965 All 94 (V 52) =
(1965) 55 ITR 501, Jagannath
Mahadeo Prasad v. Commr. of
Income-tax

The following Judgment of the
Court was delivered by

SHAH, J.: M/s. J. P. Kanodia and
Company is a firm registered under

FN/FN/C839/70/DH/Z/P

the Indian Income-tax Act, 1922. The partners of the firm were Smt. Shanti Devi and Badri Prasad. Three minors Pradeep Kumar, Anand Prakash and Rajendra Prasad were admitted to the benefits of the partnership.

2. In proceedings for assessment of tax for the assessment year 1957-58, the Income-tax Officer rejected the claim of the firm to set off loss from certain speculative transactions aggregating to Rs. 22,234/- and computed the income of the firm at Rs. 25,365/-. The Income-tax Officer was of the opinion that since the capital contributed by the partners and the minors who were admitted to the benefits of the partnership was out of the capital of the respective Hindu Undivided Families to which they belonged, the profits allocated to the partners and to the minors were liable to be assessed in the hands of the respective Hindu Undivided Families to which they belonged.

3. The order passed by the Income-tax Officer was confirmed in a revision application by the Commissioner. The firm then moved a petition under Art. 226 of the Constitution before the High Court of Allahabad. Two contentions were raised in support of the petition: (i) that the Income-tax Officer erred in directing that the profits allocated to the shares of the partners and to the minors be assessed as the income of the respective Hindu Undivided Families to which they belonged; and (ii) that the loss in speculation business should have been set off under S. 24 (1) of the Income-tax Act against profits from other business.

4. Manchanda, J. accepted the first contention, observing that the order directing assessment of the shares allocated to the partners and the minors to the benefits of the partners "was manifestly without jurisdiction", he quashed that part of the order of the Income-tax Officer (sic). The learned Judge rejected (sic) the second contention for in his view the matter was covered by the judgment in Jagannath Mahadeo Prasad v. Commr. of Income-tax, (1965) 55 ITR 501 = (AIR 1965 All 94). He accordingly held that the speculation losses were liable to be set off against the profits in other business in the year of assessment.

The order of Manchanda, J., was confirmed in a special appeal by the Division Bench of the High Court. This appeal is filed by the Commissioner with certificate granted by the High Court.

5. Sub-sections (5) and (6) of Section 23 of the Income-tax Act as they were in force at the date in the year of assessment read as follows:—

"(5) Notwithstanding anything contained in the foregoing sub-sections, when the assessee is a firm and the total income of the firm has been assessed under sub-section (1), sub-section (3) or sub-section (4) as the case may be, —

(i) the income-tax payable by the firm itself shall be determined:

(ii) the total income of each partner of the firm, including therein his shares of its income, profits and gains of the previous year, shall be assessed and the sums payable by him on the basis of such assessment shall be determined.

x x x x x x

"(6) Whenever the Income-tax Officer makes a determination in accordance with the provisions of sub-section (5), he shall notify to the firm by an order in writing the amount of the total income on which the determination has been based and the apportionment thereof between the several partners."

6. In the case of a registered firm the Income-tax Officer has to determine the Income-tax payable by the firm and also to determine the total income of each partner of the firm and the sum payable by him on the basis of such assessment. He has then to certify the determination in accordance with sub-section (6) and the apportionment thereof among the partners. Once the Income-tax Officer has granted registration of the firm, he cannot proceed to inquire whether the share allocated to a partner is beneficially held by some other person or entity. The Income-tax Officer must allocate the profits in accordance with the deed of partnership registered by him and to the persons admitted to the benefits thereof according to their respective shares. He cannot at that stage hold an inquiry whether the partners represented other persons. The order of the Income-tax Officer directing that the income of the partners and the shares allocated to

the minors admitted to the benefit of the partnership shall be assessed in the hands of the respective Hindu Undivided Families was plainly without jurisdiction.

7. On the second contention not much need be said. The High Court purported to follow the judgment in Jagannath Mahadeo Prasad's case, (1965) 55 ITR 501 = (AIR 1965 All 94) but that judgment has been expressly overruled by this Court in Commr. of Income-tax, U. P. v. Jagannath Mahadeo Prasad, (1969) 71 ITR 296 = (AIR 1969 SC 209). This Court held disagreeing with Jagannath Mahadeo Prasad's case, (1965) 55 ITR 501 = (AIR 1965 All 94) that in the computation of the income, profits and gains of the year of assessment under Section 10 (1) of the Indian Income-tax Act, the assessee is not entitled to set off speculative losses against profits from other business activities of the same year.

8. The appeal is partially allowed. The order of the High Court setting aside the order of the Commissioner of Income-tax refusing to allow the set off of speculation loss against profits from ready business is set aside. The order of the High Court vacating the direction to assess the shares allocated to the partners and persons admitted to the benefits of the partnership in the profits of the assessee firm to the respective Hindu Undivided Families to which they belonged is confirmed. There will be no order as to costs.

Appeal partly allowed.

AIR 1970 SUPREME COURT 1589
(V 57 C 340)

(From: Punjab)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

M/s. Jullundur Rubber Goods Manufacturers' Association, Appellant v. The Union of India and another, Respondents.

Indian Rubber Works and others, Interveners.

Civil Appeal No. 1220 of 1966. D/- 25-8-1969.

(A) Constitution of India, Art. 265—
Taxes not to be imposed save by au—

*(L. P. A. No. 58-D of 1966 D/- 6-4-1966—
Punj.)

DN/EN/E458/69/VBB/M

thority of law — Excise duty — It can be levied at convenient stage—Method of collection does not affect essence of duty — Whether tax ceases to be in essence excise duty is to be decided on construction of particular Act.

Subject always to the legislative competence of the taxing authority, excise duty can be levied at a convenient stage so long as the character of the impost as a duty on the manufacture or production is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience. Whether in a particular case the tax ceases to be in essence an excise duty, and the rational connection between the duty and the person on whom it is imposed ceased to exist, is to be decided on a fair construction of the provisions of a particular Act. AIR 1939 FC 1 (6) and AIR 1962 SC 1281, Rel. on.

(Para 5)

(B) Rubber Act (1947) (as amended in 1960), S. 12 (2) — Imposition of new rubber cess — Excise duty on rubber — Levy and collection from users of rubber does not affect essence of duty.

(Para 5)

(C) Constitution of India, Sch. 7 List 1 Entry 97 — Tax not mentioned in either List I or List II — Rubber Act (1947) (as amended in 1960), S. 12 (2) — Excise duty on rubber — Levy and collection from users of rubber — Whatever be the nature of the duty imposed Parliament has legislative competence under List I, Entry 97 of Sch. 7 read with Art. 248 of the Constitution even with regard to imposition which does not fall within Entry 84.

(Para 6)

(D) Civil P. C. (1908), Pre. — Interpretation of Statutes — Not only the statute but also Section (with sub-sections) has to be read as a whole and together, and not in isolation.

(Para 6)

(E) Constitution of India, Art. 245 — Extent of laws made by Parliament and by Legislatures of States — Delegated legislation — Permissible limits with special reference to taxing statute.

It is well established that essential legislative functions consist of the determination of the legislative policy and its formulation as a binding rule of conduct and cannot be delegated by

the legislature. What can be delegated is the task of subordinate legislation necessary for implementing the purpose and objects of an enactment. Where legislative policy is enunciated with sufficient clearness or a standard is laid down the courts will not interfere. It will depend on consideration of the provisions of a particular Act including its preamble as to the guidance which has been given and the legislative policy which has been laid down in the matter.

(Para 7)

In a taxing statute the guidance may take the form subjecting the rate to be fixed by the local body to the approval of the Government which acts as a watch-dog on the actions of the local body in this matter on behalf of the legislature. The reasonableness of the rates may be ensured by providing safeguards laying down the procedure for consulting the wishes of the local inhabitants. So long as the law has provided the method by which the local body can be controlled and there is a provision to see that reasonable rates are fixed it can be said that there is guidance in the matter of fixing the rates for local taxation. AIR 1968 SC 1232 (1244-45), Foll.

(Para 7)

(F) Rubber Act (1947) (as amended in 1960), S. 12 (2) — Imposition of new rubber cess — Provision does not suffer from vice of excessive delegation.

In the light of the scheme as embodied in the Act the challenge on the ground of excessive delegation cannot be sustained. The policy of the Act has been enunciated with sufficient clarity and the guidance has been furnished as to how the Board should exercise its powers in the matter of levy and collection of tax. Thus it is not possible to hold that the Parliament has abdicated its functions in enacting S. 12 (2) of the Act.

(Paras 8 and 9)

(G) Constitution of India, Art. 245 — Extent of laws made by Parliament and by legislatures of States—Rubber Act (1947), S. 12 (2) — Does not suffer from vice of excessive delegation.

(Paras 8, 9)

(H) Rubber Act (1947) (as amended in 1960), S. 12 (2) — Imposition of new rubber cess — Discretion conferred on Rubber Board to levy and collect tax from either producer or manufac-

turer (user of rubber) — No violation of Art. 14 of the Constitution on the ground of discrimination — Board cannot discriminate in arbitrary manner between owners of rubber estates and users of rubber or between persons inter se of same category. AIR 1968 SC 317 and AIR 1962 SC 263, Ref.

(Para 11)

(I) Constitution of India, Art. 14 — Equality before law — Tax laws — Rubber Act (1947), S. 12 (2) — No violation of Art. 14. (Para 11)

(J) Constitution of India, Pre. — Statement of Objects and Reasons — Use of, for seeing infringement of Art. 14 of the Constitution.

Although it may not be permissible to take the Statement of Objects and Reasons into consideration for construing the provisions of an Act the facts contained in such a statement can be looked at for the purpose of seeing any alleged infringement of Art. 14 of the Constitution.

(Para 11)

(K) Constitution of India, Art. 14 — Equality before law — Allegation of infringement of Article — Facts contained in Statement of Objects and Reasons can be looked at. (Para 11)

(L) Rubber Act (1947), S. 25—Power of Central Government to make rules — Rules framed under — Rules relating to furnishing of returns and collection of duties are not properly worded and suffer from lack of clarity.

(Para 12)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 317 (V 55)=

1968-1 SCR 65, M. M. Ipoh v. Commr. of I. T., Madras 10

(1968) AIR 1968 SC 1232 (V 55)=

1968-3 SCR 251, Municipal Corpn. of Delhi v. Birla Cotton Spg. and Weaving Mills 7

(1962) AIR 1962 SC 263 (V 49)=

1962-3 SCR 547, Raghubar Dayal Jai Prakash v. Union of India 10

(1962) AIR 1962 SC 1281 (V 49)=

1962 Supp 3 SCR 436, R. C. Jall Parsi v. Union of India 5

(1939) AIR 1939 FC 1 (V 26)=

1939 FCR 18, In re, Central Provinces and Berar 5

Mr. M. C. Chagla, Sr. Advocate (Mr. B. Datta Advocate, and Mr. J. B. Dadachanji Advocate of M/s. J. B. Dadachanji and Co. with him), for Appellant; Mr. Niren De, Attorney-General for India and Dr. V. A. Seyid

Muhammad, Sr. Advocate (M/s. R. H. Dhebar and S. P. Nayar, Advocates with them), for Respondent No. 1; Niren De, Attorney-General for India and Dr. V. A. Seyid Muhammad, Sr. Advocate (M/s. R. H. Dhebar and S. P. Nayar and Joy Joseph, Advocates with them), for Respondent No. 2; M/s. S. J. Sorabji, A. J. Rana, K. L. Hathi and K. N. Bhat, Advocate, for Interveners.

The Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the Punjab High Court (Circuit Bench) Delhi in which, the validity and legality of the levy of cess by way of excise duty on the rubber used by manufacturers of chappals under the provisions of the Rubber Act 1947, (Act XXIV of 1947), as amended, hereinafter called the Act, have been assailed.

2. M/s. Jullundur Rubber Goods Manufacturers, Association is an association of rubber chappal manufacturers at Jullundur in the State of Punjab. Its members, who manufacture chappals, are stated to use about 15 to 20 per cent of rubber in the process of their manufacture while the rest of the material used by them consists of various other articles. A petition was filed under Arts. 226 and 227 on behalf of the aforesaid Association, the second petitioner being its Secretary, challenging the levy and collection from the manufacturers of chappals under the provisions of the Act, the Rules framed and the relevant notification issued thereunder of a duty as a result of the amendment made in S. 12 of the Act by the Rubber Act of 1960. A learned Single Judge dismissed the writ petition and his judgment was affirmed by a Division Bench of the High Court.

3. The contentions which have been raised are (1) the duty sought to be imposed under S. 12 as amended being outside the ambit of Entry 84 of List I in the Schedule to the Constitution is beyond the legislative competence of the Parliament; (2) Section 12 (2) suffers from the vice of excessive delegation. It confers uncontrolled and unrestricted discretion upon the Rubber Board to levy upon and collect duty of excise from either the owners of the rubber producing estates or the users so called manufacturers (of rubber) without specifying

the circumstances under which it should be imposed upon the one or the other nor has any guiding policy or principle been laid down in the Act for making a choice. (3) In any case the Rules which have been framed do not satisfy the provisions of S. 12 (2) of the Act and do not indicate with sufficient clarity and precision on whom the levy is to be made and from whom the duty is to be collected as between the owners of the estates and the manufacturers.

4. The relevant statutory provisions may first be noticed. In 1947 the Central legislature enacted The Rubber (Production and Marketing) Act 1947. Its name was changed to Rubber Act 1947 by the Rubber (Production and Marketing) Amendment Act 1954. The Act was enacted to provide for the development, under the control of the Union, of the rubber industry. Under S. 4 the Rubber Board was to be constituted. The functions of the Board were enumerated in section 8. It was to be its duty to promote by such measure as it thought fit the development of the rubber industry. Under S. 10 it was obligatory on every person owning land planted with rubber plants to get himself registered as an owner by applying to the Board. Section 12 provided for the imposition of rubber cess. Under S. 14 no person could sell or otherwise dispose of or buy or otherwise acquire rubber except in accordance with the terms of general or special license issued by the Board. The Central Government was given the over-all control over the acts of the Board by S. 22. Section 25 empowered the Central Government to make Rules. Prior to the amendment made by the Rubber Amendment Act of 1960 (Act XXI of 1960) the duty of excise was payable under S. 12 (2) by the owners of the estates on which rubber was produced and it was to be paid by them to the Board within one month from the date on which they received a notice of demand. By Act XXI of 1960 an important change was made which affected the manufacturers and the duty could be collected by the Board either from the owners of the estates or from the manufacturers by whom the rubber is used.

5. At this stage the relevant provisions of the Act with which we are concerned may be reproduced:

"Section 3 (e) 'manufacturer' means any person engaged in the manufacture of any article in the making of which rubber is used;"

(h) "rubber" means:—

(i)

(ii)

(iii) latex (dry rubber content) in any state of concentration, and includes scrap rubber, sheet rubber, rubber in powder and all forms and varieties of crepe rubber, but does not include rubber contained in any manufactured article."

Section 4 (3) "The Board shall consist of:—

(a) a Chairman to be appointed by the Central Government;

(b) two members to represent the State of Madras, one of whom shall be a person representing rubber producing interests,

(c) eight members to represent the State of Kerala, six of whom shall be persons representing the rubber producing interests, three of such six being persons representing the small growers;

(d) ten members to be nominated by the Central Government of whom two shall represent the manufacturers and four labour; and

(e) three members of Parliament of whom two shall be elected by the House of the People and one by the Council of States; and

(f) the Rubber Production Commissioner, ex-officio."

Section 12 (4) "For the purpose of enabling the Board to assess the amount of duty of excise levied under the section:—

(a) the Board shall, by notification in the Official Gazette, fix a period in respect of which assessments shall be made; and

(b) without prejudice to the provisions of section 20, every manufacturer shall furnish to the Board a return not later than fifteen days after the expiry of the period to which the return relates, stating:—

(i) in the case of an owner, the total quantity of rubber produced on the estate in each such period; Provided that in respect of an estate situated only partly in India, the owner shall in the said return show separately the quantity of rubber produced within and outside India;

(ii) in the case of a manufacturer, the total quantity of rubber used by

him in such period out of the rubber produced in India."

The contention raised on behalf of the appellant-association is that under Entry 84 of List I in the Seventh Schedule to the Constitution the duties can be levied on goods manufactured or produced in India. Excise duty, it is pointed out, can be levied only on the actual producers and manufacturers of rubber but in the very nature of such duty it could not be imposed on users or consumers of that commodity. It is suggested that sub-s. (1) of S. 12 is the charging section and sub-s. (2) provides for the machinery for levy and collection of tax. But sub-section (2) cannot alter the substantive provision in the charging sub-section (1) and since the Parliament has employed the words "duty of excise" which have well understood meaning the incidence of tax would fall only on the actual producers. Once the incidence of tax was shifted to the users the tax would cease to be one which would fall within Entry 84. In re the Central Provinces and Berar Act No. XIV of 1938, 1939 FCR 18 at pp. 40, 41 = (AIR 1939 FC 1 at p. 6), Gwyer C. J. described "excise duty" thus:

"But its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption".

The learned Chief Justice, however, proceeded to add that there could be no reason in theory why such duty should not be imposed even on the retail sale of an article if the taxing Act so provided. It could obviously be imposed at the stage which was found to be most convenient and lucrative as that was a matter of the machinery of collection and did not affect the essential nature of the tax. Referring to this decision of the Federal Court and several other cases it was observed in R. C. Jall v. Union of India, (1962) Supp 3 SCR 436 at p. 451 = (AIR 1962 SC 1281 at p. 1287):

"Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative com-

petence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience. Whether in a particular case the tax ceases to be in essence an excise duty, and the rational connection between the duty and the person on whom it is imposed ceased to exist, is to be decided on a fair construction of the provisions of a particular Act".

The above statement of law in no way supports the argument that the excise duty cannot be collected from persons who are neither producers nor manufacturers. Its incidence certainly falls directly on the production or manufacture of goods but the method of collection will not affect the essence of the duty. In our opinion sub-s. (2) of S. 12 provides for the method of collection as the excise duty can be collected either from the producers or from the manufacturers as defined by the Act which would include members of the appellant association who use rubber in the manufacture of chappals.

6. It seems to us that if the provisions of Entry 97 in List I in the Seventh Schedule as also the provisions of Art. 248 of the Constitution are kept in view the Parliament would have legislative competence even with regard to the imposition of a tax which does not fall within Entry 84. It will be a kind of non-descript tax which has been given the nomenclature of a duty of excise. Counsel for the appellant-association quite properly has not challenged this position but has merely sought to lay emphasis on sub-sec. (1) being the charging section. We find it difficult to endorse the reading of sub-s. (1) and sub-s. (2) of S. 12 in isolation. Not only the statute but also the section have to be read as a whole and together and in our judgment whatever be the nature of duty Parliament would undoubtedly have legislative competence under Entry 97 of List I in the Seventh Schedule read with Art. 248 of the Constitution.

7. We may next deal with the question whether S. 12 (2) suffers from the vice of excessive delegation and whether there has been violation of Art. 14

as uncontrolled and unbridled discretion has been conferred on the Board to levy and collect the tax from either the producer or the manufacturer (the user of rubber). It is pointed out that there is no guiding principle or policy laid down in the Act to enable the Board to make a choice between the two categories. The principles governing such questions have been laid down in several decisions of this Court. It is well established that essential legislative functions consist of the determination of the legislative policy and its formulation as a binding rule of conduct and cannot be delegated by the legislature. What can be delegated is the task of subordinate legislation necessary for implementing the purpose and objects of an enactment. Where legislative policy is enunciated with sufficient clearness or a standard is laid down the courts will not interfere. It will depend on consideration of the provisions of a particular Act including its preamble as to the guidance which has been given and the legislative policy which has been laid down in the matter. In a taxing statute the guidance may take the form subjecting the rate to be fixed by the local body to the approval of the Government which acts as a watch-dog on the actions of the local body in this matter on behalf of the legislature. The reasonableness of the rates may be ensured by providing safeguards laying down the procedure for consulting the wishes of the local inhabitants. So long as the law has provided the method by which the local body can be controlled and there is a provision to see that reasonable rates are fixed it can be said that there is guidance in the matter of fixing the rates for local taxation; vide *Wanchoo C. J. in Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi 1968-3 SCR 251 at pp. 269, 270* — (AIR 1968 SC 1232 at pp. 1244, 45).

8. In Section 12 (2) the Parliament has made it quite clear that the Board can levy and collect the duty of excise either from the owner of a rubber estate on which the rubber is produced or from the manufacturer by whom such rubber is used. The Board has further been enjoined to do so in accordance with Rules made in this behalf. The Board, as constituted under S. 4 has to be a high powered body and among its members those repre-

senting the rubber producing interests, the small growers, the manufacturers and the labour are included. It can, therefore, keep in view the interest of all concerned. According to the preamble of the Act it was meant for the development of the rubber industry under the control of the Union. That is the main purpose for which the Board has to function. All amounts paid to the Board by the Central Government under Section 12 (7) of the Act have to go to the general fund of the Board under S. 9A. Section 12 (7) provides that the proceeds of the duty of excise collected has first to be credited to the Consolidated Fund of India reduced by the cost of collection and then it has to be paid over by the Central Government to the Board. The Board is thus vitally interested in the collection of the duty and it has to see that such duty is collected without undue delay and proper expedition. It has also to look to the best possible method of realization. In the light of this scheme as embodied in the Act, it is difficult to sustain the challenge on the ground of excessive delegation. The policy of the Act has been enunciated with sufficient clarity and the guidance has been furnished by the provisions to which reference has been made as to how the Board should exercise its powers in the matter of levy and collection of tax. There is also another important safeguard which is contained in S. 22 of the Act. All acts of the Board by virtue of that section shall be subject to the control of the Central Government which may cancel, suspend or modify any action taken by the Board.

9. The provision in S. 12 (2) that the Board shall levy and collect the duty in accordance with the Rules is another important safeguard against the Board acting arbitrarily in the matter of collection of duty from the owners of the rubber estates or the manufacturers. These Rules are to be framed by the Central Government under S. 25 (1) (xxa) which is to the following effect:

"the cases and circumstances in which the duty of excise under S. 12 shall be payable by the owner and the manufacturers respectively, the manner in which the duty may be assessed, paid or collected, the regulation of the production, manufacture, transport or sale of rubber in so far as such regula-

tion is necessary for the proper levy, payment or collection of duty;" Section 25 (3) makes it obligatory on the Central Government to place every rule before each House of Parliament for a specified period of 30 days and those Rules can be subject to criticism and can be modified or even be abrogated. Thus it is not possible to hold that the Parliament has abdicated its functions in enacting S. 12 (2) of the Act.

10. Learned Attorney General has relied on certain decisions of this court according to which it can be left to the authority which has to levy and collect the tax to decide whether to collect from one category of persons or the other category where persons in both categories can be subjected to tax. In 1968-1 SCR 65 = (AIR 1968 SC 317), *M. M. Ipoh v. Commissioner of Income-tax, Madras*, the validity of S. 3 of the Income-tax Act 1922 was challenged on the ground that it was violative of Art. 14 of the Constitution. That section invested the taxing authority with an option to assess to tax the income collectively of the association of persons. The argument raised was that that Act set no principles and disclosed no guidance to the Income-tax Officer in exercising the option. The scheme of the Income-tax Act was considered and it was observed that the duty of the Income-tax Officer was to administer its provisions in the interest of public revenue and to prevent evasion of tax and his function was mainly quasi-judicial. The decision of bringing to tax either the income of the association collectively or the shares of the members of the association separately was not final and was subject to appeal. It was held that the very nature of the authority exercised by the Income-tax Officer and his duty to prevent evasion or escapement of liability constituted adequate enunciation of principles and policy for his guidance. In *Raghubar Dayal Jai Prakash v. The Union of India*, 1962-3 SCR 547 = (AIR 1962 SC 263) the validity of certain provisions of the Forward Contracts (Regulation) Act 1952 was assailed. In regard to S. 15 of that Act the argument was that it conferred unguided and arbitrary power upon the Central Government to choose any commodity it liked and bring the Act into operation in respect of the com-

modity which the Government chose at any time it pleased. In this manner the interest of the traders could be vitally affected by rendering illegal a contract which was perfectly legal when it was entered into. This Court referred to the Report of the Expert Committee on the Bill which became an Act, dealing with the economic implications of forward trading and for the necessity of regulating such contracts in particular goods. It was observed that the suitability of a commodity for forward trading depended on factors which were far from static and which were subject to variations over a period of time. A continuous assessment was required of all elements which would necessitate regulation. All this could not be specified in a statute. It was for that reason that a Forward Markets Commission had been constituted on whom the duty had been cast of advising the Government on the situation as it existed from time to time. The following observations are pertinent and may be reproduced:

"In our opinion, the selection of the commodity, for the regulation of forward trading in it or of prohibition of such trading can only be left to the Government and the purpose for which the power is to be used and the Machinery created for the investigation furnish sufficient guidance as to preclude any challenge on the ground of a violation of Article 14."

11. In the Statement of Objects and Reasons appended to Bill No. 32 of 1960 when amendments were made in section 12 of the Act by the Rubber Amendment Act 1960, it was stated *inter alia*:

"This method of collection of the cess provided under the Act has led to considerable evasion of cess by the owners of the estates, either by evasion of registration or by failure to submit correct returns or any returns at all. There are about 26,000 estates under production in the country and most of them are small holdings. Many of them do not render returns of production to the Rubber Board and thus evade payment of duty. From October, 1947 to December 1954, it was found that 20,608 tons of rubber escaped assessment and the Board suffered during the period a loss of Rs. 2,30,805. The Rubber

Board estimates that under the present system there is no likelihood of more than 65 per cent of the potential revenue being realised each year.

With a view to improving the efficiency of collection, it is proposed to amend section 12 of the Act so as to enable the cess to be collected either from the owners or the manufacturer who ultimately consumes the rubber produced in the estates.

There are at present 347 registered rubber manufacturers in the country. It is felt that it would be far more easy to collect the cess from a small number of manufacturers than from about 26,000 producers whose number will increase year by year. The proposed amendment of section 12 in the amending Bill is an enabling measure for the administrative change in the method of collection being contemplated."

Although it may not be permissible to take the Statement of Objects and Reasons into consideration for construing the provisions of an Act the facts contained in such a statement can certainly be looked at for the purpose of seeing any alleged infringement of Art. 14. It is quite clear from the data given that the Rubber Board was finding it difficult to levy and collect the duty from the owners of rubber estates and it was considered that it would be much easier to collect the same from the manufacturers. The Board was, therefore, to collect the duty in accordance with the rules made in this behalf by the Central Government. Thus it was necessary, in view of the entire facts and circumstances stated before, that it should be left to the rule-making authority to indicate the cases and the circumstances in which the duty of excise was to be collected from the owner or the manufacturer. It was open to the rule-making authority to vary the rules according to the changing circumstances and conditions. The Board which was a high powered body was mainly responsible for collection of the duty and the rules would naturally be made in consultation with it from time to time. We are unable to see how the challenge on the ground of discrimination under Art. 14 can be sustained in view of all these reasons. It does not appear that the Board can discriminate in an arbitrary manner between owners of rub-

ber estates and the manufacturers or between persons inter se of the same category.

12. The Central Government has framed rules pursuant to the power conferred by S. 25 of the Act. Unfortunately the rules relating to furnishing of returns and collection of duties are not properly worded and suffer from lack of clarity. Under Rule 33 the Board can call for information and documents from owners of rubber estates or any licensed dealer or manufacturer relating to the stock of rubber held and sale of rubber etc. Under cl. (e) all manufacturers have to submit half yearly returns in form M showing the total quantity of all rubber purchased or otherwise required and consumed or used in the process of manufacture. Rule 33A provides for production of accounts by an owner if he fails to furnish in time the return referred to in sub-s. (4) of S. 12 or if he furnishes a defective return. The Board can after checking the amounts and after making such further enquiry as it may deem fit assess the amount payable under sub-s. (2) of S. 12. Similar provision is made with regard to manufacturers by Rule 33B. Rule 33D, however, is material and may be reproduced:

(1) "Every manufacturer shall by demand notice sent through registered post or in such other manner as the Board may direct be intimated of the amount assessed on the quantity of rubber acquired during the periods specified in rule 33 (e). On receipt of such notice, the manufacturer shall pay to the Board the amount specified therein either in cash at the Board's office at Kottayam or by money order or by bank draft or cheque duly crossed and payable at Kottayam to the Secretary of the Board within 30 days of the receipt of the said notice.

(2) On such demand being made, if a manufacturer fails to pay the amount within the due date, the Board may take steps to report the fact to the Central Government or the State Government concerned for recovery of the outstanding amount as an arrear of land revenue."

13. Now the above rule seems to contemplate the filing of return both by the owners of rubber estates and manufacturers. But under Rule 35D the demand notice can be sent only to

a manufacturer on receipt of which he must make payment to the Board of the amounts specified therein. On his failure to make such payment the Board can take steps for recovery of the amounts due as arrears of land revenue by reporting to the Central Government or the State Government as the case may be. There is no such procedure prescribed with regard to owners of estates. It would follow that under the rules the demand notice is to be sent only to the manufacturers and the amounts of duty are to be realised from them alone. The substantive provisions of sub-ss. (4), (5) and (6) of S. 12 also contemplate assessment being made with regard to the returns to be furnished by owners and manufacturers. Any person aggrieved by an assessment has been given the right of appeal to the District Judge. But as pointed out before, there is no provision either in the statute or in the rules for a demand to be made and a corrective process to be employed in the event of failure to make the payment. That is done by Rule 33D alone from which it would be reasonable to conclude that under the rules it is only the manufacturers who are liable to pay the amount of duty. The rules can therefore, be said to make a definite provision with regard to the category of persons from whom the collection of the duty is to be made, namely, the manufacturers.

14. For all the reasons given above the appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1597
(V 57 C 341)

(From Madras : ILR (1968) 3 Mad. 421)
S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

The Union of India and others, Appellants (In all the appeals) v. M/s. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and others etc., Respondents.

1. The Orissa Minerals Development Co. Ltd. 2. Bird and Co. (P) Ltd. 3. Bachar Gray & Co. (1930) Ltd. 4. S. K. Ghosh 5. Duncan Bros. & Co. Ltd. 6. Louis Dreyfus & Co. Ltd. 7. McLeod & Co. Ltd. 8. Bunge & Co. Ltd. 9. Jay Engineering Works Ltd., Interveners.

CN/DN/G169/68/KSB/D

Civil Appeals Nos. 45 to 49 of 1968, D/- 19-11-1968.

(A) Foreign Exchange Regulation Act (1947), Ss. 12 (1), 22, 23 and 23A — Foreign Exchange Regulation Rules (1952), Rr. 3 and 5 — Expression 'restrictions imposed by S. 12 (1)' — Meaning of — Export of manganese ore — Exporter making declaration in form prescribed by R. 3 supported by evidence required by R. 5 — Invoice value not representing full export value — Does not constitute contravention of restrictions imposed by S. 12 (1) and is not punishable under S. 23A read with S. 167 (8), Sea Customs Act, 1878 — It may be contravention of R. 5 and S. 12 (2) which is punishable under Ss. 22 and 23 — (Sea Customs Act (1878), Ss. 19 and 167 (8)) — (Per Hegde and Bachawat, JJ.; Sikri, J. Contra).

The respondents who were exporters of manganese ore had exported large quantities of manganese ore after ostensibly complying with the formalities of law but in reality they had under-invoiced the various consignments sent by them and had failed to repatriate foreign exchange of the value of about three crores of rupees obtained by them as the price of the manganese ore exported. The Customs authority issued several notices to the respondents to show cause why action should not be taken against them for contravening S. 12 (1) read with Section 23A of the Foreign Exchange Regulation Act and S. 19 read with S. 167 (8), Sea Customs Act. The respondents applied under Art. 226 of the Constitution for quashing those notices and prohibiting further action on those notices. The appellate bench of the Madras High Court reversing the decision of the Single Judge allowed the petitions. On further appeal to the Supreme Court;

Held (Per Hegde and Bachawat, JJ.; Sikri, J. contra) dismissing the appeal that the notices issued to the respondents were invalid as the offences alleged did not fall within S. 23A. ILR (1968) 3 Mad 421, Affirmed.

Per Hegde and Bachawat, JJ. :

If an offence falls under S. 23A the fact that the said offence is also punishable under S. 23 is immaterial. The provisions of S. 23-A are without prejudice to the provisions of S. 23.

(Para 33)

Before a case can be held to fall within the scope of S. 23-A it must be shown that there has been a contravention of the restrictions imposed by S. 12 (1). The requirement of S. 12 (1) is satisfied if the stipulated declaration in the form prescribed by R. 3 of the Foreign Exchange Regulation Rules, 1952 is furnished and is also supported by evidence prescribed in R. 5. Even if the invoice price mentioned in the declaration did not represent the full export value of the goods exported, the declaration cannot be considered as invalid or non est. The contravention complained of in this case is really the contravention of S. 12 (2) and Rule 5. The former is punishable under section 23 and the latter under section 23 read with section 22. If it is held that every declaration which does not state accurately the full export value of the goods exported is a contravention of the restrictions imposed by S. 12 (1) then all exports on consignment basis must be held to contravene the restrictions imposed by Section 12 (1). As Section 12 (1) governs every type of export it is hard to believe that the legislature intended that any minor mistake in giving the full export value should be penalised in the manner provided in S. 23-A. The wording of S. 12 (1) does not support such a conclusion. Such a conclusion does not accord with the purpose of S. 12 (1).

(Paras 34, 36)

The scheme of the Act, makes it clear that so far as the Customs authorities are concerned all that they have to see is that no goods are exported without furnishing the declaration prescribed under S. 12 (1). Once that stage is passed the rest of the matter is left in the hands of the Reserve Bank and the Director of Enforcement.

(Para 38)

(B) Foreign Exchange Regulation Act (1947), Pre and S. 12 (1) — Interpretation of Statutes — Act enacted in interest of national economy — Penal provision — Rule of interpretation.

Per Sikri, J.: The Foreign Exchange Regulation Act was enacted in the interest of the national economy. A deliberate large-scale contravention of its provisions would affect the interests of every man, woman and child in the country. Such an Act should be construed so as to make it workable; it should, however, receive a fair

construction, doing no violence to the language employed by the Legislature. The rule of interpretation that where two constructions are possible, the one in favour of the subject should be accepted, is not applicable in so far as this Act is concerned.

(Para 13)

Per Hegde and Bachawat, JJ.:

As the regulations contained in the Act are enacted in the economic and financial interest of this country, the rigour and sanctity of those regulations should be maintained. But S. 12 (1) of the Act being a penal provision the Court must construe it as it would construe any other instrument that is to say it must look at all the surrounding circumstances, at the mischief intended to be remedied and must above all give effect to the words used in the section. If there appears any reasonable doubt or ambiguity the Court must apply the principles laid down in (1887) 19 Q. B. D. 629, (1902) C. H. D. N. 466, Rel. on; 1946 AC 278 at p. 286 and AIR 1954 SC 496, Ref. to.

(Para 37)

Cases Referred: Chronological Paras

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C. K. Daphtary, Attorney-General
for India, Niren De, Solicitor-General
of India, and M/s. N. S. Bindra and
Mohan Kumaramangalam, Sr. Advoca-
tes (M/s. R. H. Dhebar, A. S. Nam-
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47 to 49 of 1968); Niren De, Solicitor-
General of India and M/s. Mohan
Kumaramangalam and N. S. Bindra,
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1968); A. K. Sen, Senior Advocate
(M/s. Soli Sorabji, S. R. Vakil, B. D.
Barucha, G. L. Sanghi and S. K. Dho-
lakia, and M/s. J. B. Dadachanji and
Co. with them), for Respondents
(In C. A. No. 45 of 1968); N. A. Palkhi-
vala, Sr. Advocate (M/s. Soli Sorabji,
D. N. Misra, S. R. Vakil and B. D.
Barucha, and M/s. J. B. Dadachanji
and Co., with him), for Respondents
(In C. As. Nos. 46 and 49 of 1968).
M/s. G. L. Sanghi, S. R. Vakil and
B. D. Barucha, and M/s. J. B. Dada-
chanji and Co. Advocates, for Res-
pondents (In C. A. No. 47 of 1968) and
Respondent (In C. A. No. 48 of
1968); N. A. Palkhivala, Sr. Advocate
(M/s. P. P. Ginewala, D. N.
Mukherjee and Ajit Choudhury,
with him), for Interveners Nos. 1 to 4.
A. K. Sen, Sr. Advocate, (M/s. S. D.
Khetri, Avadh Behari and R. N. Bajo-
ria with him), for Intervener No. 5.
N. A. Palkhivala, Sr. Advocate, (D. N.
Gupta, Advocate with him), for
Intervener No. 6. N. A. Palkhivala, Sr.
Advocate (M/s. A. K. Basu, S. C. Mitter
and I. N. Shroff, Advocates with him),
for Intervener No. 7, M. C. Chagla,
Sr. Advocate (D. N. Gupta, Advocate,
with him), for Intervener No. 8. M. C.

Setalvad, Sr. Advocate (M. K. Banerjee
and M/s. J. B. Dadachanji and Co.,
Advocates, with him), for Intervener
No. 9.

The following Judgments of the
Court were delivered by

SIKRI, J.: These five appeals by cer-
tificate are directed against the judg-
ment of the High Court of Madras
whereby the High Court accepted the
Writ Appeals against the judgment of
Kailasam, J., in Writ Petitions Nos.
1592, 1593, 1594 and 1601 of 1966 and
3948 of 1965, and directed the issue of
writs of prohibition to the Union of
India, the Collector of Customs,
Madras, and the Deputy Collector of
Customs, Visakhapatnam, appellants
before us, prohibiting them from tak-
ing any action in pursuance of certain
show-cause notice issued by the De-
puty Collector Customs, Visakhapat-
nam. Common questions of law are
involved in these appeals and it would
suffice if I give facts in Writ Petition
No. 1592 of 1966 out of which Civil
Appeal No. 45 of 1968 arises.

2. The relevant facts in that writ
petition, for appreciating the points
raised before us, are as follows: On
February 17, 1965, the Deputy Collec-
tor of Customs, Visakhapatnam, issued
memorandum No. S/21/14/65 to M/s.
Rai Bahadur Seth Shreeram Durga-
prasad (Private) Ltd., Tumsar, and five
others, hereinafter referred to as the
Shippers. In this memorandum, in
brief, it was stated that the Shippers
had entered into a formal contract on
October 13, 1965, with M/s. Inter Con-
tinental Ores Supply Corporation,
New York, for the shipment of 20,000
tons of Indian Manganese Ore of the
grade of 43 p.c. Mn., from the port of
Visakhapatnam at a price of \$ 0.67 per
unit of Manganese per dry long ton,
f.o.b. Visakhapatnam/Bombay. The
Shippers exported from the port of
Visakhapatnam 3,300 tons of Indian
Manganese per s.s. 'ALPHEM' under
the cover of Shipping Bill No. 187
dated March 20, 1957, declaring there-
in that the export was being made in
pursuance of the aforesaid contract.
A. G. R. I. form was attached. It was
stated that a certain note-book which
had been seized earlier in August 1963
disclosed that a sum of \$ 25298.24 was
received on April 21, 1957, from
INOSCO, i. e., Intercontinental Ores
Supply Corporation, New York, the
consignee of the subject goods, the

amount having been credited to an account in the name of Gangadhar Narsinghdas Agrawal with the Trust Co. of North America, 115, Broadway, New York. It was further alleged in the memorandum that the Shippers had derived financial benefits in respect of the subject export over and above those revealed to the Customs Authorities and/or other concerned authorities and the information about them was deliberately suppressed. It was further alleged that this constituted a contravention of S. 12 (1) of the Foreign Exchange Regulation Act, 1947, read with Notification No. 12 (17)-F. 1/47 dated August 4, 1947, as amended, issued thereunder and the Foreign Exchange Regulation Rules, 1952.

3. I may mention that by this notification the Central Government had prohibited "the export otherwise than by post of any goods either directly or indirectly to any place outside India other than any of the countries or territories in the Schedule annexed to this order unless a declaration supported by such evidence as may be prescribed is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been or will within the prescribed period be paid in the prescribed manner."

4. According to the Deputy Collector of Customs, the goods have been thus exported in contravention of the restrictions and prohibitions imposed under S. 19 of the Sea Customs Act, 1878, read with S. 12 (1) and the Notification No. 12 (17)-F. 1/47 dated August 4, 1947, issued thereunder, and S. 23A of the Foreign Exchange Regulation Act, 1947, which exportation constituted an offence liable to be punished under S. 167 (8) of the Sea Customs Act, 1878. Accordingly, the parties concerned were called upon to explain the matter and show cause in writing to the Collector of Customs, Madras, why a penalty should not be imposed on them/him under S. 167 (8) of the Sea Customs Act, 1878.

5. It appears that a number of such memoranda were issued in respect of diverse shipments. Thereupon five petitions were filed in the High Court of Madras. In Writ Petition No. 1592 of 1966 it was alleged that 125 show-cause notices had been issued to the

petitioners on various dates and it was prayed that a writ of prohibition or other appropriate writ, order or direction under Art. 226 of the Constitution of India prohibiting the respondents from taking any action in pursuance of the said show-cause memos, may be issued.

6. Various allegations were made but I need only mention the following allegations. It was submitted that the petitioners had complied with the statutory provisions inasmuch as a declaration in statutory form had been furnished to the prescribed authority, to wit, the Collector of Customs, and the Collector of Customs, having passed the consignments for shipment, had no further right or jurisdiction to take proceedings relating to the consignments in question. It was contended that if a declaration is found to be false, it did not mean that there was a breach of the provisions of S. 12 (1).

7. In reply it was contended that what was required under S. 12 (1) of the Foreign Exchange Regulation Act and the Rules was not any value but the actual amount representing the full export value, and a mere declaration of any value would not be sufficient compliance with the provisions of section 12 (1) of the Foreign Exchange Regulation Act.

8. The learned Single Judge, Kailasam, J., dismissed the petitions. Various points were urged but on the point addressed to us he held that the declaration to be given by the exporters meant not only that the value of the goods will be paid in the prescribed manner but also that the full export value of the goods given is the correct value.

9. I may mention that before the Division Bench the case of the Revenue was clarified in an affidavit and we may set out para 5 thereof:

"Since the Court has now directed the respondents to file a supplemental affidavit clarifying the stand taken by the department I state respectfully that the stand taken by the department both in the show cause memo and here is that the essence of the offence committed by the appellants is that in the declaration required under Section 12 (1) of the Foreign Exchange Regulation Act, they have deliberately given false particulars supported by false evidence. By giving this fraudulent declaration, they have secured

the export of their goods. This fraud vitiates the declaration itself, thereby making the export one in violation of the prohibition contained in Section 12 (1) of the Foreign Exchange Regulation Act."

10. It is not necessary to set out the *modus operandi* adopted by the petitioners but I may mention that it was contended that a scheme was entered into prior to the actual export and the goods were undervalued deliberately and the Department was induced to accept their declarations by means of false evidence and fraudulent suppression of facts. It is suggested that by this method a sum of Rs. 3,20,00,000 had been suppressed and there has been a failure to repatriate a corresponding amount of foreign exchange which had been earned surreptitiously. It was further stated that this scheme was adopted for all the shipments covered by the show cause notices, and also for many other shipments in respect of which show cause notices yet remain to be issued.

11. The Division Bench on appeal came to the conclusion that as the declarations were made under Section 12 (1) and as they were scrutinised by the authorities it is not possible to contend that these goods were either exported or attempted to be exported in violation of the prohibitions or restrictions imposed by law and are, therefore, liable to be confiscated under S. 167 (8) of the Sea Customs Act. The Division Bench further held that the alleged fraud on the part of the petitioners did not make any difference. According to the Division Bench "if the petitioners had misled the authorities by false representations or failed thereby to repatriate foreign exchange, by virtue of his obligation under Section 12 (2), these are different offences for which separate and specific penalties can be imposed."

12. The relevant statutory provisions at the time of exportation were as follows:—

"The Foreign Exchange Regulation Act, 1947.

Section 12 (1) The Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, Sea or Air (hereafter in this section referred to as export) of any goods or class of goods specified in the notification from India

directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or so specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods have been, or will within the prescribed period be paid in the prescribed manner.

(2) Where any export of goods have been made to which a notification under sub-section (1) applies, no person entitled to sell, or procure the sale of the said goods shall except with the permission of the Reserve Bank, do or refrain from doing any act with intent to secure that

(a) the sale of goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade, or

(b) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any, as may be allowed by the Reserve Bank, or is delayed to such extent as aforesaid :

Provided that no proceedings in respect of any contravention of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full amount as aforesaid has not been made in the prescribed manner.

(3) Where in relation to any such goods the said period has expired and the goods have not been sold and payment therefor has not been made as aforesaid, the Reserve Bank may give to any person entitled to sell the goods or to procure the sale thereof, such directions as appear to it to be expedient for the purpose of securing the sale of the goods and payment therefor as aforesaid and without prejudice to the generality of the foregoing provision, may direct that the goods shall be assigned to the Central Government or to a person specified in the directions.

(4) Where any goods are assigned in accordance with sub-section (3), the Central Government shall pay to the person assigning them such sum in consideration of the net sum recovered by or on behalf of the Central Government in respect of the goods as may be determined by the Central Government.

(5) Where in relation to any such goods the value as stated in the invoice is less than the amount which in the opinion of the Reserve Bank represents the full export value of those goods, the Reserve Bank may issue an order requiring the person holding the shipping documents to retain possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods.

(6) For the purpose of ensuring compliance with the provisions of this section and any order or directions made thereunder, the Reserve Bank may require any person making any export of goods to which a notification under sub-section (1) applies to exhibit contracts with his foreign buyer or other evidence to show that the full amount payable by the said buyer in respect of the goods has been, or will within the prescribed period be, paid in the prescribed manner.

Section 22. No person shall, when complying with any order or direction under Section 19 or with any requirement under Section 19-B or when making any application or declaration to any authority or person for any purpose under this Act, give any information or make any statement which he knows or has reasonable cause to believe to be false or not true, in any material particulars.

Section 23. (1) If any person contravenes the provisions of Section 4, Section 5, Section 9 or sub-section (2) of Section 12 or of any rule, direction or order made thereunder, he shall —

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner hereinafter provided, or

(b) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(1A) Whoever contravenes—

(a) any of the provisions of this Act or of any rule, direction or order made

thereunder, other than those referred to in sub-section (1) of this section and Section 19, shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both;

(b) any direction or order made under Section 19 shall, upon conviction by a Court, be punishable with fine which may extend to two thousand rupees.

(1B) Any Court trying a contravention under sub-section (1) or sub-section (1A) and the authority adjudging any contravention under clause (a) of sub-section (1) may, if it thinks fit, and in addition to any sentence or penalty which it may impose for such contravention, direct that any currency, security, Gold or Silver, or goods or any other money or property, in respect of which the contravention has taken place, shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the person committing the contravention or any part thereof shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

Explanation. — For the purpose of this sub-section, property in respect of which contravention has taken place shall include deposits in a bank, where the said property is converted into such deposits.

(2) Notwithstanding anything contained in Section 32 of the Code of Criminal Procedure, 1898, it shall be lawful for any Magistrate of the first class, specially empowered in this behalf by the State Government, and for any Presidency Magistrate to pass a sentence of fine exceeding two thousand rupees on any person convicted of an offence punishable under this section.

(3) No Court shall take cognizance—

(a) of any offence punishable under sub-section (1) except upon complaint in writing made by the Director of Enforcement, or

(b) of any offence punishable under sub-section (1A) of this section or under section 54 of the Indian Income-tax Act, 1922, as applied by section 19 of this Act, except upon complaint in writing made by the Director of Enforcement or any officer authorised in this behalf by the Central Government

or the Reserve Bank by a general or special order:

Provided that where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission.

(4) Nothing in the first proviso to section 188 of the Code of Criminal Procedure, 1898, shall apply to any offence punishable under this section.

Section 23A. Without prejudice to any provisions of section 23 or to any other provision contained in this Act,

the restrictions imposed by sub-sections (1) and (2) of section 8, sub-section (1) of section 12 and clause (a) of sub-section (1) of section 13 shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1878, and all the provisions of that Act shall have effect accordingly, except that section 183 thereof shall have effect as if for the word "shall" therein the word "may" were substituted."

"The Sea Customs Act, 1878

167. The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively:

Offences 1	Sections of this Act to which offence has reference 2	Penalties 3
8. If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction; or if any attempt be made so to import or export any such goods; or if any such goods be found in any package produced to any officer of Customs as containing no such goods; or if any such goods, or any dutiable goods, be found either before or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in India; or if any goods, the exportation of which is prohibited or restricted as aforesaid, be brought to any wharf in order to be put on board of any vessel for exportation contrary to such prohibition or restriction.	18 & 19	such goods shall be liable to confiscation; and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.

"Foreign Exchange Regulation Rules, 1952.

3. Form of declaration.—(1) A declaration under section 12 of the Act shall be in one of the forms set out in the First Schedule as the Reserve Bank may by notification in the Gazette of India specify as appropriate to the requirements of a case.

(2) Declaration shall be executed in sets of such number as indicated on the forms.

4. Authority to whom declaration to be furnished. (1) The original of the declaration shall be furnished to the Collector of Customs; provided that when export is by post, the original of the declara-

tion shall be furnished to the postal authorities.

(2) Copies of the declaration shall be submitted to the authority and in the manner specified on forms.

(3) The documents pertaining to every export passed by the Customs shall within 21 days from the date of the export, be submitted to the authorised dealer mentioned on the relevant declaration form, unless the Reserve Bank, in its discretion, authorises otherwise.

5. Evidence in support of declaration. (1) The Reserve Bank, or subject to such directions, if any, as may be given by the Reserve Bank, the Collector of Customs or the postal authorities, may, to satisfy themselves of due compliance with section 12 of the Act, require such evidence in support of the declaration as may satisfy them that the exporter is a person resident in India, or has a place of business in India.

(2) The Reserve Bank, or subject to such corrections, if any, as may be given by the Reserve Bank, the Collector of Customs, or the Postal authorities may require any exporter to produce in support of the declaration such evidence as may be in his possession or power to satisfy them.

(i)
(ii) that the invoice value stated in the declaration is the full value of the goods; and

(iii) that the amount representing the full export value of the goods has been or will be paid to the exporter. Explanation.

The points which have emerged from the discussion at the Bar and which require determination may be formulated thus:

(1) What is the meaning of the expression "restrictions imposed by sub-section (1) of section 12" occurring in S. 23-A of the Exchange Act? Can other sections of the Exchange Act be looked at for determining the ambit of the restrictions imposed by S. 12 (1)? Do restrictions imposed under the Rules made under the Exchange Act and relating to S. 12 (1) come within the meaning of this expression?

(2) What is the true meaning of the words "a declaration supported by such evidence as may be prescribed or so specified is furnished by the exporter to the prescribed authority that the amount representing the full ex-

port value of the goods has been or will within the prescribed period be paid in the prescribed manner"? Is it necessary that the declaration shall be made honestly or in good faith? Should it disclose the true export value? Is it a breach of the sub-section if a declaration is made honestly but happens to show incorrect export value to a small but not material extent? Does not a deliberately false declaration contravene the provisions of S. 12 (1)?

(3) If an action is a contravention of S. 12 (1) and other provisions of the Exchange Act, e.g., Ss. 22, 23, 12 (2), 12 (3) and 12 (5), was it the intention that it should be treated as a contravention of S. 12 (1)?

13. Before dealing with point (1) mentioned above, a few preliminary observations may be made. I have to construe an Act which was enacted in the interest of the national economy. A deliberate large-scale contravention of its provisions would affect the interests of every man, woman and child in the country. Such an Act, I apprehend, should be construed so as to make it workable; it should, however, receive a fair construction, doing no violence to the language employed by the Legislature. It was said that if two constructions are possible the one that is in favour of the subject should be accepted. It is not necessary to pronounce on this proposition for I have come to the conclusion that there is one true construction of S. 12 (1). But I should not be taken to be assenting to this proposition in so far as it is applicable to an enactment like the Exchange Act, for no subject has a right to sabotage the national economy.

14. Coming to the first point, I find that the following words of Lord Blackburn express my views as to how the construction of S. 23A should be approached. He was dealing with a case where a single section of an Act of Parliament has been introduced into another Act. He said in *The Mayor of Portsmouth v. Charles Smith*: 10 A.C. 364 at p. 371:

"When a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in

order to ascertain what the section meant, though those other sections are not incorporated in the new Act. I do not mean that if there was in the original Act a section not incorporated, which came by the way of a proviso or exception on that which is incorporated, that should be referred to. But all others, including the interpretation clause, if there be one, may be referred to."

15. It seems to me that this is the correct way of looking at S. 23A of the Exchange Act for another reason. The restrictions imposed by S. 12 (1) cannot be different for the purpose of the Exchange Act from that for the purposes of S. 167 (8) of the Sea Customs Act, for a breach of S. 12 (1) may also be punishable under the Exchange Act. In other words, the same contravention may attract penalties under the Sea Customs Act as well as the Exchange Act, and it would be incongruous to hold that the restrictions imposed by a section are different for different Acts.

16. Then am I entitled to take into account the restrictions imposed by the Rules made under S. 27 of the Exchange Act? It seems to me that rules not referable to S. 12 (1) cannot be taken into account, but any restrictions imposed by rules referable to S. 12 (1) must be treated as restrictions imposed by S. 12 (1). Section 12 (1) itself contemplates rules being made on three points, i.e. (1) the evidence which is to support the declaration, (2) the authority to which the declaration is to be furnished; and (3) manner of payment. It was said that the words "by section 12 (1)" exclude the restrictions made under the Rules. But though in some contexts and scheme of an Act this proposition may be true, the general rule is as stated by Lord Alverstone, C. J., in *Wellingale v. Norris* (1909) 1 KB 57 at p. 64 as follows:

"If it be said that a regulation is not a provision of an Act, I am of opinion that *Rex v. Walker*, (1875) 10 QB 355 is an authority against that proposition. I should certainly have been prepared to hold apart from authority that, where a statute enables an authority to make regulations, a regulation made under the Act, becomes for the purpose of obedience or disobedience a provision of the Act.

The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done."

17. These observations were approved by the House of Lords in *Wicks v. Director of Public Prosecution* (1947) 1 All ER 205 at p. 206 thus:

"There is, of course, no doubt that, when a statute like the Emergency Powers (Defence) Act, 1939, enables an authority to make regulations, a regulation which is validly made under the Act i. e. which is intra vires of the regulation-making authority, should be regarded as though it were itself an enactment. As the Court of Criminal Appeal has pointed out in its judgment, that was decided by the Divisional Court in (1909) 1 KB 57 and it appears to me that that decision is perfectly correct. Consequently, the charge against the appellant here was, in effect, that he had committed crimes defined or contained in the Act of Parliament."

18. The Court of Criminal Appeals had stated in *R. v. Wicks*, 1946-2 All ER 529 at p. 531 as follows:

"The first observation which the court would make is that they are in complete agreement with the decision of the Divisional Court in (1909) 1 KB 57 that, where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done. It is, therefore, clear that the regulations must be read as though they were contained in the Act itself. They derive their efficacy solely from the Act and accordingly expire with the Act, but it may be that the legislature has provided that some restrictions or consequences shall remain effective notwithstanding the expiration of the Act."

19. In a recent case, *Rathbone v. Bundock*, 1962-2 All ER 257 the Divisional Court following these cases held that regulation 89 of the Motor Vehicles (Construction and Use) Regulations, 1955, was for the purpose of obedience or disobedience of a provision of the Road Traffic Act, 1930.

20. In *Dr. Indramani Pyarelal Gupta v. W. R. Nathu*, 1963-1 SCR

721 at p. 737 = (AIR 1963 SC 274 at p. 281) this Court was concerned, inter alia, with the interpretation of S. 3 (1) of the Forward Contract (Regulation) Act, 1952, which used the words "such duties as may be assigned by or under this Act." Ayyangar, J., speaking for the majority, observed:

"Learned Counsel is undoubtedly right in his submission that a power conferred by a by-law is not one conferred "by the Act" for in the context the expression "conferred by the Act" would mean "conferred expressly or by necessary implication by the Act itself. . . . The words "under the Act" would, in that context, signify what is not directly to be found in the statute itself but is conferred or imposed by virtue of powers enabling this to be done. In other words, by laws made by a subordinate law-making authority which is empowered to do so by the parent Act. This distinction is thus between what is directly done by the enactment and what is done indirectly by rule-making authorities which are vested with powers in that behalf by the Act. (vide *Hubli Electricity Bombay Ltd. v. Province of Bombay*, 76 Ind App 57 at p. 66 = (AIR 1949 PC 136 at p. 139) and *Narayanawami Naidu v. Krishna Murthi*, ILR (1958) Mad 513 at p. 547 = (AIR 1958 Mad 343 at pp. 359, 360)."

The observations of Subba Rao, J., as he then was, at p. 775, (of SCR) = (at p. 295 of AIR) relied upon by the appellants are these:

"I would, therefore, construe the words "by or under this Act, or as may be prescribed" as follows: "by this Act" applies to powers assigned proprio vigore by the provisions of the Act; "under this Act" applies to an assignment made in exercise of an express power conferred under the provisions of the Act; and "may be prescribed" takes in an assignment made in exercise of a power conferred under a rule. This construction gives a natural meaning to the plain words used in the section and avoids stretching the language of a statutory provision to save an illegal "by-law."

In my opinion that case does not assist me because the Court was construing the words "by or under the Act", and Ayyangar, J., specifically discussed the meaning of "by the Act" in the context.

21. Regarding the case of *United States v. George R. Eaton*, (1892) 36 L Ed 591 relied on appellants' behalf, I find that the Supreme Court of the United States explained and distinguished that case in *Singer v. United States* (1944) 89 L Ed 285 at p. 290 as follows:

"*United States v. Eaton* turned on its special facts, as *United States v. Grimaud*, (1910) 220 US 506 at pp. 518-519 = 55 L Ed 563 at p. 568 = 31 S Ct 480 emphasizes. It has not been construed to state a fixed principle that a regulation can never be a "law" for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute. The *Eaton* case involved a statute which levied a tax on cleomargarine and regulated in detail cleomargarine manufacturers. Section 5 of the statute provided for the keeping of such books and records as the Secretary of the Treasury might require. But it provided no penalty for non-compliance. Other sections, however, laid down other requirements for manufacturers and prescribed penalties for violations. Section 20 gave the Secretary the power to make "all needful regulations" for enforcing the Act. A regulation was promulgated under section 20 requiring wholesalers to keep a prescribed record. The prosecution was for non-compliance with that regulation. Section 18 imposed criminal penalties for failure to do any of the things "required by law". The Court held that the violation of the regulation promulgated under S. 20 was not an offence. It reasoned that since Congress had prescribed penalties for certain acts but not for the failure to keep books the omission could not be supplied by regulation. And Congress had not added criminal sanctions to the rules promulgated under S. 20 of the Act."

I would in this connection prefer to apply the English decisions referred to above, as S. 12 (1) itself does not impose any restrictions and contemplates certain things to be prescribed.

22. Coming now to the construction of S. 12 (1), it seems to me that what it requires is a declaration of some actual figure which according to the declarant represents 'the full export value'. Otherwise there is no point in requiring support of such evidence as may be prescribed. Further

it is clear that some actual figure has to be mentioned when the exporter declares that he has received the amount representing the full export value. I apprehend that the same applies in the case where the amount has not yet been received. The rules make this clear. Rule 5 (2) (ii) which requires the invoice value stated in the declaration to be the full export value of goods, is referable to S. 12 (1) of the Exchange Act and may be taken to indicate that an actual figure has to be mentioned. It may be an estimate if the goods have not been sold before the export, but a figure must be indicated.

23. Coming to the crux of the problem, does S. 12 (1) by itself require absolutely correct particulars? It is said that S. 12 (1) does not require it for S. 22 requires the exporter only to make a declaration "which he knows or has reasonable cause to be false or not true in any material particulars." How could it be that if S. 12 (1) itself requires absolutely correct particulars, S. 22 limits the requirement? It seems to me that there is force in this contention but only to a limited extent. Section 12 (1) and the notification dated August 4, 1947, made under it, impose a conditional prohibition. The section confers a power on an exporter to lift the bar by a unilateral declaration. When such a power is conferred on an exporter by a statute, good faith on his part must at least be implied and be a condition pre-requisite. This construction is necessary in order to prevent abuse of the power given by the Act (See *Maxwell on Interpretation of Statutes*, 11th Edition, p. 116). If the exporter makes a deliberately false declaration he contravenes S. 12 (1) because he has not made the statutory declaration in good faith. It is not necessary to say that the declaration becomes a nullity because the breach of good faith, a condition prerequisite, is itself a contravention of the conditional prohibition or restriction, within S. 167 (8) of the Sea Customs Act read with S. 23A and S. 12 (1) of the Exchange Act. Clerical mistakes and mistakes made bona fide even in respect of material particulars are not within the mischief of S. 12 (1), but a deliberate falsehood and a deliberate evasion of the provisions of S. 12 (1) come within S. 12 (1). Otherwise the ambit of S. 12 (1), read

with S. 23A, would be narrowed to the point of extinction. An exporter and persons concerned in the export could with impunity give a deliberately false declaration but in apparent compliance with S. 12 (1), and deprive this country of foreign exchange. I cannot give an interpretation which will make a mockery of the section. But it is said that other sections of the Exchange Act will take care of such an exporter. He can be prosecuted under S. 23 (1A) read with S. 22. He can be sentenced to imprisonment which may extend to two years. He can also be fined to an unlimited extent. The Foreign Exchange lost can be retrieved by a Court acting under S. 23 (1B). This may be true that the exporter is liable as stated above. But what about persons concerned in the illegal export? It is the persons concerned in the export which in most cases enable the exporter to successfully evade the provisions of the Exchange Act. These persons are taken care of only under the Customs Act. If they are covered by S. 167 (8), there is no reason to exclude the exporter himself. It is not unusual to make persons liable both to penalties under the Sea Customs Act and the Exchange Act. It is indeed conceded that if no declaration is given under S. 12 (1) and the goods are exported, the exporter and the persons concerned in the export would be liable to be proceeded both under section 167 (8) of the Sea Customs Act and the Exchange Control Act. I can draw no distinction between such an exporter and an exporter who gives a deliberately false declaration for the purpose of the applicability of S. 167 (8) of the Sea Customs Act.

24. I am not impressed by the argument that the Foreign Exchange Act deals with the basic policy regarding foreign exchange and it was not the intention to punish offenders who violate foreign exchange restrictions under the Sea Customs Act. It is section 23A of the Exchange Act which itself deems the restrictions imposed under section 12 (1) to have been imposed under section 19 of the Sea Customs Act. Not only that. The opening sentence of S. 23A makes it clear that this is without prejudice to section 23 and to any other provisions in the Exchange Act. In other words, the provisions of section 23 and other relevant sections are not affected or

limited. They will have their full operation.

25. The fact that the exporter may be proceeded under section 12 (2) (I may assume that this is so for the purpose of this case) for non-payment of the full amount payable by the foreign buyer, or that the Reserve Bank can in the eventualities mentioned in section 12 (5) require the holding up of shipping documents or that the Reserve Bank by exercising powers under section 12 (6) secure contracts and other evidence to discover the full amount payable do not throw any light on the construction of section 23A and section 12 (1) except that the Legislature is anxious that the "full export value" shall be received in this country. Section 23A read with section 12 (1) calls in the aid of Customs authorities to achieve the same object, but ropes in along with the exporter the persons concerned in the prohibited export.

26. I am not able to appreciate how the existence of S. 167 (37), section 167 (72) and S. 167 (81) is of any assistance for the purpose of interpreting S. 23A and S. 12 (1) of the Exchange Act. It may be—I do not decide it—that an exporter, like the respondents will also be liable to be proceeded against under these items of section 167.

27. Taking the facts as alleged by the Customs authorities to be true, as they must be taken to be true for the purpose of this application under Article 226, it seems to me that no case for the issue of a writ of prohibition has been made out. In the result the judgment of the Appeal Court is reversed and that of the learned Single Judge restored. The appellants will have costs incurred in this Court. One bearing fee.

28. HEGDE, J.:—We had the advantage of studying the judgment just now delivered by our brother Sikri, J., but we regret that we are unable to agree with the conclusions reached by him. After carefully analysing the arguments advanced before us we have come to the conclusion that no grounds were made out to interfere with the order of the Appellate Bench of the Madras High Court. We shall now proceed to give our reasons in support of our conclusion.

29. The respondents in these appeals are exporters of manganese ore.

It is said that they had exported large quantities of manganese ore after ostensibly complying with the formalities of law but in reality they had under-invoiced the various consignments sent by them and further that they had failed to repatriate foreign exchange of the value of about three crores of rupees obtained by them as the price of the manganese ore exported. It is said that by so doing they had contravened section 12 (1) of the Foreign Exchange Regulation Act, 1947 (to be hereinafter referred to as the Act) read with S. 23A of that Act and Ss. 19 and 167 (8) of the Sea Customs Act. The case for the appellants is that during the search of the house of some of the respondents on suspicion that they had boarded gold, certain documents from the house of some of the respondents were seized and those documents disclosed the facts set out above. On the basis of the said information the Deputy Collector of Customs, Visakhapatnam issued several notices to the respondents requiring them to show cause why an action should not be taken against them under the aforementioned provisions. On receipt of those notices the respondents moved the High Court of Madras under Article 226 of the Constitution praying that that Court may be pleased to quash the show cause notices in question and prohibit the appellants from taking any further action on the basis of those notices. Those petitions were dismissed by Kailasam J. on September 1, 1966 but his orders were reversed by the Appellate Bench of that Court by its Judgment dated September 12, 1967. The Appellate Bench granted the reliefs prayed for by the respondents. It is as against that decision these appeals have been brought after obtaining the necessary certificates from the High Court.

30. The only question that arises for decision in these appeals is whether on the facts set out in the show cause notices, which facts have to be assumed to be correct for the purpose of these proceedings, the respondents can be held to have contravened S. 12 (1) which reads:

"The Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, sea or air (hereinafter in this section referred to as export) of any

goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed manner."

On August 4, 1947, the Central Government issued a notification prohibiting the export of all goods to any place outside India unless a declaration supported by such evidence as may be prescribed is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been or will within the prescribed period be, paid in the prescribed manner. Rule 3 of the Foreign Exchange Regulation Rules 1952 framed under S. 27 of the Act provides that a declaration under S. 12 of the Act shall be in one of the forms set out in the First Schedule as the Reserve Bank may by notification in the Official Gazette specify as appropriate to the requirements of a case. The form that is relevant for our present purpose is G. R. 1. Rule 5 empowers the Reserve Bank, the Collector of Customs or the postal authorities, to require the exporter to furnish such evidence in support of the declaration as may satisfy them that the exporter is a person resident in India or has a place of business in India. These authorities may also require the exporter to produce in support of the declaration such evidence as may be in his possession or power to satisfy them (i) that the destination stated on the declaration is the final place of destination of the goods exported; (ii) that the invoice value stated in the declaration is the full export value of the goods, and (iii) that the amount representing the full export value of the goods has been or will be paid to the exporter. Form G. R. 1 stipulates that the exporter should furnish the information called for therein. Therein the exporter is also required to make the following declaration:

"I hereby declare that I am the seller/consignor of the goods in respect of which this declaration is made and that the particulars given above are true and (a) that the invoice value

declared is the full export value of the goods and is the same as that contracted with the buyer; (b) that this is a fair valuation of the goods which are unsold.

I/My principals undertake that I/they will deliver to the bank mentioned below the foreign exchange/rupee proceeds resulting from the export of these goods or before. . . "

It is not denied that the respondents before exporting the goods in question had furnished declarations in the prescribed forms. Therein they had declared that the full export value of the goods has been or will within the prescribed period be paid in the prescribed manner. It is also not denied that they had furnished to the appropriate authorities the prescribed evidence. The case against them as mentioned earlier, is that they had under-invoiced the goods and failed to repatriate a portion of the foreign exchange earned by them. It is also alleged that they gave incorrect information in their declarations. If these allegations are correct which we have to assume to be correct for the purpose of this case, then it is obvious that the declarations given by the respondents do not comply with the requirements of rule 5.

31. Section 22 of the Act provides that no person when making an application or declaration to any authority or person for any purpose under the Act shall give any information or make any statement, which he knows or has reasonable cause to believe to be false or not true, in any material particular. Section 23 prescribes that if any person contravenes the provisions of S. 12 or of any rule, direction or order made thereunder he shall (a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner provided in the Act or (b) upon conviction by a court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both. In view of these provisions it was not disputed before us that if the information given by the respondents in the aforementioned declarations was false to the knowledge of those who made

those declarations or if they had reasonable cause to believe that it was false or not true in any material particular then they are liable to be dealt with under Section 23.

32. Sub-section (2) of Section 12 provides that:

"where any export of goods has been made to which a notification under sub-section (1) applies, no person entitled to sell, or procure the sale of the said goods shall, except with the permission of the Reserve Bank, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing that:....."

(b) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any, as may be allowed by the Reserve Bank, or is delayed to such extent as aforesaid..."

The contravention of the above provisions is punishable under Section 23. Hence the respondents' failure to repatriate any part of the foreign exchange earned by them by the sale of the manganese ore exported can be penalised by imposing on them a penalty not exceeding three times the value of the foreign exchange in respect of which the contravention had taken place or Rs. 5,000 whichever is more as may be adjudged by the Director of Enforcement in the manner provided in the Act. Hence it is open to the Director of Enforcement to levy on such of the respondents as have contravened Section 12 (2) penalty not exceeding three times the value of the foreign exchange not repatriated which in the present case can be about nine crores of rupees. They may also be punished under Section 23 (1) (b). This position is conceded by the Counsel appearing for

the appellants. But it is urged on behalf of the appellants that for the offences committed by the respondents they are not only liable to be punished under Section 23 but also under Section 23A. The Appellate Bench of the Madras High Court negatived that contention. Section 23A as it stood at the relevant time provided that:

"without prejudice to the provisions of Section 23 or any other provision contained in this Act, the restrictions imposed bysub-section (1) of Section 12.....shall be deemed to have been imposed under Section 19 of the Sea Customs Act, 1878 and all provisions of that Act shall have effect accordingly, except that Section 163 thereof shall have effect as if for the word 'shall' therein the word 'may' was substituted."

If the allegations mentioned in the show cause notices come within the scope of Section 23A then it necessarily follows that they will be governed by the provisions in Section 19 and Section 167 (8) of the Sea Customs Act, 1878. Section 19 of the Sea Customs Act provides:

"that the Central Government may from time to time by notification in the Official Gazette prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontiers as defined by the Central Government."

This section is similar to Section 12 (1) of the Act. Section 167 (8) provides for punishments for offences under that Act. That section to the extent material for our present purpose reads:

"The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively:

Offences	Sections of this Act to which offence has reference	Penalties
1	2	3
8. If any goods, the importation or exportation of which is for the time being prohibitory or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction; or	18 & 19	such goods shall be liable to confiscation; and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.

if any attempt be made so to import or export any such goods; or

if any such goods be found in any package produced to any officer of Customs as containing no such goods; or

if any such goods, or any dutiable goods, be found either before or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in India, or

if any goods, the exportation of which is prohibited or restricted as aforesaid, be brought to any wharf in order to be put on board of any vessel for exportation contrary to such prohibition or restriction.

33. If an offence falls under Sec. 23A the fact that the said offence is also punishable under Section 23 is immaterial. The provisions of Section 23A are without prejudice to the provisions of Section 23. The mere fact that the offences alleged against the respondents are punishable under Section 23 would not exclude the application of Section 23A. Therefore all that we have to see is whether those offences fall within the ambit of Section 23A. If they do then the impugned show cause notices must be held to be valid. If they do not, then no proceeding can be taken on the basis of those notices.

34. Before a case can be held to fall within the scope of Section 23A it must be shown that there has been a contravention of the restrictions imposed by Section 12 (1). Therefore we have to find out what those restrictions are? The only restriction placed by Section 12 (1) read with the Central Government Notification dated August 4, 1947, is that no one should export any goods from this country without furnishing the declaration mentioned in Section 12 (1). Admittedly the stipulated declarations in the prescribed forms have been furnished. The evidence specified have also been given. Therefore prima facie there was no contravention of Section 12 (1). What is said against the respondents that the invoice price mentioned by them in the declarations did not represent the full

export value; hence the declarations given by them are invalid declarations which means that the concerned goods were exported without furnishing the declaration required by Section 12 (1). It is not possible to accept this argument. The declarations given do satisfy the requirements of Section 12 (1) though they do not correctly furnish all the informations asked for in the form. Such declarations cannot be considered as non est. The informations called for in the prescribed form cannot be considered as restrictions imposed by Section 12 (1). They are merely informations called for the proper exercise of the powers under the Act. Many of them do not relate to the restrictions imposed by Section 12 (1). Neither Section 12 (1) nor any other provision in the Act empower the rule-making authority to add to the restrictions imposed by Section 12 (1). For finding out the restrictions imposed by Section 12 (1) we have only to look to that section. The requirement of that section is satisfied if the stipulated declaration supported by the evidence prescribed or specified is furnished. The contravention complained of in this case is really the contravention of Section 12 (2) and Rule 5. The former is punishable under Section 23 and the latter under Section 23 read with Section 22.

35. The declaration required by Section 12 (1) is only to the effect that the amount representing the full ex-

port value of the goods has been or will within the prescribed period be, paid in the prescribed manner. This is as it should be because this section governs both the goods sold to the foreign buyers as well as those sent on consignment basis. So far as the goods sold to the foreign buyer are concerned it is generally possible for the exporter to know the exact value but that would not be the position when the goods are sent on consignment basis. In the case of goods sent on consignment basis, the exporter can give only an estimated value. The main purpose of Section 12 (1) is to get a declaration from the exporter that he has either brought or will bring back the amount representing the full export value of the goods exported. There are other provisions in the Act to deal with other situations. We shall presently refer to them.

36. If we are to hold that every declaration which does not state accurately the full export value of the goods exported is a contravention of the restrictions imposed by Section 12 (1) then all exports on consignment basis must be held to contravene the restrictions imposed by Section 12 (1). Admittedly Section 12 (1) governs every type of export. Again it is hard to believe that the legislature intended that any minor mistake in giving the full export value should be penalised in the manner provided in S. 23A. The wording of Section 12 (1) does not support such a conclusion. Such a conclusion does not accord with the purpose of Section 12 (1).

37. It is true that the regulations contained in the Act are enacted in the economic and financial interest of this country. The contravention of those regulations, which we were told are widespread are affecting vital economic interest of this country. Therefore the rigour and sanctity of those regulations should be maintained but at the same time it should not be forgotten that Section 12 (1) is a penal section. The true rule of construction of a section like Section 12 (1) is, if we may say so with respect, as mentioned by Plowman J. in *Re H. P. C. Productions Ltd.*, (1962) C. H. D. N. 466 at p. 473. Therein the learned Judge observed:

"I approach the question of the construction of the Exchange Control Act

in the light of principles stated by Upjohn J. in *London and County Commercial Properties Investments v. Attorney-General*, (1953) 1 All ER 436 to which Mr. Bagnall referred. In that case the court was concerned with the construction of the Borrowing (Control and Guarantees) Act, 1946 and the Control of Borrowing Order 1947. Upjohn J. said: "the first question I have to consider is what are the principles of construction which I must adopt in construing this Act and this order. . . I have to bear in mind that this is a penal statute. It indeed, I suppose, represents the high water mark of the Parliamentary invasion of the traditional rights of the subjects of this realm." Then he went on to explain why that was so and continued:

"In those circumstances what are the canons of construction to be adopted? I do not propose to refer to the authorities at length. I think that the proper approach to the construction of such a statute as this is that I must construe it as I would any other instrument, that is to say, I must look at all the surrounding circumstances, I must look at the mischief intended to be remedied, I must above all give effect to the words that have been used in the section. That is plain from the decision in *Dyke v. Elliot*, (1872) LR 4 PC 184 at p. 191; see, in particular, the judgment of James L. J. but if on construing the relevant sections of the Act and the order there appears any reasonable doubt or ambiguity, then being a penal statute I must apply the principles laid down succinctly by Lord Esher in *Tuck and Sons v. Priestar*, (1887) 19 QBD 629.

In *London and North Eastern Ry. Co. v. Berriman* 1946 AC 278 at pp. 286, 295 Lord Macmillan observed:

"Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language."

This Court in *Tolaram Relumal v. State of Bombay*, 1955 SCR 158 at p. 164 = (AIR 1954 SC 496 at pp. 498, 499) speaking through Mahajan C. J. observed:

"It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to

carry out the intention of the Legislature."

Hereinbefore we have examined the language of S. 12 (1) and its purpose. We have also referred to the provisions which provide for the punishment of the contraventions complained of in these cases. Those provisions are adequate to meet the situation. In our opinion the language of S. 12 (1) does not permit the acceptance of the interpretation placed on it by the appellants nor are we able to come to the conclusion that the legislature intended that the offences complained of in these proceedings should be made punishable under S. 23 (A). If the interpretation sought to be placed by the appellants on S. 12 (1) is accepted it may result in unnecessary hardship in numerous cases.

38. There are two facets in every export, one relating to the goods exported and the other relating to the foreign exchange earned as a result of the export. Broadly speaking, the former aspect is dealt with by the Customs authorities and the latter either by the Reserve Bank or by the Director of Enforcement. The price of goods exported has to be mentioned in the invoice. But the Reserve Bank has power to examine whether the price mentioned in the invoice is correct. Section 12 (5) provides that where in relation to any goods exported the value as stated in the invoice is less than the amount which in the opinion of the Reserve Bank represents the full export value of those goods, the Reserve Bank may issue an order requiring the person holding the shipping documents to retain possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods. Sub-section (6) of S. 12 says that for the purpose of ensuring compliance with the provisions of that section and any orders or directions made thereunder, the Reserve Bank may require any person making any export of goods to which a notification under sub-s. (1) applies to exhibit contracts with his foreign buyer or other evidence to show that the full

amount payable by the said buyer in respect of the goods have been or will within the prescribed period be paid in the prescribed manner. These provisions go to indicate that so far as the value of the goods exported is concerned the matter is left primarily in the hands of the Reserve Bank, and the Customs authorities are not burdened with that work. This aspect becomes relevant in ascertaining the true scope of S. 12 (1). If we bear in mind the scheme of the Act, it is clear that so far as the Customs Authorities are concerned all that they have to see is that no goods are exported without furnishing the declaration prescribed under S. 12 (1). Once that stage is passed the rest of the matter is left in the hands of the Reserve Bank and the Director of Enforcement.

39. In view of our above conclusion it is unnecessary for us to examine the other contentions advanced on behalf of the parties. In the result these appeals fail and they are dismissed with costs. One hearing fee.

ORDER

40. In accordance with the opinion of the majority, these appeals are dismissed with costs. One hearing fee.
Appeals dismissed.

AIR 1970 SUPREME COURT 1613
(V 57 C 342)

(From: Calcutta)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

The General Fibre Dealers Ltd., Appellant v. Commissioner of Income Tax (Central) Calcutta, Respondent.

Civil Appeal No. 1735 of 1966, D/- 17-4-1970.

(A) Income-tax Act (1922), S. 4 — Taxable income — Receipts arising from business — Contract to supply hessian cloth at stipulated price by assessee — Sale confirmed as per sales terms of Calcutta Jute Fabrics Shippers Association — According to those terms alteration in export duty to be on buyers' account — Export duty reduced by Government — But entire amount at contractual rate without reducing duty was realized by assessee, although buyers were fully aware of duty — But in the accounts, extra amount, realised as duty, credited by assessee

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to duty account of buyers — Claim by assessee that such amount could not be treated as income earned by him during relevant year from trading account — Amount so credited in the circumstances held could be treated as income of assessee as assessee was entitled to entire amount of money under contract — Assessee had himself treated the stipulated price as the net price payable to him and there was no intention of varying it on increase or decrease of export duty. (Para 2)

(B) Income-tax Act (1922), S. 66 — Nature of jurisdiction of High Court — Questions of fact — Findings of fact given by Tribunal — High Court on reference is bound by those findings and cannot express any views on them where question referred does not involve challenge to those findings. (Para 2)

The following judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the Calcutta High Court in an Income-tax Reference. During the assessment year 1954-55, the previous year being from 20th January 1953 to 7th February 1954, the assessee who is the appellant entered into a contract for supply of 10,000 tons of Hessian cloth at £136-10-0 per metric ton with a party in Buenos Aires in South America which will hereinafter be referred as the "I. A. P. I." The contract was entered into through the agency of Panos Morosini S. R. L. On June 10, 1953 the agent wrote to I. A. P. I. confirming the sale as per the sales terms of the Calcutta Jute Fabric Shippers Association. The printed form of this Association contained a note regarding the payment of export duty which was as follows:

"Export Duty was based on current rates; any alterations to be on buyers' account".

Before September 1953, 6,250 tons of Hessian cloth had been shipped. The Export Duty then payable was Rupees 275/- per ton. With effect from September 15, 1953 the duty was reduced to Rs. 120/- per ton. For the balance quantity of Hessian cloth, namely, 3,750 tons, the Export Duty was paid at the reduced rate. With regard to each shipment of goods the assessee prepared an invoice in duplicate with the full sale price charged on it. A

copy of this invoice along with the bill of lading was presented by the assessee, to the bankers and the entire amount was realized. For the purpose of accounting the assessee prepared another invoice in which the full amount of the stipulated sale price was first calculated and deduction was given on account of reduction in the Export Duty at the rate of Rs. 155/- per ton. The reduced net sale price was then credited to the shipment account and the amount of deduction made from the sale price on account of the reduction in Export Duty was credited to the "duty account of I. A. P. I." All such credits in this account aggregated to Rs. 5,72,081/- and it was this amount which was sought by the Income-tax authorities to be included in the income of the assessee for the year in question.

2. The Income-tax Officer found that the assessee had contracted to sell the goods at the fixed price of £136-10-0 per ton and that the contract did not specifically provide for any fluctuation in the sale price consequent on the variation in the rate of export duty. It was further found that the assessee had received payment upto full invoice price from the buyers who never made any claim on account of the reduction in the export duty. The sum of Rs. 5,72,081/- was treated as revenue receipt and included in the income of the assessee. The Appellate Assistant Commissioner confirmed the disallowance. The Tribunal referred to the entire evidence including the documents relating to the contract and the correspondence that passed between the assessee and the agent and came to the conclusion that at no stage during the course of the execution of the contract or thereafter the I. A. P. I. made any demand from the appellant on account of reduction in export duty. In all the bills which had been presented by the assessee to the I. A. P. I. the full amount of the sale price was charged without any reduction and the I. A. P. I. made the entire payments without any demur or protest although it was fully aware that the Export Duty had been reduced. The Tribunal put its conclusions in the following words:

"The course of dealings between the parties would thus show clearly as to what was intended by them when they had entered into a contract. It

is evident that the appellant entered into the contract on the footing that the price to be paid was not subject to any variation and that the IAPI also understood the contract in the same sense."

The assessee sought reference of the following question which was allowed by the Tribunal:

"Whether on the facts and in the circumstances of the case the sum of Rs. 5,72,081/- was rightly treated as the income of the assessee of the relevant previous years?"

The High Court answered the question in the affirmative and against the assessee. The High Court gave a summary of its conclusions as follows:

"(1) Liability in terms of contract did certainly arise when there was a variation in the rate of export duty but since the contractual liability was not accepted and admitted it cannot be said to have arisen.

(2) As the assessee had no intention of accepting the liability and as the assessee by its own conduct disowned the liability by realising full price, nothing was deductible from the money received as contractual price, during the accounting year.

(3) The Tribunal came to a finding of fact that the second set of invoices prepared for accounting purposes were fictitious and that they were created for the purpose of avoiding tax liability. No material was placed before this Court from the record for discountenancing this finding of fact and accordingly the said second set of invoices cannot go to show that the contractual liability was subsequently accepted.

(4) The factum of billing for the contractual price as many as on 19 occasions after the decrease in the rate of export duty as found by the Tribunal as a fact and the total withdrawal of the same from the bank would inevitably go to show that the assessee treated the contractual price as inflexible.

(5) The express terms in the contract "export duty based on current rates; any alterations to be on buyer's account" were finally disregarded by the assessee as will be evident from correspondence; accordingly it cannot be said that it was holding the disputed money on behalf of the buyer in a fiduciary capacity".

The principal contention addressed before us on behalf of the assessee is that since according to the terms of the contract a liability had been incurred by it to the extent of the amount by which the export duty was reduced it could not be treated as income earned during the relevant year at any subsequent stage. In other words, the liability being contractual obligation to pay the amount of the rebate arose from the contract and unless its terms were varied by mutual assent it could not be said that the amount in question could be treated as income accruing to the assessee from its trading account. In our opinion the High Court was bound by the finding of fact given by the Tribunal and since no question had been referred involving a challenge to those findings it was hardly open to the High Court to express any views of its own on the points of fact. As stated before, the Tribunal had found, on a consideration of the evidence, that according to the terms of contract the stipulated price of £136-19-9 was the net price payable by the I. A. P. I. to the assessee and that there was no intention of varying it on increase or decrease of export duty. The assessee itself had interpreted the contract in that sense and had sent as many as 19 bills to the buyers at the full contractual price despite reduction in the duty. It had received payment of the full amount charged for in all the bills. In the opinion of the Tribunal the set of invoices charging the sale price as reduced by the amount of reduction in export duty were fictitious and were prepared only to avoid taxation. The I. A. P. I. never made any demand from the assessee on account of reduction in export duty although it was fully aware of such reduction. The assessee was, therefore, entitled under the contract to receive the entire amount of the money paid by the I. A. P. I. On these findings which were based on the materials which have been placed before the Tribunal by the parties the only conclusion possible was that a sum of Rs. 5,72,081/- formed a part of the price which the assessee received for the sale of the Hessian cloth. On that view no question of any liability on the part of the assessee to pay the aforesaid amount to the buyers could arise. We have no doubt that the ans-

wer given by the High Court to the question referred was correctly given although we are not inclined to concur in all its conclusions or reasoning.

3. The appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1616 (V 57 C 343)

(From: AIR 1969 Assam 128)

M. HIDAYATULLAH, C. J., J. M. SHELAT, C. A. VAIDIALINGAM, A. N. GROVER AND A. N. RAY, JJ.

The State of Assam and another, Appellants v. Kuseswar Saikia and others, Respondents.

Civil Appeal No. 358 of 1969, D/- 17-10-1969.

(A) Constitution of India, Art. 233 (1) — Promotion of person to be Additional District Judge, vests in Governor. AIR 1969 Assam 128, Reversed.

The expression "District Judge" includes among others an Additional District Judge and an Additional Sessions Judge. The promotion of persons belonging to the judicial service but holding post inferior to a District Judge vests in the High Court. As the expression District Judge includes an Additional District Judge and an Additional Sessions Judge they rank above those persons whose promotion is vested in the High Court under Art. 233. Therefore, the promotion of persons to be Additional District Judges or Additional Sessions Judges is not vested in the High Court. That is the function of the Governor under Art. 233. The expression 'promotion of' in Art. 233 (1) does not govern 'District Judges'. The comma that follows the word 'of' cannot be ignored. The article, if suitably expanded, reads as under:

"Appointments of persons to be, and the posting and promotion of (persons to be), District Judges etc."

It means that appointment as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court and the expression 'District Judge' includes an Additional District Judge and an Additional Sessions Judge. District Judges may be directly appointed or may be promoted from the subordinate ranks of the judiciary.

The article is intended to take care of both. If the promotion is from the junior service to the senior service it is a 'promotion' of a person to be a District Judge which expression includes an Additional District Judge. AIR 1969 Assam 128, Reversed.

(Paras 4, 5)

(B) Constitution of India, Art. 235—Reconstitution of subordinate judicial service in State by amending rules, leaving no scope for exercise of power of High Court to make promotions in case of persons below the rank of District Judges (which term includes Assistant District Judges)—New hierarchy of Courts cannot be ignored by High Court — Remedy is not to go against the Civil Courts Act as amended but to have the amendment rescinded. AIR 1969 Assam 128, Reversed.

(Para 6)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 447 (V 53)=
(1966) 1 SCR 771, State of West Bengal v. Nripendra Nath Bagchi 4

Mr. M. C. Setalvad, Sr. Advocate (M/s. Naurit Lal and S. N. Choudhury, Advocates with him), for Appellants; Mr. Sarjoo Prasad, Sr. Advocate (M/s. R. B. Datar and S. N. Prasad, Advocates with him), (for No. 4) and Mr. S. K. Nandy, Advocate (for No. 5), for Respondent.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This is an appeal by certificate under Art. 132 of the Constitution against the judgment and order of the High Court of Assam, February 5, 1969. It is filed by the State of Assam and the Legal Secretary to the Government of Assam and challenges a writ of quo warranto issued against Upendra Nath Rajkhowa, Distt. and Sessions Judge, Darrang at Tezpur declaring that he was not entitled to hold that office. It was issued at the instance of Respondents 1 to 3 in this appeal. These respondents on conviction by Upendra Nath Rajkhowa in a sessions trial, challenged their conviction inter alia on the ground that Shri Rajkhowa was not entitled to hold the post of District and Sessions Judge, Darrang. The High Court held that the 'promotion' of Rajkhowa by the Governor as Additional District Judge by notifica-

tion LJJ 74/66/65 dated 19-6-67 purporting to act under Art. 233* was void because he could only be promoted by the High Court acting under Art. 235**. Consequently his further appointment as District Judge by the Governor by notification LJJ 94/67/14 dated 28-7-1967 was also declared by the High Court to be void. The High Court, however, held that Rajkhowa's simultaneous 'promotion' as Addl. Sessions Judge was valid as that post was not included in the judicial service of the State and the Governor was competent to make the appointment. The High Court also held that his further appointment as Sessions Judge was also valid. The High Court, therefore, did not disturb the conviction and also did not pronounce any opinion on whether the judgments given as District Judge by Rajkhowa were void since that question did not arise on a petition for writ of quo warranto.

2. The Assam Judicial Service was constituted by a notification of the Government of Assam issued on August 25, 1952. The Senior Branch of the service was known as State

*Art. 233. "(1) Appointments of persons to be, and the posting and promotion of district judges in any State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

**Art. 235. "The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district Judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

Judicial Service (Senior) and it consisted of the following posts:

Senior Grade I

1. Registrar.
2. Legal Remembrancer.
3. District Judges.

Senior Grade II

Additional District Judges.

On April 9, 1954, the State Judicial Service (Junior) was created. Separate rules governed the junior service. The following posts were included:

Junior Grade I

1. Subordinate Judges.
2. Deputy Registrar.

Junior Grade II

1. Munsiffs.
2. Assistant Registrar.

3. Rajkhowa was originally a Munsiff in grade II. The Chief Justice of the High Court appointed him as Deputy Registrar and thus he was promoted to Grade I of the Junior Service. On June 19, 1967 the following notification was issued:

"No. LJJ 74/66/65—The services of Sri U. N. Rajkhowa, Deputy Registrar, High Court of Assam and Nagaland being replaced at the disposal of the Government. The Governor of Assam in consultation with the High Court of Assam and Nagaland, and in exercise of powers conferred by Article 233 of the Constitution read with Rule 5 (ii) of the Assam Judicial Service (Senior) Rules, 1952 is pleased to appoint Sri Uppendra Nath Rajkhowa to officiate as Additional District and Sessions Judge, Lower Assam Districts with Headquarters at Nowgong with effect from the date he takes over as such vice Sri M. C. Mahajan.

Sd. B. Sarma,

Secy. to the Government,
Law Department".

It is this 'appointment' under Art. 233 which is considered by the High Court to be void. According to the High Court this was a case of 'promotion' of a person belonging to the judicial service of the State and the High Court was the authority to make the promotion under Art. 235. In this appeal the view of the High Court is challenged.

4. Chapter VI of Part VI of the Constitution deals with Subordinate Courts. The history of this Chapter and why judicial services came to be provided for separate from other ser-

vices has been discussed in *State of West Bengal v. Nripendra Nath Bagchi*, (1966) 1 SCR 771 = (AIR 1966 SC 447). This service was provided for separately to make the office of a District Judge completely free of executive control. The Chapter contains six articles (233 to 237). We are not concerned with Art. 237 in the present case. Article 235 vests in the High Court the control over District Courts and Courts subordinate thereto, including the posting and promotion and grant of leave to persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge. By reason of the definitions given in Art. 236, the expression 'Judicial Service' means a service consisting exclusively of persons intended to fill the post of District Judge and other Civil Judicial posts inferior to the District Judge and the expression "District Judge" includes among others an Additional District Judge and an Additional Sessions Judge. The promotion of persons belonging to the judicial service but holding post inferior to a District Judge vests in the High Court. As the expression District Judge includes an additional District Judge and an Additional Sessions Judge, they rank above those persons whose promotion is vested in the High Court under Art. 235. Therefore, the promotion of persons to be Additional District Judges or Additional Sessions Judges is not vested in the High Court. That is the function of the Governor under Art. 233. This follows from the language of the article itself:

"(a) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

x x x x x x
The language seems to have given trouble to the High Court. The High Court holds: .

(1) 'appointment to be' a District Judge is to be made by the Governor in consultation with the High Court vide Art. 233; and

(2) 'promotion of' a District Judge and not promotion 'to be a District Judge' is also to be made by the Governor in consultation with the High Court vide Art. 233

The High Court gives the example of selection grade posts in the cadre of District Judges which according to it is a case of promotion of a District Judge.

5. The reading of the article by the High Court is, with respect, contrary to the grammar and punctuation of the article. The learned Chief Justice seems to think that the expression 'promotion of' governs 'District Judges' ignoring the comma that follows the word 'of'. The article, if suitably expanded, reads as under:

"Appointments of persons to be, and the posting and promotion of (persons to be), District Judges etc."

It means that appointment as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court and the expression 'District Judge' includes an additional District Judge and an Additional Sessions Judge. It must be remembered that District Judges may be directly appointed or may be promoted from the subordinate ranks of the judiciary. The article is intended to take care of both. It concerns initial appointment and initial promotion of persons to be either District Judges or any of the categories included in it. Further promotion of District Judges is a matter of control of the High Court. What is said of District Judges here applies equally to Additional District Judges and Additional Sessions Judges. Therefore when the Governor appointed Rajkhowa an Additional District Judge, it could either be an 'appointment' or a promotion under Art. 233. If it was an appointment it was clearly a matter under Art. 233. If the notification be treated as 'promotion' of Rajkhowa from the junior service to the senior service it was a 'promotion' of a person to be a District Judge which expression, as shown above, includes an Additional District Judge. In our opinion it was the latter. Thus there is no doubt that the appointment of Rajkhowa as Additional District Judge by the Governor was a promotion and was made under Art. 233. It could not be made under Art. 235 which deals with posts subordinate to a District Judge including an Additional District Judge and an Additional Sessions Judge. The High Court was in error in holding that the appointment of Rajkhowa to the position of an Addi-

tional District Judge was invalid because the order was made by the Governor instead of the High Court. The appointment or promotion was perfectly valid and according to the Constitution.

6. This brings us to the next point in the case which arises as a side issue involving the Legal Secretary, who is also an appellant here. The Civil Courts Act was amended by the Assam Legislature by Act XII of 1967 which came into force on 16th August, 1967. The designation of subordinate judge was altered to Assistant District Judge. On August 17, 1967, new rules for the Assam Judicial Services were brought into force. The Judicial Service was reconstituted as follows:

Grade I

1. District and Sessions Judge.
2. Registrar.
3. Presiding Officer, Industrial Tribunal.
4. Presiding Officer, Labour Court.

Grade II

1. Additional District Magistrate.
2. Assistant District Judge.
3. Deputy Registrar.

Grade III

1. Munsiff.
2. Judicial Magistrate.
3. Sub-Divisional Magistrate (Judicial)
4. Assistant Registrar.

The High Court was of opinion that this was deliberately done to grab at the power of promoting subordinate judges by taking advantage of the definition of District Judge which includes an Assistant District Judge. By this device, which the High Court described as 'a fraud upon the Constitution' the power of promotion vested in the High Court in respect to persons belonging to the Judicial Service of a State and holding posts inferior to the post of the District Judge the jurisdiction of the High Court under Art. 235 was taken away. Formerly, the subordinate service was composed of two grades and promotion between the two grades was made by the High Court. Under the new rules there is only one grade (i.e. grade III) in which Art. 235 can operate if at all. Since all the posts there are equal and carry equal pay there is no scope for promotion at all. The High Court is thus right that there is no scope for the exercise of the power of the High Court to make promotions in the case

of persons below the rank of District Judges (which term includes an Assistant District Judge). The High Court was thus far right—but the High Court is not right in thinking that it can ignore the hierarchy of courts in Assam as established by law and treat the change as of no consequence. The remedy is not to go against the Civil Courts Act as amended, but to have the amendment rescinded. We are of the view that the change is likely to lead to an impairment of the independence of the judiciary at the lowest levels whose promotion which was vested by the Constitution in the High Court advisedly, will no longer be entirely in the hands of the High Court. The remedy for it is by amendment of the law to restore the former position. We may say that we do not approve of the change of mere name without any additional benefits.

7. The High Court was unnecessarily hard upon the Legal Secretary. It is proved that this amendment was first thought of several years ago when there was some other Legal Secretary. It is also established that the amendment was intended to bring in the nomenclature existing in some other States without realising what effect it would have upon the operation of Art. 235 in the State. The remarks of the Chief Justice against the Legal Secretary were unmerited.

8. For these reasons we allow the appeal and set aside the writ of quo warranto issued by the High Court, but in the circumstances of the case we make no order about costs.

Appeal allowed.

**AIR 1970 SUPREME COURT 1619
(V 57 C 344)**

(From: Madhya Pradesh)*

J. C. SHAH, V. RAMASWAMI, G. K. MITTER, K. S. HEGDE AND A. N. GROVER, JJ.

Harnath Singh, Appellant v. The State of Madhya Pradesh, Respondent.

Criminal Appeal No. 130 of 1966, D/-27-9-1968.

(A) Criminal P. C. (1898), S. 164 — Power to record statements and confessions — Magistrate conducting identification proceedings — Duty of.

*(Criminal Appeal No. 55 of 1964, D/-24-4-1965—Madh. Pra.)

CN/DN/B307/70/DHZ/D

A Magistrate when called upon to conduct identification proceedings should confine his attention only to the steps to be taken to ensure that the witnesses were able to identify certain persons alleged to have been concerned in the commission of the crime. If the Magistrate transgresses this limit and records other statements which may have a bearing in establishing the guilt of the accused this must be done strictly in accordance with the provisions of Section 164.

Where a Magistrate having only third class powers recorded statements of identifying witnesses in support of the identification of the accused and also recorded what the witness had said after identifying particular accused this statement would be inadmissible as being in contravention of Section 164 but this would not apply to the record by him to the effect that the witnesses correctly identified the accused. AIR 1961 SC 1527 Rel. on.

(Paras 13, 14)

(B) Evidence Act (1872), S. 9 — Identification parades — Reasons for and scope of — Stated. AIR 1955 SC 104 Rel. on. (Para 9)

Cases Referred: Chronological Paras

- (1961) AIR 1961 SC 1527 (V 48) =
 (1962) 1 SCR 662 = 1961 (2)
 Cri LJ 705, Deep Chand v.
 State of Rajasthan 12, 13
 (1955) AIR 1955 SC 104 (V 42) =
 1955-1 SCR 903 = 1955 Cri
 LJ 196, Ramkrishan Mithan-
 lal Sharma v. State of Bombay 9
 (1936) AIR 1936 PC 253 (2)
 (V 23) = 37 Cri LJ 897, Nazir
 Ahmad v. King Emperor 9, 11, 12
 (1918) AIR 1918 Cal 88 (V 5) =
 1LR 45 Cal 557 = 19 Cri LJ
 305, Amiruddin Ahmed v.
 Emperor 12
 Mr. R. L. Kohli, Advocate, for Ap-
 pellant; Mr. I. N. Shroff, Advocate, for
 Respondent.

The following Judgment of the Court was delivered by

MITTER, J. — This is an appeal by Special Leave from the judgment and order of the Madhya Pradesh High Court, Gwalior Bench on April 24, 1965 in Criminal Appeal No. 55 of 1964. The said appeal was heard and disposed of along with two other appeals Nos. 44 and 45 of 1964. The appellant before us, Harnath Singh

was the appellant in Appeal No. 55 of 1964 while Narayan Singh and Chhotelal were the appellants in the other two appeals. Narayan Singh and Harnath Singh were convicted by the Additional Sessions Judge, Morena, under Section 395 of the Indian Penal Code while Chhotelal was convicted in the same trial under Section 395 read with S. 75 of the Indian Penal Code.

2. The prosecution case was as follows. There was a dacoity at the house of one Dhudilal in village Chhota Khada on the night of December 10, 1962 in which the inmates of the house were beaten and property, to wit, Rs. 350 in currency notes, some silver ornaments etc., belonging to one Raghunath were taken away by the dacoits from the said house. Ramkumar (P. W. 1) raised an alarm which brought the neighbours on the scene and one of the dacoits, Chhotelal, was caught on the spot and handed over to the Police. The first information report was lodged by Dhudilal at about 9 a.m. on the following morning. During investigation Rs. 335 in currency notes besides some silver articles and small change were found on the person of Chhotelal. Some articles were also produced by Narayan Singh on December 12, 1962. On the same day, on a personal search of the appellant, Harnath Singh, four George V Silver rupee coins one Victoria silver rupee coin, one silver half-rupee coin and one old square coin with vermillion on them were found and seized. On December 25, 1962 there were test identification parades of the accused and all the appellants were identified by some of the eye-witnesses. The appellant, Harnath Singh, was identified by Ramkumar (P. W. 1), Panabai (P. W. 13), and Hari Shankar (P. W. 15). The Articles seized from the accused were also identified. Chhotelal admitted his presence in the village on the night of the incident and the seizure of Rs. 335 from his person but claimed them as his own. He denied the seizure of the other articles from his possession. Narayan Singh denied the recovery of any articles from his house while the appellant, Harnath Singh, admitted the seizure of five rupee coins and the square coin from his person but claimed them as his own.

3. The Sessions Judge found all the accused guilty and sentenced them as stated.

4. So far as the appellant Harnath Singh is concerned, the High Court held that he had been "identified as one of the dacoits by Ramkumar (P. W. 1), Panabai (P. W. 13) and Hari Shankar (P. W. 15)" and they had also "identified him earlier in a test identification parade." Discussing the question as to whether the evidence with regard to the test identification parade was admissible in view of the fact that it was conducted by a Magistrate of the Third class who was not empowered to record statements under Section 164 of the Criminal Procedure Code, the High Court was of the view that:

"the test identification parade..... cannot be disregarded as of no value under the circumstances of the case."

5. The High Court then went on to consider the evidence against the appellant as to his being concerned in the dacoity. It relied on the testimony of Ramkumar, P. W. 1, that the appellant was standing near his sister, Tulsabai and had a Gajkundi and was firing crackers. Ramkumar had also given a description of the appellant to the Police and stated in his evidence that he was able to identify him from his facial features. Panabai, another of the identifying witnesses, had stated that the appellant was wearing a black coat and was flashing a torch. The third identifying witness, Hari Shankar, could give no special reason for identifying the appellant but stated that he was standing near his aunt, Tulsabai. All these witnesses stated that they had identified the appellant in the identification parade. Tulsabai did not identify the appellant but had stated that the person standing near her had a black coat on. The High Court held on the evidence that there was no sufficient reason to discard the testimony of those persons on the point of their identifying the appellant as one of the dacoits although there were some minor discrepancies in their statements. The High Court also found that the evidence of the witnesses was amply corroborated from other evidence on record.

6. One of the circumstances which corroborated the testimony of the witnesses, according to the High Court, was the unexplained possession

of the appellant of some of the articles taken away by the dacoits from the scene after the incident. In the first information report there had been specific mention of the loss of four George V rupee coins, one Victoria rupee coin and a gilt half rupee piece. These correspond with the recovery from the appellant along with one square coin probably of brass all bearing marks of vermillion. This mark was explained by Raghunath, the claimant of the coins as having been used in the Diwali pooja. The High Court did not accept the appellant's version of his having carried them on his person because they used to be worshipped by his father and grandfather. The High Court held that the presence of the square piece in his possession showed his complicity in the offence. According to Raghunath this coin was kept separately from the other coins but all bore vermillion mark because of their use in the pooja.

7. The second circumstance incriminating the appellant as found by the High Court was his unexplained absence from duty in the Chambal Canal Project from December 9, 1962. While the appellant admitted his absence from duty he tried to account for it by saying that he was ill but offered no independent witness to establish his statement. Accordingly, the High Court found itself unable to disturb the conviction of the appellant under Section 395 and dismissed the appeal.

8. Before us learned counsel for the appellant contended that the conviction of the appellant could not stand in view of the reliance of the High Court on the record of the test identification parade. In our opinion, the learned Judges of the High Court did not affirm the conviction relying merely or mainly on the said report. The elaborate discussion on this point appears to have been prompted by the two judgments in Appeal No. 218/1963 and Appeal No. 35/1964 of the same High Court on which reliance was placed by counsel for the accused. As noted already, the view of the High Court was that the test identification parade could not be discarded as of no value in the circumstances of the case. It was only after recording the said view that the High Court proceeded to consider the evidence of the

witnesses and the circumstances which corroborated their testimony. These were only two as discussed above. It appears therefore that although the High Court did not reject the testimony of the Naib Tehsildar, Dinkar Rao who presided at the parade, it really upheld the conviction of the appellant on other evidence on the record.

9. Relying principally on the judgment of the Judicial Committee of the Privy Council in *Nazir Ahmad v. King Emperor*, AIR 1936 PC 253 (2) and on certain observations of this Court in *Ramkrishan Mithanlal Sharma v. State of Bombay*, 1955-1 SCR 903 = (AIR 1955 SC 104) counsel for the appellant attacked the identification proceedings as being without jurisdiction and as such inadmissible in evidence. It was further argued that if the High Court had rejected the said evidence, it would not have maintained the conviction of the appellant. In order to appreciate the foundation for this argument, it is necessary to take a brief note of the reason for holding identification proceedings and the scope thereof. During the investigation of a crime the Police has to hold identification parades for the purpose of enabling witnesses to identify the properties which are the subject-matter of the offence or to identify the persons who are concerned therein. They have thus a two-fold object: first, to satisfy the investigating authorities that a certain person not previously known to the witnesses was involved in the commission of the crime or a particular property was the subject of the crime. It is also designed to furnish evidence to corroborate the testimony which the witness concerned tenders before the Court. The process of identification proceedings and the legal basis of evidence adduced thereat were considered by this Court in 1955-1 SCR 903 = (AIR 1955 SC 104) (*supra*). It was there said (at p. 920) (of SCR) = (at p. 114 of AIR):

".....it is clear that the process of identification by the identifying witnesses involves the statement by the identifying witnesses that the particular properties identified were the subject-matter of the offence or the persons identified were concerned in the offence. This statement may be express or implied. The identifier

may point out by his finger or touch the property or the person identified, may either nod his head or give his assent in answer to a question addressed to him in that behalf or may make signs or gestures which are tantamount to saying that the particular property identified was the subject matter of the offence or the person identified was concerned in the offence. All these statements express or implied including the signs and gestures will amount to a communication of the fact of identification by the identifier to another person The distinction between the mental act of identification and the communication thereof by the identifier to another person is quite logical and such communications are tantamount to statements made by the identifiers.....The physical facts of identification has thus no separate existence apart from the statement involved in the very process of identification....."

10. On the above logic the Court pointed out that identifications by a Police Officer would be hit by Section 162 of the Code of Criminal Procedure

11. It being hardly practicable to have identification proceedings conducted by private citizens, they are, as a rule, held by Magistrates at the request of the investigating Police authorities. Usually the record of the proceedings is made on certain forms and one such, Ex. P-1, was used in this case. This form contains 9 cols., the first being for the serial number, the second for the names of the witnesses who identified the accused, the third for names of the accused who are to be identified, the fourth for the number of persons who were mixed in the identification parade, the fifth being headed "correctly identified", the sixth reading "wrongly identified", the seventh for "statement of the witnesses about identification", the eighth for the signature of the identifying witnesses and the ninth and last being for remarks. The note at the end of the form shows how the parade was conducted, where it was held, how many persons were mixed up with the accused in the case, what precautions were taken so that the witnesses could not see the steps being taken for mixing the accused per-

sons etc. The last sentence of the form reads:

"From their gestures it appeared that the witnesses had correctly identified the accused persons."

In Nazir Ahmad's case, AIR 1936 PC 253 (2) the appellant was convicted mainly, if not entirely, on the strength of a confession said to have been made by the appellant to a Magistrate who was examined at the trial. The Magistrate however did not record the confession under Section 164 of the Criminal Procedure Code which provides that a Magistrate of the class therein mentioned may record any statement or confession made to him in the course of an investigation in the manner prescribed and after complying with the formalities therein laid down. The Judicial Committee found that though the Magistrate was manifestly acting under Part V of the Criminal Procedure Code, he neither purported to follow nor in fact followed the procedure of Secs. 164 and 364 of the Code. To quote the words of the judgment to show absence of non-compliance with Sections 164 and 364 of the Criminal Procedure Code:

".....there was no record in existence at the material time (at the time the alleged confession was made), there was nothing to be shown or to be read to the accused, and nothing he could sign or refuse to sign."

The Magistrate gave no explanation as to why he adopted this procedure. It was argued on behalf of the appellant that by necessary implication in the Code of Criminal Procedure the Magistrate must either proceed under Section 164 of the Code or not at all. Considering the position of the accused persons and the position of the Magistracy, the Judicial Committee observed that it was most undesirable that Magistrates and Judges should be in the position of witnesses in so far as it could be avoided. According to the Judicial Committee:

".....it would be particularly unfortunate if Magistrates were asked at all generally to act rather as Police Officers than as judicial persons to be by reason of their positions; freed from the disability that attaches to Police Officers under S. 162 of the Code; and to be at the same time freed, notwithstanding their position as Magistrates, from any obligation to make records

under Section 164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever."

In the result it was held that the Code of Criminal Procedure did not sanction any departure from the mode in which the confessions were to be dealt with by the Magistrates when made during an investigation.

12. This decision of the Judicial Committee was considered by this Court in Deep Chand v. State of Rajasthan, (1962) 1 SCR 662 = (AIR 1961 SC 1527) and the above observations were adopted. In this case, one Suraj Bhan had been abducted by certain persons and according to the prosecution case he was taken first to the house of Deep Chand and kept blindfolded and confined in a small room for 17 days. During this period after temporary removal of the bandage over his eyes he was made to write letters to his father asking for moneys to be paid for releasing him. He was thereafter removed to the house of one Lachman. As regards the identification of Deep Chand's house, the High Court accepted the evidence of Suraj Bhan that he had been able to note certain features of it through a chink in the wall of his room. Suraj Bhan's evidence was corroborated by the evidence of one Devi Singh, a Magistrate who had taken Suraj Bhan along with him to the house of Deep Chand. The Magistrate had inspected the house and got a plan prepared under his supervision and recorded a memorandum in which his observations and the statements made by Suraj Bhan were noted down. The Magistrate gave evidence at the trial describing the building of Deep Chand and proved the memorandum prepared by him. Objection was taken by the appellant to the verification proceedings conducted by the Magistrate on the strength of Nazir Ahmad's case, AIR 1936 PC 253 (2) (supra) and it was argued that the High Court had gone wrong in acting upon the memorandum prepared by the Magistrate. It was pointed out by this Court that the decision in Nazir Ahmad's case, AIR 1936 PC 253 (2) did not preclude a Magistrate from depos-

ing to relevant facts if no statute precluded him from doing so either expressly or impliedly. It was also said that neither the Evidence Act nor the Code of Criminal Procedure prohibited a Magistrate from deposing to relevant facts within the meaning of Section 9 of the Evidence Act. Reference was made by this Court to the observation in *Amiruddin Ahmed v. Emperor*, ILR 45 Cal 557 = (AIR 1918 Cal 88) in relation to identification proceedings that "the main concern of the Court would seem to be to ensure that evidence not strictly admissible is not admitted." In that case, the High Court had further observed that the verifying Magistrate should not be permitted to speak to statements said to have been made to him in the course of the proceedings. The High Court observed that:

"additional statements being statements made in the course of an investigation, when not recorded in the manner provided in Section 164 of the Code of Criminal Procedure . . . are inadmissible."

According to this Court, the above decision was

"an authority for the position that the evidence given by a Magistrate on the basis of the verification proceedings conducted by him is relevant evidence, though he could not speak to statements made by the accused or a witness recorded by him in contravention of Sec. 164 of the Code of Criminal Procedure."

13. Deep Chand's case, (1962) 1 SCR 682 = (AIR 1961 SC 1527) goes to show that a Magistrate when called upon in a case like this to conduct verification proceedings should confine his attention only to the steps to be taken to ensure that the witnesses were able to identify certain persons alleged to have been concerned in the commission of the crime or to identify certain things which were said to be the subject matter thereof. The Code of Criminal Procedure does not sanction his transgression of this limit and recording of other statements which may have a bearing in establishing the guilt of the accused except in accordance with S. 164 of the Code.

14. In this case the Magistrate gave evidence to the effect that he was a Naib Tehsildar at Sirpur on 26th December 1962 on which date he

had executed the proceedings of identification parade of the three accused including the appellant. He also stated that he had the power of a Third Class Magistrate. After stating how the parade was conducted he recorded statements in support of the identification of the three accused by different persons. He also purported to give evidence of what the witnesses had said after identifying a particular accused. Learned counsel for the appellant contended that as he had purported to record statements made in the course of investigation, the entire evidence of the Magistrate including the record of the identification proceedings became inadmissible because he was a Third Class Magistrate not empowered to proceed under S. 164 Cr. P. C. We find ourselves unable to accept this argument. The Magistrate was called upon only to conduct the identification proceedings. He was not required to record any confession or to interrogate witnesses to elicit any other facts or call upon them to make any statement beyond mere identification. The statements in column 7 would therefore be inadmissible in evidence. This would not however be applicable to the record under column 5. The High Court did not refer to the statements in column 7 at all. It would therefore be clear that the judgment does not suffer from the infirmity complained of and the appeal must fail. It is therefore dismissed.

Appeal dismissed

AIR 1970 SUPREME COURT 1624
(V 57 C 345)

(From: Madras)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Rm. Ramanathan Chettiar etc., Appellants v. Commissioner of Income Tax, Madras, Respondent.

Civil Appeal No. 710 of 1967, D/- 30-4-1968

Income-tax Act (1922), Sec. 23 (5) (a), proviso 2 — Non-resident partner — Total income cannot be computed with reference to S. 4 (1) (c).

Concept of total income in S. 23 (5) (a) cannot be carried into the second proviso to section 23 (5) (a), relevant

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to a non-resident partner. A non-resident partner of a resident firm was not entitled to exclude from his total income such proportionate share of the profits of the said firm which accrued or arose to it without taxable territory under S. 4 (1) (c). The second proviso to S. 23 (5) (a) does not call for the determination of the total income of the non-resident partner. There is no ground for computing the income of the non-resident partner with reference to S. 4 (1) and for excluding income derived without the taxable territories by the operation of S. 4 (1) (c). AIR 1949 PC 159, Foll.; (1961) 43 ITR 485 (Mad) Approved.

(Para 4)

Cases Referred: Chronological Paras

(1961) 1961-43 ITR 485 (Mad),
Gnanam & Sons v. Commr.
of Income-tax, Madras 1, 2, 4
(1949) AIR 1949 PC 159 (V 36)=
(1949) 17 ITR 209, Seth Badri
Das Daga v. Commr. of Income-
tax, Central and United Provin-
ces 4, 5

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave against a judgment of the Madras High Court rendered in its advisory jurisdiction in a case stated under S. 66(1) of the Income-tax Act, 1922, hereinafter referred to as the "Act". The appellant was a non-resident individual. During the previous year ending April 12, 1956 relevant to the assessment year 1956-57, he was a partner of a registered resident firm which carried on money lending business in India and Malaya. The entire income of that firm for the assessment year in question accrued outside India. The appellant's share in the income of the firm came to Rs. 62,612 the whole of which was foreign income. The appellant had also incurred a loss of Rs. 8,484/- in his own business at Madras. While assessing the appellant the Income-tax Officer set off the loss in the appellant's Madras business against the foreign income and assessed him at the maximum rate as the appellant had not filed a declaration in terms of the proviso to S. 17 (1). The Appellate Assistant Commissioner confirmed the assessment. An appeal was taken to the Appellate Tribunal but it failed. Two questions of law were referred by the Tribunal:

(1) "Whether the assessment made on the assessee, a non-resident, by including in his total income his share of foreign income of the resident firm of Messrs. K. V. Al. Rm. Ramathan Chettiar, is valid in law?

(2) Whether the levy of the tax at the maximum rate is correct?"

The High Court answered the questions referred against the assessee on the ground that the points were covered by its previous decision in *Gnanam & Sons v. Commr. of Income tax, Madras* (1961) 43 ITR 485 (Mad).

2. The argument which was raised before the Madras High Court in the above case (*Gnanam and Sons*), (1961) 43 ITR 485 (Mad) was based largely on a reading of two provisions of the Act. Under Section 4 (1) (c) when a person was not resident in the taxable territories the income, profits and gains which accrued or arose to him without the taxable territories were not to be included in his "taxable income" unless they were brought into or received by him in the taxable territories. Sub-section (5) (a) of S. 23 was intended to tax the total income of each partner of the firm including therein his share of its income, profits and gains of the previous year. The argument raised was that this concept of the total income must be carried into the second proviso to S. 23 (5) (a) relevant to a non-resident partner. It would, therefore, mean that this income arose wholly outside the taxable territories and had to be excluded by virtue of the operation of S. 4 (1) (c) of the Act.

3. Under section 23 (5) when the assessee is a registered firm and its income has been assessed the income tax payable by itself shall be determined and the total income of each partner of the firm including therein his share of its profits and gains of the previous year shall be assessed and the sum payable by him on the basis of such assessment shall be determined. The provisions relating to payment of income tax by the firm itself were introduced by the Finance Act, 1956. The position before 1956 was that where the firm was registered the firm did not itself pay the tax and therefore each partner's share in the firm's profits was added to his other income and the tax payable by each partner on the basis of his total income was determined and the demand was

also made on the partners individually. After 1956 income tax at low rates became chargeable on the registered firms but the partners continued to be assessed individually in the same way as before. There can be no manner of doubt that the unit of assessment was the registered firm and when it was assessed and its total income computed the individual partners were taxed under S. 23 (5) (a) on their respective shares of the firm's income.

4. The Privy Council in *Seth Badri Das Daga v. Commr. of Income-tax, Central and United Provinces*, (1949) 17 ITR 209 = (AIR 1949 PC 159) took the view that a non-resident partner of a resident firm was not entitled to exclude from his total income such proportionate share of the profits of the said firm which accrued or arose to it without British India under S. 4 (1) (c) of the Act. In *Gnanam & Sons' case*, (1961) 43 ITR 485 (Mad), the Madras High Court relied on this decision and repelled the argument raised on behalf of the assessee that the second proviso to section 23 (5) (a) called for the determination of the total income of the non-resident partner. It was held that on the language of the proviso there was no ground for computing the income of the non-resident partner with reference to S. 4 (1) of the Act and for excluding income derived without the taxable territories by the operation of S. 4 (1) (c).

5. A faint attempt was made to assail the correctness of the decision of the Privy Council in *Seth Badri Das' case*, (1949) 17 ITR 209 = (AIR 1949 PC 159) but the discussion of all the relevant provisions by their Lordships is, with respect, so clear and cogent that we are unable to find any infirmity or flaw therein. It is not disputed that if that decision lays down the law correctly this appeal must fail.

6. It is therefore dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1626
(V 57 C 346)

(From: Industrial Tribunal—Andhra Pradesh)*

J. M. SHELAT AND C. A.

VAIDIALINGAM, JJ.

Vizagapatnam Dock Labour Board, Appellant v Stevedores Association, Vishakhapatnam and others, Respondents.

Civil Appeal No. 2113 of 1968, D/- 10-9-1969.

(A) Industrial Disputes Act (1947), S. 18 — Tonnage bonus — Claim by dock workers at Vizagapatnam Port against Stevedores Association and its members — In view of pleadings and nature of claim, held that there was no justification to make Vizagapatnam Dock Labour Board, liable for same — Award dated 24-5-1968 of I. T. Andhra Pradesh in I.D. No. 10 of 1967, Reversed. (Paras 10 and 14)

(B) Dock Workers (Regulation of Employment) Act (1948) S. 4 — Vizagapatnam Dock Workers (Regulation of Employment) Scheme 1959, under S. 4—Relationship between Vizagapatnam Dock Labour Board, Stevedores' Association and Dock labour workers — Scheme of Act and the Scheme have to be looked into—After considering the provisions of the Act and the scheme it was held that the Board could not be considered employer of Dock labour workers — Facts that recruitment and registration of dock labour force, fixation of their wages and dearness allowances, payment of workmen's compensation taking of disciplinary action and prohibition against employment of those who are not registered with the Board, are made by the Board, do not establish relationship of employer and employees between Board and Dock labour — These functions ensure better regulation of employment of Dock labour — Dock labour workers are employees of registered employers to whom they are allotted by the Board. 1968 Lab IC 588 (Ker) Overruled; 1963-3 SCR 514, Distinguished. AIR 1968 Cal 114, Ref.: Award D/-24-5-1968 of I. T. Andhra Pradesh in I.D. No. 10 of 1967, Reversed. (Prs. 23, 24, 25)

(C) Industrial Disputes Act (1947), S. 2 (i)—Industry—Vizagapatnam Dock

*I. D. No. 10 of 1967 D/- 24-5-1968—Ind. Tri.—A. P.)

DN/DN/E572/69/RGD/P

Labour Board functioning under Dock Workers (Regulation of Employment) Act, 1948 and Vizagapatnam Dock Workers (Regulation of Employment) Scheme 1959, is not an industry. AIR 1968 SC 554 (561), Foll. (Para 30)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 554 (V 55) =

(1968) 1 SCR 742, Gymkhana Club Union v. Management 29

(1968) AIR 1968 Cal 114 (V 55) =

71 Cal WN 531, A. C. Roy & Co. Ltd. v. Taslim 28

(1968) 1968 Lab IC 588 = (1967)

1 Lab LJ 509 (Ker), C. V. A. Hydross & Son v. Joseph San- 27

jon

(1963) 3 SCR 514 = 1963-1 Lab

LJ 126, Kirloskar Oil Engines v. Hanmant Laxman Bibawe 26

Mr. Niren De, Attorney General, for India, (M/s S. K. Dholakia, R. H. Dhebar and S. P. Nayar, Advocates with him), for Appellant; M/s. K. Srinivasamurthy and Naunit Lal, Advocates, for Respondents Nos. 1 to 12. Mr. B. P. Maheshwari, Advocate, for Respondent No. 13.

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: This appeal, by special leave, by the Vizagapatnam Dock Labour Board (hereinafter referred to as the Board), is directed against the award, dated May 24, 1968 of the Industrial Tribunal, Andhra Pradesh, Hyderabad, in I. D. No. 10 of 1967 holding that the appellant should pay the Dock workers employed at Vizagapatnam Port bonus for the accounting years 1964-65, 1965-66 and 1966-67.

2. The Central Govt., by its order dated April 13, 1967, referred for adjudication to the said Tribunal the question whether the demand for payment of bonus to Dock Labour Board Workers employed at Visakhapatnam Port for the accounting years 1964-65, 1965-66 and 1966-67 was justified and, if so, at what rate should such bonus be paid. The parties to the Reference included the Board, the Visakhapatnam Stevedores Association, certain individual Stevedores and two Unions representing workers. The two Unions were the Port Khalasis Union and the Dock Workers Union.

3. Both the Unions filed statements of claim on behalf of their workmen. They referred to the demands made

by them for payment of bonus and the rejection thereof by the Board and the Stevedores Association. They referred to certain agreements having been reached in respect of bonus between the workmen and the respective Stevedores Associations, in Calcutta, Cochin, Madras and Bombay. They claimed that the work done by the workmen at Visakhapatnam Port was exactly similar to the type of work done by the Stevedores workmen at Bombay, Calcutta, Cochin and Madras and that therefore their claim for bonus was justified. They further referred to the fact that the Board and the Stevedores Association were all governed by the Dock Workers (Regulation of Employment) Act, 1948 (Act IX of 1948) (hereinafter referred to as the Act) and the Vizagapatnam Dock Workers Regulation of Employment) Scheme, 1959 (hereinafter referred to as the Scheme), framed thereunder. The said Scheme is similar to the Scheme obtaining in the areas where a settlement had been entered into regarding bonus and the relationship between the Stevedores and the Dock Labour Board was also the same in all ports. The Unions claimed bonus at 14 paise per ton for 1964-65, 15 paise per ton for 1965-66 and 16 paise per ton for 1966-67.

4. The Visakhapatnam Stevedores Association and its member Stevedores filed statements contesting the claim of the workmen. After referring to some of the provisions of the Act and the Scheme, the Association urged that the Dock workers were the workmen of the Board as all the ingredients of master and servant existed as between the Board and the Dock workers. The Association further urged that the Dock Labour workers were not the employees of the Stevedores and, as such no claims for bonus could be made as against the Stevedores Association or its members. The Association further pleaded that it was an unnecessary party to the Reference and the workmen had no claim as against it in view of the fact that the Association or its members were not the employers of the dock workers. They also contested the claim of the workmen on merits.

5. The Board, represented by its Chairman, filed a written statement contesting the claim of the Stevedores that they were not the employers of the dock workers. The Board claimed

that it was a statutory body constituted under the Act and governed by the statutory Scheme in the discharge of its statutory functions. According to it none of the functions discharged by it under the Act or the Scheme could be characterised as 'carrying on of an industry' so as to attract the provisions of the Industrial Disputes Act. On the other hand, the Board urged that it was the Stevedores and their Association that carried on the stevedoring industry during the years for which a claim for bonus was made by the workmen and therefore, if at all, the liability for payment of bonus should be that of the Stevedores and their Association. It further urged that the claim, having been made by the workmen against the Stevedores, the latter should not be allowed to convert the said claim into one against the Board. The Board also further pleaded that it was not a necessary or proper party to the dispute. It filed an additional written statement pointing out that the Visakhapatnam Stevedores Association had been appointed by the Central Government as the Administrative Body for the purpose of carrying on the day-to-day administration of the Scheme and that the said Administrative Body is deemed to act as an agent for the employers, as would be evident from the Scheme. After referring to the functions of the Administrative Body under the Scheme, the Board claimed that it had no further part to play in the proceedings before the Tribunal.

6. The Industrial Tribunal, after referring to the nature of the duties performed by the Board as well as the Stevedores Association and its members and their relationship with the Dock Labour Boards, held that it is the Board that is the employer of the dock workers and that the Board is liable for meeting the claim for bonus. The Tribunal has proceeded on the basis that the bonus claim by the workmen is 'tonnage bonus' because while loading or unloading cargo any particular gang or gangs of workmen may not be working continuously for a given period for a particular Stevedore and therefore the bonus that has to be paid to the dock workers must be on the basis of the tonnage handled by them. The Tribunal then considered the rate at which bonus is to be awarded for the three

years. Ultimately it has held that the demand for bonus by the workmen for the three years in question is justified and it has to be paid by the Board at the rate of 13 paise per ton for the year 1964-65, at 14 paise per ton for the year 1965-66 and at 15 paise per ton for the year 1966-67.

7. The learned Attorney General, on behalf of the appellant, raised two contentions: (i) That the Tribunal has acted illegally and without jurisdiction in making the Board liable for payment of bonus when the claim of the workmen for such payment was against the Stevedores Association and its members, and (ii) having due regard to the provisions of the Act and the Scheme and the functions discharged by the Board, the Tribunal should have held that there is no employer-employee relationship between the Board and the Dock Labour workmen and, as such the Board could not be made liable for the claim.

8. Regarding the first contention, the learned Attorney General invited our attention to the nature of the claim made by the two Unions as well as the discussion contained in respect of such claim in the award. The Attorney General also referred us to the plea taken by the Board in its written statement that a claim exclusively made by the dock workers as against the Stevedores should not be allowed by the Stevedores to be converted into a claim made as against the Board and that no award could be passed against the Board contrary to the claim of the workmen themselves.

9. Mr. K. Srinivasamurthy, learned counsel appearing for the Stevedores Association, urged that the claim by the Unions was for payment of bonus against the Board and therefore the Board has been properly made liable. Alternatively, the counsel urged that the claim by the Unions was for payment of bonus and the Tribunal was perfectly justified in considering which party was liable to meet this claim. It was in considering such a claim that the Tribunal had held the Board to be liable.

10. Having due regard to the nature of the claim and the basis on which the Tribunal itself has proceeded, we are satisfied that the claim for bonus has been made by the Unions specifically against the Stevedores Association and its members and, as such, the

Tribunal was not justified in making the Board liable.

11. In the statement of claim filed by the Port Khalasis Union, in paragraph 2 it is stated that since the Stevedores are the registered employers of the Dock Labour Board, the bonus should be settled by the Stevedores Association only. In paragraph 14 the Union has stated that the plea of the Stevedores at Visakhapatnam that they are not concerned with the demand for bonus since the workers are registered with the Dock Labour Board is wrong, baseless and aimed at confusing the issue. After referring to the agreements arrived at between the Stevedores workmen and the Stevedores at Bombay, Calcutta, Cochin and Madras, the Union has stated in Para 15 that the Stevedores at Visakhapatnam Port are in no way different and they cannot disclaim their responsibilities for payment of bonus to the workmen.

12. Similarly, the Dock Workers Union in its statement, has referred to the fact that it has been agitating for many years for the introduction of payment of bonus as obtaining in Madras, Bombay, Calcutta and Cochin. The Union has further stated that the Stevedores of Visakhapatnam are the employers registered in the Dock Labour Board as the real employers. It has further stated that the Stevedore companies are private employers who work for a consideration and derive large profits out of the employment and the operations of the Stevedore workers. The Stevedores have been resisting the claim of the workmen for payment of bonus and have been postponing consideration of the claim. The Union has further stated that payment of bonus can be made by the Board on behalf of the Stevedores and the stevedoring business is very lucrative and profitable. The Union further prayed the Tribunal to summon the accounts of the Stevedores as the claim of the workmen regarding the financial position of the Stevedores will be fully found established.

13. The Stevedores Association no doubt has stated that the Dock workers are the workmen of the Board as all the ingredients of master and servant exist as between the Board and the dock workers. The Board has categorically stated in its written

statement that the dock workers' claim against the Stevedores should not be allowed to be converted by the Stevedores into a claim against the Board. The Board has further specifically pleaded that no award could be passed against it contrary to the claim made by the dock workers themselves.

14. The various averments contained in the statements referred to above will clearly show that the claim for payment of bonus by the dock workers was essentially and in the main directed against the Stevedores Association and its members. Otherwise a reference by the Union to the prosperity and lucrative business conducted by the Stevedores and the large profits made by them will have no relevancy at all. No doubt here and there there are certain averments regarding the Board, but so far as we could see, no specific claim for payment of bonus as against the Board has been made. On the other hand the claim is that the Board 'on behalf of the Stevedores in Visakhapatnam' can pay the bonus claimed by the Unions. The statement filed by the Stevedores Association also makes it clear that they understood the claim by the workmen as directed against them because it makes various averments to establish that the workmen have no claim as against them as the Stevedores Association or its members are not the employers of the workmen. The Board has specifically stated that a claim made against the Stevedores should not be converted into a claim made against the Board and no award can be passed contrary to the claim of the workmen themselves. That the Tribunal also understood that the claim of the workmen was against the Stevedores Association and its members is also evident from the statement in para 4 of the award wherein the Tribunal observes as follows:

"The claimants claim bonus for the three years mentioned in the issue, and they claim that it should be paid by the Stevedores. They claim that it should be paid on the same basis as adopted at the other ports viz., Calcutta, Bombay, Madras and Cochin." That the claim for bonus in the four areas referred to above was being met by the respective Stevedores Associations—though on the basis of agreement—is not in dispute. The observation extracted earlier shows that the

Tribunal has also proceeded on the basis that the claim by the workmen has to be adjudicated upon on the basis that it is the liability of the Stevedores. But, unfortunately, in the latter part of the award the Tribunal has mixed up the discussion regarding the liability of the Board or the Stevedores Association and has ultimately held that the Board is liable for payment of bonus. No doubt the basis for this conclusion is that the Board is the employer of the dock workers. The correctness of the view about the Board being the employer of the dock workers will be considered by us when we deal with the second contention of the learned Attorney General. To conclude on the first aspect the learned Attorney General is well founded in his contention that in view of the pleadings and the nature of the claim made by the workmen the award making the Board liable for payment of bonus is not correct.

15. Normally, our decision accepting the first contention of the learned Attorney General is enough to dispose of the appeal. But, as the Tribunal has adjudicated upon the contention of the Board that it is not the employer of the dock workers and held against it, we shall proceed to consider the second contention of the learned Attorney General.

16. In order to appreciate the relationship between the Board, the dock workers and the Stevedores Association, it is necessary to refer to certain provisions of the Act and the Scheme. But before we do so, we can broadly set out how the work of loading and unloading of ships in the port of Visakhapatnam is being done. The Board maintains a Dock Labour pool. The shipping companies have their agents at Visakhapatnam. The Stevedores enter into contracts with the ship-owners for the loading and unloading of cargo. The contracts contain clauses regarding the rate per ton of cargo payable to the Stevedores who handle the loading or the unloading of cargo. The shipping agents inform the Stevedores about the ship that is due to arrive as also the nature and quantity of the cargo to be loaded or unloaded. The Stevedores inform the Board about the quantity of cargo to be loaded or unloaded and place an indent stating the approximate labour force that may be required for the

said purpose. The Board supplies the labour force as asked for. Along with the labour force the Board deputes two supervisors who are called the loading mazdoors and the tindal. The Stevedores employ one Foreman for the entire operation of either loading or unloading. The duty of the Foreman appears to be to see that the cargo is not damaged and that it is properly handled by the labour force supplied by the Board. The Stevedores have to carry on the work with the labour force supplied by the Board and they cannot engage outside labour for the work. The Stevedores pay to the Board for the services of the workers supplied by it. Over and above the wages due to the labourers and paid to the Board the Stevedores have also to pay 105 per cent of the actual wages to the Board known as 'General & Welfare Levy'. The Board utilises this additional amount for making certain payments to the workers. The Stevedores cannot take any disciplinary action against the workmen but, on the other hand, they have to complain to the Board. The Board takes the necessary disciplinary action against the workers concerned. It fixes the rates of wages to be paid by the Stevedores and collects the same from them and pays to the workers. A particular gang of workmen may work for one Stevedore on a particular day and on the next day they may work for another Stevedore. In fact it may even happen that one gang of workmen work for different Stevedores in the course of the same day.

17. We shall now refer to the salient features of the Act and the Scheme. The object of the Act is to provide for regulating the employment of dock workers. Section 2 defines inter alia the expressions 'Board', 'Dock worker', 'employer' and 'scheme'. The expression 'Dock worker' in brief means a person employed or to be employed in, or in the vicinity of any port on work in connection with the various matters referred to in the definition. 'Employer', in relation to a dock worker, means the person by whom he is employed or to be employed as aforesaid. 'Scheme' has been defined to mean a scheme made under the Act. Section 3 provides for the scheme being made for the registration of dock workers and employers with a view to ensuring greater regu-

larity of employment and for regulating the employment of dock workers, whether registered or not, in a port. A perusal of clauses (a) to (k) of sub-sec. (2) of S. 3 shows that the scheme may make provision for various matters which include regulating the recruitment and entry into the scheme of dock workers, the registration of dock workers and employers, the employment of dock workers as well as the terms and conditions of employment, including rates of remuneration etc. The scheme may also, provide for the manner in which, and the persons by whom, the cost of operating the scheme is to be defrayed as well as for constituting the authority to be responsible for the administration of the scheme. Section 5 provides for the Central Government or the State Government, as the case may be, when making a scheme, constituting an Advisory Committee to advise upon such matters arising out of the administration of the Act or any scheme made under it as well as regarding its composition. The Advisory Committee shall include an equal number of members representing the Government, the dock workers and the employers of dock workers and shipping companies. Section 5A provides for the establishment of a Dock Labour Board by the Government for a port or group of ports, as well as its composition. Under Section 5B the Board is made responsible for administering the scheme for the port or group of ports for which it has been established and also the Board is to exercise such powers and perform such functions as may be conferred on it by the scheme.

18. The Central Government has framed a scheme under sub-section (1) of Section 4 of the Act for the Port of Vizagapatam. Clause 2 states that the objects of the Scheme are to ensure greater regularity of employment for dock workers and to secure that an adequate number of dock workers is available for the efficient performance of dock work. The Scheme applies to the registered dock-workers and registered employers. Clause 3 defines the various expressions. 'Daily worker' means a registered dock worker who is not a monthly worker. 'Monthly worker' means a registered dock worker who is engaged by a registered employer or a group of such employers on a monthly basis under a contract

which requires for its termination at least one month's notice on either side. 'Dock employer' means a person by whom a dock worker is employed or is to be employed and also includes a group of dock employers formed under Cl. 14 (1) (d). 'Registered dock worker' means a dock worker whose name is for the time being entered in the employers' register. 'Reserve pool' means a pool of registered dock workers who are available for work and who are not for the time being in the employment of a registered employer or a group of dock employers as monthly workers. Clause 5 provides for the Central Government appointing an Administrative Body for the purpose of carrying on the day-to-day administration of the Scheme. There is no controversy that the Vizagapatnam Stevedores' Association, in this case, has been appointed as the Administrative Body.

19. Under Cl. 7 dealing with the various functions of the Board, the latter is authorised to take various measures for furthering the objects of the Scheme. The measures contemplated under sub-cl. (a) to (i) of cl. 7 (1) include ensuring the adequate supply and the full and proper utilisation of the dock labour regulating the recruitment and entry into and the discharge from the Scheme, of dock workers, the allocation of registered dock workers in the reserve pool to registered employers, maintaining the employers' registers and dock register of dock workers, the levying and recovering from registered employers, contributions in respect of the expenses of the Scheme, administering the Dock Workers' Welfare Fund and recovering from registered employers contribution for such fund, administering a Provident Fund and a Gratuity Fund for registered dock workers in the Reserve Pool. The various functions enumerated show that the Board's primary responsibility is the administration of the Scheme and to see that the work in the dock is properly done and the labour employed for such purpose is not exploited. Among the responsibilities and duties enumerated in cl. 8 are the fixing of the number of dock workers to be registered under various categories, considering registration of new employers, determination of the wages, allowance and other conditions of service and fixing the rate of

contribution to be made by registered employers to the Dock Workers' Welfare Fund. Under cl. 9 (1) (k), the Chairman of the Board is given power to take disciplinary action against registered dock workers and employers in accordance with the provisions of the Scheme. Under cl. 11, the Administrative Body has been made responsible for the administration of the Scheme and in particular of the various matters mentioned in sub-cl. (a) to (k). Sub-clause (e) thereof provides for the Administrative Body allocating registered dock workers in the reserve pool who are available for work to registered employers and for this purpose, under cl. (1) thereof the Administrative Body is deemed to act as an agent for the employer. Sub-cl. (i) and (ii) of cl. (f) cast the duty on the Administrative Body of collecting the levy, contribution to the Dock Workers' Welfare Fund or any other contribution from the employers as may be prescribed under the Scheme, as well as the collection of the registered dock workers' contribution to the Provident Fund, Insurance Fund or any other fund which may be constituted under the Scheme. Sub-clause (iii) makes the Administrative Body responsible for payment as agent of the registered employer to each daily worker of all earnings properly due to the dock worker from the employer and the payment to such workers of all monies payable by the Board to those workers in accordance with the Scheme. Two points emerge from cl. 11, viz., that when allocating registered dock workers in the reserve pool for work to registered employers, the Administrative Body is deemed to act as agent for the employer; and the payment to each daily worker of all earnings properly due to him from the employer is made by the Administrative Body as agent of the registered employer.

20. Clause 14 deals with the maintenance of Employees' Register and the Workers' Registers. Clause 18 deals with promotion and transfer of workers. Sub-clause (3) thereof deals with the transfer of a monthly worker to the reserve pool at the request of the employer or the worker, but such transfer is made subject to the fulfilment of any contract subsisting between the monthly worker and his employer. Sub-clause (4) provides for

considering the request for transfer to a reserve pool by a monthly worker whose services have been terminated by his employer for an act of indiscipline or misconduct.

21. Clauses 30, 31 and 33 deal with the payment of guaranteed minimum wages to a worker in the reserve pool register, payment of attendance allowance and disappointment money to such worker, respectively. Clause 36 deals with the obligations of registered dock workers and cl. (2) thereof states that a registered worker in the reserve pool who is available for work shall be deemed to be in the employment of the Board. We have already seen that under cl. 11 (e), when allocating registered dock workers in the reserve pool for work to registered employers, the Administrative Body shall be deemed to act as an agent for the employer. Under sub-clause (5) of cl. 36 a registered dock worker when allocated for employment under a registered employer is bound to carry out his duties in accordance with the directions of such registered employer or his authorised representative or supervisor and the rules of the port or place where he is working. Clause 37 enumerates the obligations of registered employers. They are prohibited from employing a worker other than a dock worker who has been allocated to him by the Administrative Body under cl. 11 (e). The registered employers are also bound to pay the Administrative Body the levy under cl. 51 (1) as well as the gross wages due to a daily worker. They are also bound to make contributions to the Dock Workers Welfare Fund under cl. 53.

22. Clause 38 deals with restriction on employment. Registered employers are prohibited from engaging workers on dock work unless they are registered dock workers. It also prohibits persons other than registered employers employing any worker on dock work. Under cl. 40 it is provided that it shall be an implied condition of contract between a registered worker (whether in the reserve pool or on the monthly register) and a registered employer that the rates of wages, allowances and overtime, hours of work shall be such as may be prescribed by the Board for each category of workers and the fixation of wage periods etc., shall be in accordance with the provisions of the Payment of

Wages Act, 1936. Clause 44 deals with disciplinary procedure to be followed in taking action against a registered employer and a registered dock worker. Clause 46 deals with termination of employment. Clause 51 provides for the cost of operating the Scheme being defrayed by payments made by registered employers to the Board. It provides for the registered employer paying to the Board such amount by way of levy in respect of the Reserve Pool Workers when paying the gross amount of wages due from them under cl. 37 (5) (i). Clauses 52 and 53 provide for Provident Fund and Gratuity and Dock Workers' Welfare Fund, respectively.

23. We have rather elaborately gone into the various matters dealt with under the Act and the Scheme as that will give a true picture of the nature of the functions and duties that the Board discharges in respect of the work carried on in the port. From the various provisions of the Act and the Scheme referred to above, it is evident that the Board is a statutory body charged with the duty of administering the Scheme, the object of which is to ensure greater regularity of employment for dock workers and to secure that an adequate number of dock workers are available for the efficient performance of dock work. The Board is an autonomous body, competent to determine and prescribe the wages, allowances and other conditions of service of the Dock workers. The purport of the Scheme is that the entire body of workers should be under the control and supervision of the Board. The registered employers are allocated monthly workers by the Administrative Body and the Administrative Body supplies, whenever necessary, the labour force to the Stevedores from the Reserve Pool. The workmen who are allotted to the registered employers are to do the work under the control and supervision of the registered employers and to act under their directions. The registered employers pay the wages due to the workers to the Administrative Body and the latter, in turn, as agent of the registered employers, pay them over to the concerned workmen.

24. All these circumstances, in our opinion, prima facie establish that the Board cannot be considered to be the employer of the Dock Labour work-

men. In fact, the various provisions referred to in the Scheme clearly show that the registered employer to whom the labour force is allotted by the Board is the employer whose work of loading or unloading of ships is done by the dock workers allotted to them.

25. Mr. Srinivasamurthy, learned counsel for the respondents, referred us to certain circumstances to support his contention that the relationship of employer-employee exists between the Board and the dock workers. Some of those circumstances are recruitment and registration of the dock labour force, fixation of wages and dearness allowance, payment of workmen's compensation, taking of disciplinary action and prohibition against employment of workmen who are not registered with the Board. These circumstances, in our opinion, do not establish a relationship of employer and employee between the Board and the dock labour. The functions referred to above are discharged by the Board under the Scheme, the object of which, as mentioned earlier, is to ensure greater regularity of employment for dock workers and to secure that an adequate number of dock workers is available for the efficient performance of dock work. It is with this purpose in view that the Scheme has provided for various matters and considerable duties and responsibilities are cast on the Board in this regard. But we have also already pointed out that under sub-clause (5) of cl. 36 a registered dock worker, when allotted for employment under a registered employer, shall carry out his duties in accordance with the directions of such registered employer and cl. 11 (e) also makes it clear that in the matter of allocation of registered dock workers in the Reserve Pool to registered employers, the Administrative Body shall be deemed to act as agent for the employer. Though the contributions for the Dock Workers' Fund as well as the wages and other earnings due to a worker are paid by the registered employer to the Board at the rates fixed by it, the latter passes on the same to the dock worker concerned, as agent of the registered employer, under cl. 11 (f) (iii). Further, the definition of the expression 'dock worker' and 'employer' under S. 2 (b) and (c) respectively of the Act and the definition of 'dock employer' and 'monthly

worker' in cls. 3(g) and (k) respectively of the Scheme and the obligation cast under cl. 36(5) of the Scheme on a registered dock worker, when allocated for employment under a registered employer to carry out his duties in accordance with the directions of the latter and the provisions contained in cl. 37(5) of the Scheme regarding payment by a registered employer to the Administrative Body of the gross wages due to the dock worker and the implied condition of contract between the registered dock worker and the registered employer under cl. 40, read along with the provisions regarding the functions of the Board, in our view, clearly lead to the conclusion that the Board cannot be considered to be the employer of the dock workmen and there is no relationship of master and servant between the two.

26. Mr. Srinivasamurthy, learned counsel, referred us to the decision of this Court in *Kirloskar Oil Engines v. Hanmant Laxman Bibawe*, 1963-3 SCR 514, in which, according to him, an inference of relationship of master and servant was not drawn, though for all practical purposes a person was working under the directions of another. The question that arose for consideration in that case was whether a watchman deputed to work by the Police Department under a private individual on the basis of a scheme could be considered to be the employee of the latter, after considering the salient features of the scheme framed by the Police Department and after observing that a decision on the question as to the relationship of employer and employee has to be determined in the light of relevant facts and circumstances and that it would not be expedient to lay down any particular test as decisive in the matter, this Court held that a relationship of master and servant, between the watchman and the private employer, did not exist, notwithstanding the fact that the private employer was entitled to issue orders to the watchman deputed to work under him. The scheme dealt with in this decision was entirely different from the Scheme before us.

27. The learned counsel then referred us to a decision of a Single Judge of the Kerala High Court in *C. V. A. Hydross & Son v. Joseph Sanjon*, 1967-1 Lab LJ 509 = 1968 Lab IC

588 (Ker). That decision had to consider the question regarding payment of retrenchment compensation to certain workmen who had registered themselves as workmen under the Dock Labour Board. They had filed a claim against the permanent Stevedores under whom they were working originally. The learned Judge, after a consideration of the Scheme framed for the Cochin Port, which is substantially similar to the one before us, held that the Board was the employer of the workmen. We are not inclined to agree with this decision.

28. We may also refer to the decision of the Calcutta High Court in *A. C. Roy & Co. Ltd. v. Taslim*, 71 Cal WN 531 = (AIR 1968 Cal 114). There is no doubt the question arose in respect of a claim under the Workmen's Compensation Act, 1923. The learned Chief Justice, after a brief analysis of the Act and the Scheme framed for the Calcutta Port, held that when the Administrative Body of the Board allocated a worker in the Reserve Pool to the registered employer, then for the time being and for the purpose of the work concerned, that worker becomes an employee under the registered employer; and in that decision the Court came to the conclusion that the particular worker concerned was at the material time under the employ of the Stevedore. When that is the position with regard to a workman in the Reserve Pool, it stands to reason that the monthly worker who is engaged by a registered employer under a contract on a monthly basis is an employee of such registered employer.

29. The matter can also be considered from another point of view, viz., can it be stated that the Board is carrying on an industry, so as to attract the provisions of the Industrial Disputes Act? We have already referred to the various circumstances which will show that there is no employment as such of the dock worker by the Board. As observed by this Court in *Gymkhana Club Union v. Management* 1968-1 SCR 742 at p. 752 = (AIR 1968 SC 554 at p. 561):

"What matters is not the nexus between the employee and the product of the employer's efforts but the nature of the employer's occupation. If his work cannot be described as an in-

dustry his workmen are not industrial workmen and the disputes arising between them are not industrial disputes. The cardinal test is thus to find out whether there is an industry according to the denotation of the word in the first part. The second part will then show what will be included from the angle of employees."

Dealing with the definition of 'industry', this Court further observed:

"The definition of 'industry' is in two parts. In its first part it means any business, trade, undertaking, manufacture or calling of employers. This part of the definition determines an industry by reference to occupation of employers in respect of certain activities. These activities are specified by five words and they determine what an industry is and what the cognate expression 'industrial' is intended to convey. This is the denotation of the term or what the word denotes. We shall presently discuss what the words 'business, trade, undertaking, manufacture or calling' comprehend. The second part views the matter from the angle of employees and is designed to include something more in what the term primarily denotes. By the second part of the definition any calling, service, employment, handicraft or industrial occupation or avocation of workmen is included in the concept of industry. This part gives the extended connotation. If the activity can be described as an industry with reference to the occupation of the employers, the ambit of the industry, under the force of the second part, takes in the different kinds of activity of the employees mentioned in the second part. But the second part standing alone cannot define 'industry'. An industry is not to be found in every case of employment or service."

Dealing with the expression 'industrial dispute' in the Industrial Disputes Act, this Court further proceeds to state, in the above decision at p. 757 (of SCR) = (at p. 564 of AIR):

"...the words are 'industrial dispute' and not 'trade dispute'. Trade is only one aspect of industrial activity; business and manufacture are two others. The word also is not industry in the abstract which means diligence or assiduity in any task or effort but a branch of productive labour. This requires

co-operation in some form between employers and workmen and the result is directly the product of this association but not necessarily commercial."

and wound up the discussion, at p. 758, thus:

"Industry is the nexus between employers and employees and it is this nexus which brings two distinct bodies together to produce a result."

30. Applying the above principles to the case on hand, in our opinion it is clear that it cannot be stated that the Board functioning under the Act and the Scheme, carries on any industry so as to attract the provisions of the Industrial Disputes Act. As a claim for any type of bonus can be met only from the actual employer in respect of any industry and as we have held that the Board is neither the employer nor carries on any industry, it follows that the Industrial Tribunal was wrong in directing the Board to pay bonus for the years in question. In this view the order of the Industrial Tribunal, dated May 24, 1968 has to be set aside. But, as the claim of the workman against the Stevedores Association and its members who are parties to the Reference has to be considered and adjudicated by the Industrial Tribunal, I.D. No. 10 of 1967 has to be remanded to the Industrial Tribunal concerned for disposal according to law. The Tribunal will be at liberty to call upon the parties concerned to file supplementary statements and permit them to adduce further evidence, oral and documentary, which may be considered necessary; but it is made clear that the Dock Labour Board, the appellant, will be completely out of the picture in the remand proceedings.

31. In the result, the order of the Industrial Tribunal, Andhra Pradesh, Hyderabad, dated May 24, 1968 is set aside and this appeal allowed. I.D. No. 10 is remanded to the said Tribunal to be dealt with and disposed of, according to law and the directions contained in this judgment. Parties will bear their own costs of this appeal.

Appeal allowed.

AIR 1970 SUPREME COURT 1636
(V 57 C 347)

(From: Patna)*

J. C. SHAH AND V. RAMASWAMI JJ.

Nani Gopal Mitra, Appellant v. State of Bihar, Respondent.

Criminal Appeal No. 181 of 1965, D/-15-10-1968.

(A) Prevention of Corruption Act (1947), S. 5 (3) — Appeal against conviction under S. 5 (2) — Pending appeal sub-section (3) repealed — Appellate Court can invoke presumption under S. 5 (3).

It is true that as a general rule alterations in the form of procedure are retrospective in character unless there is some good reason or other why they should not be. (1878) 3 AC 582 and (1905) 2 KB 335, Rel. on.

(Para a)

But there is another equally important principle, viz., that a statute should not be so construed as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the amending Act came into force. Same principle is embodied in Sec. 6 of General Clauses Act. The effect of the application of this principle is that pending cases, although instituted under the old Act but still pending, are governed by the new procedure under the amended law, but whatever procedure was correctly adopted and concluded under the old law cannot be opened again for the purpose of applying the new procedure. 1936 Ch 237 and (1960) AC 965, Rel. on.

(Para 6)

Thus, even though pending appeal against conviction under S. 5 (2) of Prevention of Corruption Act, S. 5 (3) was repealed by Anti-Corruption Laws (Amendment) Act, 40 of 1964, it is open to the High Court to invoke the presumption contained in S. 5 (3) in considering the case of the appellant since the conviction of the appellant was pronounced by trial Judge long before the amendment. (Para 6)

(B) Civil P. C. (1908), Preamble — Interpretation of Statutes — Retrospective operation — Procedural matter amended during pendency of appeal — Procedural amendment operates re-

trospectively but in cases instituted under old procedure and still pending when amendment came into force, old procedure applies. (Para 6)

(C) General Clauses Act (1897), S. 6 — Change in procedural law during pendency of cases instituted under old procedural law — Old procedure applies — S. 6 embodies this principle. (Para 5)

(D) Prevention of Corruption Act (1947), S. 5 (2) — Charge under, not disclosing amounts taken as bribes and persons from whom the accused had taken such bribes — This does not invalidate the charge though it may be a ground for asking for better particulars — Charge, however, should have contained better particulars to enable accused to prove his case. (Para 9)

(E) Criminal P. C. (1898), S. 222 — Charge under S. 5 (2), Prevention of Corruption Act, should contain particulars of amounts taken as bribes and persons from whom they were taken — Absence of these particulars does not, however, invalidate charge but entitles accused to ask for better particulars. (Para 9)

Cases Referred: Chronological Paras

(1960) 1960 AC 965 = 1960-3	
WLR 466, In re Vernazza	5
(1936) 1936 Ch 237 = 52 TLR	
70, In re a Debtor	5
(1905) 1905-2 KB 335 = 74 LJKB	
450, King v. Chandra Dharma	5
(1899) 1899 P 236 = 68 LJP	
101, The Ydun	5
(1678) 3 AC 582, James Gardner	
v. Edward A. Lucas	5

Mr. S. C. Agarwala, Advocate of M/s. Ramamurthi and Co., for Appellant; Mr. D. Goburdhun, Advocate, for Respondent.

The following Judgment of the Court was delivered by:

RAMASWAMI, J.—This appeal is brought, by special leave, from the judgment of the Patna High Court dated September 14, 1965 in Criminal Appeal No. 268 of 1962 filed by the appellant against the judgment of the Special Judge, Santhal Parganas, Dumka, dated March 31, 1962.

2. In January, 1958 the appellant was employed as a Railway Guard on the Eastern Railway and was posted at Shibganj Railway Station. On January 18, 1958, Hinga Lal Sinha (P.W. 47) who was in charge of squad of travelling ticket examiners caught hold of

*(Criminal Appeal No. 268 of 1962, D/-14-9-1965—Pat.)

DN/DN/F475/68/RGD/M

Shambu Pada Banerji (P.W. 54) as he found him working as a bogus travelling ticket examiner in a train. P.W. 47 handed Shambu Pada Banerji to Md. Junaid (P.W. 46) who was a police officer in charge of Barharwa Railway out-post. A Fard Beyan was recorded on the statement of P.W. 47 and G.R.P. Case No. 12(1)58 was registered against Shambu Pada Banerji. In connection with the investigation of that case the house of the appellant which was at a distance of 300 yards from Sahebganj Railway station was searched on January 19, 1958 at about 3 p.m. by P.W. 56 along with other police officers, Md. Junaid (P.W. 46) and Dharmadeo Singh (P.W. 57). Various articles were recovered from the house of the appellant and a search list (Ex. 5/17) was prepared. A charge-sheet was submitted in G.R.P. Case No. 12(1)58 against the appellant and Shambu Pada Banerji. Both of them were tried and convicted by the Assistant Sessions Judge, Dumka, by a judgment dated June 12, 1961. The appellant filed Criminal Appeal No. 405 of 1961 against his conviction under S. 474/466 of the Indian Penal Code. The appeal was allowed by the High Court by its judgment dated September 14, 1962, on the ground that there was no proof that the appellant was in conscious possession of the incriminating articles.

3. During the course of the investigation of G. R. P. Case No. 12(1)58, the investigating officer (P.W. 56) found a sum of Rs. 51,000 standing to the credit of the appellant in the Eastern Railway Employees' Co-operative Credit Society Ltd., Calcutta. He also found the appellant in possession of National Savings Certificates of the value of Rs. 8,000. On August 24, 1958, the Investigating Officer (P.W. 56) handed over charge of the investigation of G.R.P. Case No. 12(1)58 to P.W. 46 of Sahebganj Government Railway Police Station. P.W. 46 completed the investigation on February 26, 1958. Since by that time it was found that the appellant was in possession of pecuniary resources disproportionate to his known sources of income it was thought that he had come in possession of these pecuniary resources by committing acts of misconduct as defined in clauses (a) to (d) of sub-section (1) of S. 5 of the Prevention

of Corruption Act, 1947 (Act 2 of 1947), hereinafter referred to as the 'Act', and since the investigation of a case under the Act could be carried only in accordance with the provisions of S. 5A of the Act, under the orders of the superior officers, the case being G.R.P. Case No. 12(1)58 was split up in the sense that a new case against the appellant being Sahebganj Police Station Case No. 11(2)59 was started upon the first information report of P.W. 46 made on February 26, 1959 to Gokhul Jha (P.W. 45), Officer in charge of Sahebganj Police Station. By his order dated February 27, 1959, Sri R. P. Lakhaiyar, Magistrate, First Class, Sahebganj, accepted the recommendation of the Deputy Superintendent of Police that Inspector Madhusudan Haldhar, P.W. 55, may investigate the case. Accordingly, Madhusudan Haldhar, P.W. 55, proceeded to investigate the case and after obtaining the sanction of the appropriate authority for prosecution of the appellant submitted a charge-sheet on March 31, 1960. Cognizance was taken and the case was transferred to Sri Banerji, a Magistrate, First Class, who committed the appellant and the two co-accused Baldeo Prasad and Mrs. Kamla Mitra to stand trial before the Court of Session. By his judgment dated March 31, 1962, the Special Judge, Santhal Parganas, convicted the appellant under S. 5 (2) of the Act and S. 411, Indian Penal Code. The appellant and the other co-accused Baldeo Prasad and Mrs. Kamla Mitra were acquitted of the charge of conspiracy under S. 120-B read with Sections 379, 411, 406 and 420, Indian Penal Code and S. 5 (2) of the Act. The Special Judge also acquitted the appellant of the charge under S. 474/466, Indian Penal Code. The matter was taken in appeal to the High Court which by its judgment dated September 14, 1965, set aside the conviction and sentence of the appellant under S. 411, Indian Penal Code and confirmed the conviction of the appellant under S. 5 (2) of the Act. The High Court, however, reduced the sentence of 6 years' simple imprisonment and fine of Rs. 40,000 to 2 years' imprisonment and a fine of Rs. 20,000.

4. Section 5 of the Act, as it stood before its amendment by Act 40 of 1964, read as follows:—

"5. (1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in Section 161 of the Indian Penal Code, or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

(2) Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine:

Provided that the Court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year.

x x x x

(3) In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is proved that the accused person is

guilty of criminal misconduct in the discharge of his official duty and his conviction therefore shall not be invalid by reason only that it is based solely on such presumption.

(4) The provisions of this section shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this section, be instituted against him."

On December 18, 1964, Parliament enacted the Anti-Corruption Laws (Amendment) Act, 1964 (Act No. 40 of 1964) which repealed sub-section (3) of S. 5 of the Act and enlarged the scope of criminal misconduct in S. 5 of the Act by inserting a new clause (e) in S. 5 (1) of the Act to the following effect:

"(e) if he or any person on his behalf is in possession or has, at any time during the period of his office, been in possession, for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income."

5. It was in the first place contended on behalf of the appellant that Section 5 (3) of the Act was repealed by Parliament while the appeal was pending in the High Court and the presumption enacted in Section 5 (3) of the Act was not available to the prosecuting authorities after the repeal of the sub-section on Dec. 18, 1964. The argument was stressed that it was not open to the High Court to invoke the presumption contained in S. 5 (3) of the Act in considering the case against the appellant. It was also said that the presumption contained in S. 5 (3) of the Act was a rule of procedural law and not a rule of substantive law and alterations in the form of procedure are always retrospective in character unless there is some good reason or other why they should not be. It was, therefore, submitted that the judgment of the High Court was defective in law as it applied to the present case the presumption contained in Section 5 (3) of the Act even after its repeal. We are unable to accept the contention put forward on behalf of the appellant as correct. It is true that as a general rule alterations in the form of procedure are retrospective in character unless there

is some good reason or other why they should not be. In *James Gardner v. Edward A. Lucas*, (1878) 3 AC 582 at p. 603, Lord Blackburn stated:

"Now the general rule, not merely of England and Scotland, but, I believe, of every civilized nation, is expressed in the maxim, 'Nova constitutio futuris formam imponere debet, non prae-teritis'—prima facie, any new law that is made affects future transactions, not past ones. Nevertheless, it is quite clear that the subject-matter of an Act might be such that, though there were not any express words to show it, it might be retrospective. For instance, I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. Then, again, I think that where alterations are made in matters of evidence, certainly upon the reason of the thing, and I think upon the authorities also, those are retrospective, whether civil or criminal."

In the *King v. Chandra Dharma*, (1905) 2 KB 335, Lord Alverstone, C. J., observed as follows:

"The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective. It has been held that a statute shortening the time within which proceedings can be taken is retrospective (*The Ydun*, 1899 P 236), and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective. If the case could have been brought within the principle that unless the language is clear a statute ought not to be construed so as to create new disabilities or obligations, or impose new duties in respect of transactions which were complete at the time when the Act came into force, Mr. Compton Smith would have been entitled to succeed; but when no new disability or obligation has been created by the statute, but it only alters the time within which proceedings may be

taken, it may be held to apply to offences completed before the statute was passed. That is the case here."

It is therefore clear that as a general rule the amended law relating to procedure operates retrospectively. But there is another equally important principle, viz., that a statute should not be so construed as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the amending Act came into force (See *In re a Debtor*, 1936 Ch 237 and *In re Vernazza*, 1960 AC 965). The same principle is embodied in S. 6 of the General Clauses Act which is to the following effect:

"6. Effect of repeal.—Where this Act or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

x x x x x

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

x x x x x

(c) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

6. The effect of the application of this principle is that pending cases, although instituted under the old Act but still pending, are governed by the new procedure under the amended law, but whatever procedure was correctly adopted and concluded under the old law cannot be opened again for the purpose of applying the new procedure. In the present case, the trial of the appellant was taken up by the Special Judge, Santhal Parganas, when Section 5 (3) of the Act was still operative. The conviction of the appellant was pronounced on March 31, 1962 by the Special Judge, Santhal Parganas, long before the amending Act was promulgated. It is not hence possible to accept the argument of the appellant that the conviction pronounced by the Special Judge, Santhal

Parganas, has become illegal or in any way defective in law because of the amendment to procedural law made on December 18, 1964. In our opinion, the High Court was right in invoking the presumption under S. 5 (3) of the Act even though it was repealed on December 18, 1964 by the amending Act. We accordingly reject the argument of the appellant on this aspect of the case.

7. It was next argued on behalf of the appellant that the statutory safeguards under Section 5A of the Act have not been complied with and the Magistrate has not given reasons for entrusting the investigation to a police officer below the rank of Deputy Superintendent of Police. Section 5A of the Act provides as follows:

"Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no police officer below the rank—

(a) in the presidency towns of Madras and Calcutta, of an assistant commissioner of police,

(b) in the presidency town of Bombay, of a superintendent of police, and

(c) elsewhere, of a deputy superintendent of police, shall investigate any offence punishable under Section 161, Section 165 or Section 165A of the Indian Penal Code or under sub-section (2) of Section 5 of this Act, without the order of a presidency Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant;

x x x x x "

In the present case the officer-in-charge of Sahibganj police station (P.W. 45) filed a petition dated February 27, 1959 (Ex. 1) to the First Class Magistrate upon which the Deputy Superintendent of Police made an endorsement (Ex. 1/1) suggesting that Inspector Haldhar may be empowered to investigate the case. The order of the Magistrate is Ex. 1/2 and is dated February 27, 1959. The order states: "Inspector Sri M. S. Haldhar is allowed to do it." The evidence of P.W. 1 is that he was posted at Sahibganj as a Magistrate from 1956 and used to do the work of the Sub-Divisional Officer also in his absence. He passed the order (Ex. 1/2) authorising M. S. Haldhar to investigate the case because the Deputy Superintendent of Police used to remain busy with his work and

the present case needed a whole-time investigation. It was argued on behalf of the appellant that there was nothing in the endorsement of the Deputy Superintendent of Police that he was busy and therefore the inquiry should be entrusted to Sri Haldhar. But the High Court has observed that P.W. 1 was a Magistrate working at Sahibganj for a period of two years prior to the passing of the order in question and he must have known that the Deputy Superintendent of Police could not devote his whole time to the investigation of the case and therefore the Inspector of Police should be entrusted to do the investigation. On this point the High Court has come to the conclusion that the order of the Magistrate was not mechanically passed and the permission of the Magistrate authorising Haldhar to investigate the case was not illegal or improper. In our opinion Counsel on behalf of the appellant has been unable to make good his argument on this point.

8. It was then said that the charge against the appellant under S. 5 (2) of the Act was defective as there were no specific particulars of misconduct as envisaged under cls. (a) to (d) of Section 5 (1) of the Act. It was suggested that the charge was defective inasmuch as it deprived the appellant of the opportunity to rebut the presumption raised under Section 5 (3) of the Act. The charge against the appellant reads as follows:

"First—that during the period of 1956 to 19th January, 1958 at Sahebganj Police Station, Sahebganj G.R.P. and Sahebganj Local, District Santhal Parganas and at other places, within and without the said district, you, being a public servant, viz., Guard of trains in the Eastern Railway of the Railway Department and while holding the said post, habitually accepted or obtained from persons for yourself gratifications other than legal remuneration as a motive or reward such as mentioned in Sec. 161 of the Indian Penal Code, habitually accepted or obtained for yourself valuable things without consideration or for a consideration which you know to be inadequate from persons having connection with your official function, habitually, dishonestly and fraudulently, misappropriated or otherwise converted for your own use properties entrusted to

you or put under your control as a guard of trains or otherwise, and habitually by corrupt and illegal means, or by otherwise abusing your position as a public servant obtained for yourself valuable things or pecuniary advantage, with the result that during the search of your house at Sahebganj aforesaid on 19-1-1958 and during the investigation of the Sahebganj G.R. P.S. Case No. 12 dated 19-1-1958 under Section 170, etc., I.P.C., you were found, during the month of January 1958 in possession of cash amount to the extent of Rs. 59,000 and other properties fully described in the Appendix No. 1 attached herewith and forming part of this charge (of Sahebganj P.S. Case No. 11(2)59), and that the said cash amount and properties are disproportionate to your known sources of income and that you cannot satisfactorily account the possession of the same and that you thereby committed the offences of criminal misconduct, under clauses (a) to (b) of Section 5 (1) of the Prevention of Corruption Act, 1947 (Act II of 1947), punishable under Section 5 (2) of the said Act, within the cognizance of this Court.

x x x x x"

9. It was argued that the charge did not disclose the amounts the appellant took as bribes and the persons from whom he had taken such bribes and the appellant had therefore no opportunity to prove his innocence. But, in our view, this circumstance does not invalidate the charge, though it may be a ground for asking for better particulars. The charge, as framed, clearly stated that the appellant accepted gratification other than legal remuneration and obtained pecuniary advantage by corrupt and illegal means. The charge, no doubt, should have contained better particulars so as to enable the appellant to prove his case. But the appellant never complained in the trial Court or the High Court that the charge did not contain the necessary particulars. The record on the other hand disclosed that the appellant understood the case against him and adduced all the evidence which he wanted to place before the Court. Section 225 of the Criminal Procedure Code says: "that no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be

regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice". It also appears that the appellant never raised any objection either before the Special Judge or in the High Court on the score that the charge was defective and that he was misled in his defence on the ground that no particulars of the persons from whom the bribes were taken were mentioned. We accordingly reject the argument of the appellant on this point.

10. For the reasons expressed we hold that the judgment of the High Court dated September 14, 1965, is correct and this appeal must be dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 1641
(V 57 C 348)

(From: AIR 1965 Punj 399)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

State of Punjab and others, Appellants v. Sukh Deb Sarup Gupta, Respondent.

Civil Appeal No. 528 of 1967, D/- 29-4-1970.

General Clauses Act (1897), S. 8 (1) — 'Former enactment' — Meaning of — Applicability of Section 8 to State enactments.

An 'enactment' would include any Act or a provision contained therein passed by the Union Parliament or the State Legislature. When an Act passed by the Union Parliament repeals a State Act, the principle underlying S. 8 would apply. (Para 3)

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the Punjab High Court holding that medicinal or toilet preparations containing alcohol were exempt from the payment of tax under the East Punjab General Sales Tax Act, hereinafter called "the Act".

2. The respondent is running a factory for manufacturing spirituous and medicinal preparations containing alcohol at Jind in the district of Sang-

rum. Before the coming into force of the Constitution of India on January 26, 1950, "medicinal or toilet preparations" fell within the definition of "excisable articles" on which the excise duty was payable under S. 3 (6) (c) of the Punjab Excise Act, 1914. The Act came into force in 1948. Under its provisions tax was levied on the sale of goods with the exception of articles exempted under S. 6 of the Act. These articles were given in Schedule B wherein Entry 37 was in these terms:

"All goods on which duty is or may be levied under the Punjab Excise Act, 1914."

After the enforcement of the Constitution alcoholic preparations which under the Government of India Act, 1935, was a provincial subject came to be dealt with in the Union List. Section 3 (6) (c) of the Punjab Excise Act was, therefore, omitted by the Adaptation of Laws Order, 1950. However, by virtue of Art. 277 of the Constitution the State Government continued to levy and collect the excise duty on the above articles even after January 26, 1950. In 1955 the Union Parliament enacted the Medicinal and Toilet Preparations (Excise Duties) Act, hereinafter referred to as "the Central Act". Section 21 of the Central Act provided:

"If, immediately before the commencement of this Act, there is in force in any State any law corresponding to this Act, that law is hereby repealed."

The effect of the Central Act was to bring about uniformity in all States in the imposition of excise duty on alcoholic preparations. It is common ground that the collection of the duty leviable under the Central Act continued to be done by the State Government and the duty so collected went to the State Exchequer. The respondent was assessed to sales tax on alcoholic preparations on which excise duty was being levied under the Central Act by the State authorities for the years 1959-60, 1960-61 and 1961-62. According to the appellant State, it was entitled to levy sales tax on alcoholic preparations of the nature which were covered by the Central Act, for the reason that the respondent could no longer claim the benefit of the exemption contained in Entry 37 of Schedule B to the Act.

The respondent filed a petition under Art. 226 of the Constitution challenging the levy of sales tax on the alcoholic preparations on which excise duty was being paid under the Central Act. This petition succeeded before a learned Single Judge of the High Court who held that by virtue of Section 8 of the General Clauses Act, 1897, in Entry 37 reference to the Punjab Excise Act must be taken to be a reference to the relevant provisions of the Central Act. According to him the State could not levy any sales tax under the Act on the preparations in question. His judgment was affirmed by a Division Bench and the appeal filed by the State was dismissed.

3. The short point which falls to be determined is whether Section 8 of the General Clauses Act, 1897, would govern the case and whether the respondent could claim the benefit of the exemption in Entry 37 of Sch. B to the Act notwithstanding that the exemption related expressly only to goods on which duty could be levied under the Punjab Excise Act, 1914. Section 8(1) of the General Clauses Act provides:

"8. (1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

According to Section 3 (19) of that Act "enactment" shall include any provision contained in any Act. On behalf of the State it has been argued that the words "former enactment" in S. 8 can refer only to a Central Act or provisions contained therein and they cannot cover Acts passed by the State Legislature. Such an argument cannot be entertained because it goes against the express language of Section 3 (19) which does not lay down any such limitation. The obvious meaning of that provision is that enactment would include any Act or provision contained therein passed by the Union Parliament or the State Legislature. The limited meaning sought to be attributed to the word

"enactment" cannot be given to it for another reason. It could never be intended that when an Act passed by the Union Parliament repeals a State Act, the principle underlying Sec. 8 should never become applicable. The High Court, in our opinion, was right in saying that there was nothing in Section 8 to indicate that the words "former enactment" meant only a Central enactment and not a State enactment and that the Courts would not be justified to read in that section words which were not there and to place a narrow and limited construction on the words "former enactment". It has not been disputed on behalf of the appellant that if Section 8 is applicable the respondent would be exempt from payment of tax under the Act on the alcoholic preparation on which excise duty is being levied under the provisions of the Central Act.

4. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1643
(V 57 C 349)

(From: Punjab)*

V. BHARGAVA AND K. S. HEGDE JJ.

(1) Shamlal and others (in C. A. No. 1954 of 1966) and (2) Chambeli Devi and others (in C. A. No. 1955 of 1966), Appellants v. Amar Nath and others (in both the appeals), Respondents.

Civil Appeals Nos. 1954 and 1955 of 1966, D/-17-9-1969.

(A) Hindu Law — Succession — Stridhana other than Shulka — Succession to — Mitakshara — Daughters of predeceased son of woman do not succeed in preference to son of brother of deceased husband.

Under Hindu Law of Mitakshara, daughters of predeceased son of a Hindu woman married in approved form is not entitled to succeed to her Stridhana other than Shulka in preference to the son of the brother of her deceased husband. (Para 5)

*(F. A. No. 105 of 1957, D/-30-5-1963—Punj.)

DN/EN/E847/69/RGD/M

Colebrooke's translation of Mitakshara brings out accurately the meaning of the relevant passages in Mitakshara.

Yajñawalkya, Colebrooke's Mitakshara, Mulla's Hindu Law and (1909) ILR 33 Bom 452, Considered.

(Para 8)

It is now well settled that stridhana of a Hindu woman governed by Mitakshara passes in the order mentioned in Mitakshara and the children of the deceased woman do not take the same as a body either jointly or as tenants-in-common. Only the heirs belonging to a class take the properties as tenants-in-common. (Para 9)

The expression "son's son" does not include son's daughter. The rule of interpretation that the masculine includes the feminine, is inapplicable in the case as daughter's daughter succeeds to the stridhana in preference to daughter's son. The order of succession prescribed in Mitakshara clearly rules out the application of that rule of interpretation. (Para 11)

(B) Hindu Women's Rights to Property Act (1937) — Applicability.

Hindu Women's Rights to Property Act, 1937, applies only to the separate property left by a Hindu male. It does not apply either to the coparcenary property or to the property of a Hindu female. (Para 14)

Cases Referred: Chronological Paras
(1952) AIR 1952 SC 60 (V 39) =

(1952) 3 SCR 208, Annagouda
Nathgouda v. Court of Wards 13

(1939) AIR 1939 Pat 636 (V 26) =
ILR 18 Pat 590, Raghava

Surendra Sahi v. Lachmi Koer 12
(1909) ILR 33 Bom 452 = 11

Bom LR 654, Bhimacharya v.
Ramacharya 8

(1906) 33 Ind App 176 = ILR
30 Bom 431 (PC), Bai Kesser-
bai v. Hunsraj Morarji 12

Mr. A. K. Sen, Senior Advocate
(Mr. R. K. Aggarwal, Advocate, with
him), for Appellants (in C. A.
No. 1954 of 1966) and Respondents
Nos. 5, 6, 8 and 9 (in C. A. No. 1955
of 1966); Mr. Bishan Narain, Senior
Advocate (M/s. B. P. Maheshwari and
R. K. Gupta, Advocates with him),
for Appellants (in C. A. No. 1955
of 1966) and Respondents Nos. 2 to 6
(in C. A. No. 1954 of 1966); Mr. Sarjoo
Prasad, Senior Advocate (M/s. Ramesh-
war Prasad and A. D. Mathur, Advo-

cates, with him), for Respondent No. 1 (in both the Appeals); Mr. S. M. Jain, Advocate, for Respondents Nos. 13 (i) to 13 (iv) (in C. A. No. 1954 of 1966) and Respondents Nos. 12 (i) to 12 (iv) (in C. A. No. 1955 of 1966).

The following Judgment of the Court was delivered by

HEGDE J.—The question of law that arises for decision in these appeals by certificate is whether the daughters of a predeceased son of a Hindu woman are entitled to succeed to her stridhana? The trial Court answered the question in the affirmative but the High Court in appeal came to the conclusion that they are not entitled to succeed to the state in question.

2. The material facts of this case are few. For a proper understanding of the facts of the case, it will be convenient to have before us the admitted pedigree of the family. It is as follows:—

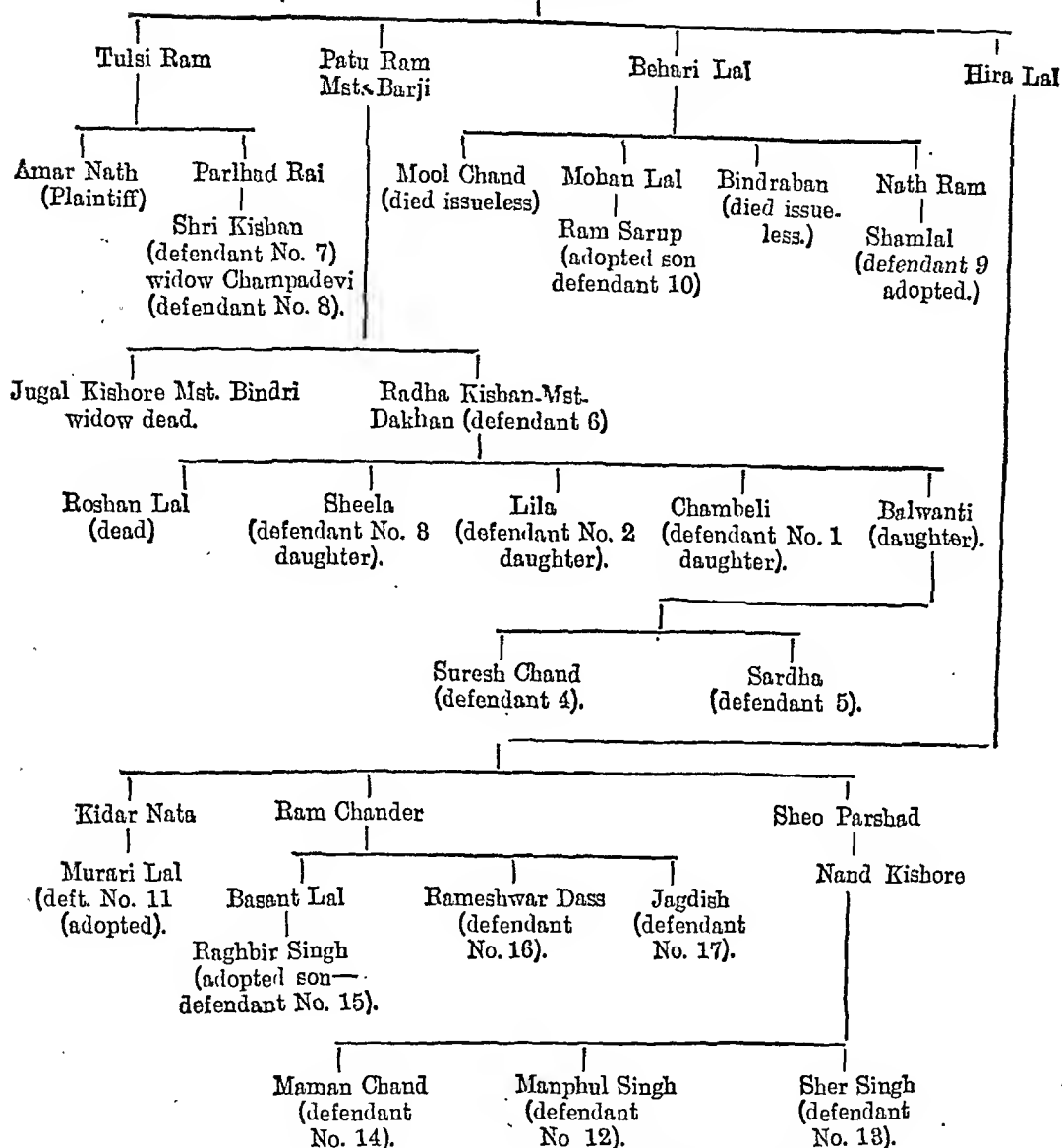
(See pedigree on next page)

3. The finding of the trial Court that the suit properties are the stridhana properties of Barji was not contested before the High Court. In this Court at one stage a feeble attempt was made on behalf of the appellants to contest that finding. We did not permit that finding to be challenged as the same had not been challenged before the High Court. Therefore we proceed on the basis of that finding. Barji died in September 1950. Her husband Patu Ram had predeceased her. It appears he died sometime in 1904. Patu Ram's father Bool Chand as well as Patu Ram's brothers Tulsi Ram, Behari Lal and Hira Lal had predeceased Barji. Patu Ram and Barji had a son by name Jugal Kishore who had predeceased Patu Ram leaving behind him his widow Bindri who died in 1931. They had no children. Radha Kishan, the adopted son of Patu Ram and Barji died about 20 years before the death of Barji leaving behind him his widow, defendant No. 6. Radha Kishan had five children including defendants Nos. 1 to 3 through another wife. His son Roshanlal had died a few months before the death of Barji. His daughter Balwanti had predeceased Barji leaving behind her children defendants 4 and 5. Tulsi Ram's son Prahlad Rai had

also predeceased Barji leaving behind his widow defendant No. 8 and son defendant No. 7. By the time succession to the estate of Barji opened all the children of Behari Lal and Hiralal had died but some of them had children and grandchildren as seen from the pedigree. After the death of Barji, her properties came to the possession of defendant No. 6. Defendant No. 1 sued for the possession of those properties on the ground that she and her sisters are preferential heirs to the deceased Barji. To that suit she did not make Amar Nath, the plaintiff in the present suit, a party. Amar Nath's application for being impleaded as a party in that suit was opposed by the 1st defendant and the said application was ultimately rejected by the Court. The dispute in that suit was referred to arbitration. The arbitrators upheld the claim of defendants Nos. 1 to 3. Thereafter the present suit was brought. In the High Court as well as in the trial Court there was a triangular contest. The plaintiff claimed that he was exclusively entitled to the suit properties, defendants Nos. 1 to 3 claimed that they are the nearest heirs to Barji; some of the other defendants contended that they succeeded to the suit properties as co-tenants with the plaintiff. In this Court all the contesting defendants sail together. As mentioned earlier, the trial Court accepted the claim of defendants Nos. 1 to 3 but the High Court held that the plaintiff was exclusively entitled to the suit properties, he being the nearest heir to the deceased. That finding is contested both by defendants Nos. 1 to 3 as well as by the other contesting defendants. That is how the aforementioned two appeals came to be filed.

4. In arriving at its finding the High Court relied on the rules of succession found in paragraph 147 of Mulla's Principles of Hindu Law (13th Edn.). It came to the conclusion that those rules are exhaustive. On the basis of those rules, it ruled that defendants Nos. 1 to 3 were not entitled to succeed to the estate of Barji. So far as the other defendants are concerned it rejected their claim on the ground that as between the plaintiff and themselves the former is a preferential heir as he is the nearest in degree to Barji.

SHRI BOOL CHAND



5. It is the admitted case of the parties that the properties in question are not shulka and that Barji was married in one of the approved forms. Therefore, while pronouncing on the competing claims made in this case, we must be guided by the order of succession prescribed in paragraph 147, if the same is correct and exhaustive. Paragraph 147 says:

"Stridhana other than shulka passes in the following order:

- (1) unmarried daughter;
- (2) married daughter who is unprovided for;
- (3) married daughter who is provided for;

(4) daughter's daughter;

(5) daughter's son;

(6) Son;

(7) Son's son;

If there be none of these, in other words, if the woman dies without leaving any issue, her stridhana, if she was married in an approved form, goes to her husband, and after him, to the husband's heirs in order of their succession to him; on failure of the husband's heirs, it goes to her blood relations in preference to the Government. But if she was married in an unapproved form, it goes to her mother, then to her father, and then to the father's heirs and then to the

husband's heirs in preference to the Government". The legal position is stated in identical terms in Mayne's Treatise on Hindu Law (11th Edn.—Paragraph 623, pp 744 to 746) as well as in the other text-books on Hindu Law referred to at the time of the hearing. At this stage it may be mentioned that the correctness of the order of succession mentioned in paragraph 147 till we come to item No. 7 (son's son) was not challenged. The same is well settled by decided cases. It is not necessary to refer to those cases. The only contention advanced on behalf of some of the defendants is that after son's sons come son's daughters. Alternatively it was contended that the expression "son's son" includes "son's daughter". We have to see whether these contentions are well founded.

6. The rules relating to succession to stridhana enunciated in the text-books are based on Yajnyawalkya's text "her kinsmen take it, if she die without issue". This statement is elaborated by Vijnyaneswara in Mitakshara. The relevant portions thereof as translated by H. T. Colebrooke are found in placita 8, 9, 10 and 11 in Section XI of his book "Mitakshara". They read as follows:

"8. A woman's property has been thus described. The author next propounds the distribution of it: "Her kinsmen take it, if she die without issue".

9. If a woman die "without issue" that is leaving no progeny; in other words, having no daughter - nor daughter's daughter nor daughter's son, nor son, nor son's son; the woman's property, as above described shall be taken by her kinsmen; namely her husband and the rest, as will be (forthwith) explained.

10. The kinsmen have been declared generally to be competent to succeed to a woman's property. The author now distinguishes different heirs according to the diversity of the marriage ceremonies. "The property of a childless woman, married in the form denominated Brahma, or in any of the four (unblamed modes of marriage), goes to her husband; but, if she leave progeny, it will go to her (daughter's) daughters; and, in other forms of marriage (as the Asura, etc.), it goes to her father (and mother, on failure of her own issue).

11. Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, Daiva, Arsha and Prajapatya, the (whole) property, as before described belongs in the first place to her husband. On failure of him, it goes to his nearest kinsmen (sapindas) allied by funeral oblations. But, in the other forms of marriage called Asura, Gandharva, Rakshasa and Paisacha, the property of a childless woman goes to her parents, that is, to her father and mother. The succession devolves first (and the reason has been before explained) on the mother, who is virtually exhibited (first) in the elliptical putrigami implying 'goes' (gachhati) to both parents (pitarau) that is to the mother and to the father'. On failure of them, their next of kin take the succession.

7. These passages have received interpretation at the hands of the Judicial Committee as well as the High Courts in India and the law is now settled as to the mode of succession to stridhana under Mitakshara until we reach son's son. The controversy now is as to who should succeed to such an estate if none of the heirs mentioned in items Nos. 1 to 7 in paragraph 147 of Mulla's Hindu Law are in existence at the time of the death of the woman concerned.

8. Mr. A. K. Sen, learned Counsel for some of the defendants contested the correctness of Colebrooke's translation in certain respects. He wanted us to examine the original text to find out whether the translation found in placita 9 is correct? The parties did not place before us either an admitted translation of the original text or even an official translation. Colebrooke is a distinguished oriental scholar. The Judicial Committee as well as the various High Courts in this country have relied on his translation of Mitakshara in dealing with the question of inheritance. Jogendra Nath Bhattacharya in his commentary on Hindu Law (2nd Edn) deals with the order of succession under Mitakshara to stridhana in Chapter VI of that book. His translation of the relevant commentaries accords with those made by Colebrooke. To the same effect is the opinion expressed by Justice Chandavarkar in Bhimacharya v. Ramcharya,

(1909) ILR 33 Bom 452. Hence, we are unable to agree with Mr. Sen that Colebrooke's translation does not bring out accurately the meaning of the relevant passages in Mitakshara. Colebrooke in his book 'Mitakshara' published in 1869 sets out the order of succession to a woman's stridhana properties at p. 158 thus:

Maiden daughter	1
Unendowed married daughter	2
Endowed married daughter	3
Daughter's daughter	4
Daughter's son	5
Son	6
Grandson	7
Husband	8

If the contention of defendants is correct then son's daughter and not husband should have come after the grandson. But that is not the case.

9. Mr. Bishan Narain, learned Counsel for defendants Nos. 1 to 3, contended that the list given in Mitakshara is only illustrative and not exhaustive. He urged that Yajnyawalkya had stated that "a woman's property would devolve on her kinsmen if she died without issue" which means that it would devolve on her progeny which expression includes son's daughter as well. In this connection he also relied on Vijnyaneswara's commentary stating that the expression 'without issue' found in Yajnyawalkya text means "leaving no progeny". On the basis of these statements he contended that even according to Vijnyaneswara, the deceased woman's progeny would take her stridhana in preference to her kinsmen including her husband. On the basis of this premise he proceeded to argue that the other words used in placita 9, viz.: "having no daughter nor daughter's daughter nor daughter's son nor son nor son's son" should be understood as merely being illustrations of the word "progeny". This contention is opposed to the commentaries by Narada, Gautama and the later commentators. More than that it runs counter to the decisions rendered by the Judicial Committee and the various High Courts during the last over a century. It is now well settled that stridhana of a Hindu woman governed by Mitakshara passes in the order mentioned in Mitakshara and the children of the deceased woman do not take the same as a body either jointly

or as tenants-in-common. Only the heirs belonging to a class take the properties as tenants-in-common.

10. Mr. Bishan Narain next contended that under Mitakshara propinquity is the text of inheritance. Therefore, there is no reason why the deceased woman's husband's brother's son should take the properties in preference to her son's daughters. We do not think that in the matter of succession to stridhana propinquity was considered by the law-givers as the sole or even the principal test, otherwise there is no justification for a daughter's daughter or a daughter's son to succeed to the estate of a woman in preference to her son. It is true that it is not easy to find out the reason behind the rules relating to succession to stridhana. But that is equally true of many other branches of our family laws. These contradictions are inevitable in socio-religious matters, particularly when our social laws were controlled by our religious beliefs and our law-givers were our religious preceptors. It is for the Legislatures to step in and bring about harmony between the society and the laws governing it. That is why our Parliament enacted several statutes in 1955 to amend the Hindu Law in various respects.

11. We are unable to accept the contention of Mr. Bishan Narain that the expression 'son's son' includes son's daughters as according to the rules of interpretation the masculine includes the feminine. That rule of interpretation is inapplicable in the present case as daughter's daughter succeeds to the stridhana in preference to daughter's son. The order of succession prescribed clearly rules out the application of that rule of interpretation.

12. Mr. Sen in support of his contention that on a true interpretation of the relevant passages in 'Mitakshara', defendants Nos. 1 to 3 are preferential heirs to deceased Barji, relied on certain passages in some of the decided cases. First he referred to the decision of the Patna High Court in Raghava Surendra Sahi v. Babui Lachmi Kuer, ILR 18 Pat 590=(AIR 1939 Pat 636). Therein the dispute related to the succession to the properties left by a maiden and not by a married woman. The rules relating to the succession to the stridhana of a

deceased maiden are wholly different from those relating to succession to the stridhana of a married woman. Therefore, the observations made in regard to those rules have no relevance for our present purpose. He next invited our attention to certain passages in the decision of the Judicial Committee in *Bai Kesserbai v. Hunsraj Morarji*, (1906) 33 Ind App 176 (PC). Therein the dispute was between Bai Kesserbai the surviving co-widow of the deceased Bachubai's husband Koreji Haridass, Hunsraj Morarji the separated nephew of Koreji, being the son of his eldest brother, who predeceased Bachubai and Bai Moghibai, the widow of a younger brother of Koreji named Ranchordass Haridass. The question for consideration by the Judicial Committee was as to the true scope of the latter part of the *plactia* 9 in *Colebrooke's Mitakshara* which says "if a woman die without issue, that is, leaving no progeny . . . the woman's property . . . shall be taken by her kinsmen, namely her husband and the rest as will be forthwith explained". Their Lordships observed that there can be no reasonable doubt that according to *Mitakshara* definition of *sapinda*, husband and wife are *sapindas* to each other and the co-widow of the husband of the deceased was the nearest *sapinda* of the deceased woman's husband hence entitled to succeed to the estate in question. This decision again does not bear on the point under consideration.

13. Lastly, Mr. Sen contended that in view of the Hindu Women's Rights to Property Act (XVIII of 1937), it must be held that defendants 1 to 3 are nearer heirs to the deceased than the plaintiff. This contention was negatived by the High Court on the basis of the rule laid down by this Court in *Annagouda Nathgouda v. Court of Wards*, (1952) 3 SCR 208 = (AIR 1952 SC 60), wherein this Court dealing with Act II of 1929, observed:

"The question is whether the provisions of this Act can at all be invoked to determine the heirs of a Hindu female in respect of her stridhan property. The object of the Act as stated in the preamble is to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate; and Section 1 (2) expressly lays down that "the Act applies

only to persons who, but for the passing of this Act, would have been subject to the Law of *Mitakshara* in respect of the provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will". Thus, the scope of the Act is limited. It governs succession only to the separate property of a Hindu male who dies intestate. It does not alter the law as regards the devolution of any other kind of property owned by a Hindu male and does not purport to regulate succession to the property of a Hindu female at all. It is to be noted that the Act does not make these four relations statutory heirs under the *Mitakshara* Law under all circumstances and for all purposes; it makes them heirs only when the *propositus* is a male and the property in respect to which it is sought to be applied is his separate property."

Similar would be the position under the Hindu Women's Rights to Property Act, 1937. Section 3 (1) of that Act which provides for the devolution of the property reads thus:

"When a Hindu governed by the *Dayabhaga* School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property his widow or if there is more than one widow all his widows together shall, subject to the provisions of sub-sec. (3) be entitled in respect of property in respect of which he dies intestate to the same share as a son. . . ."

14. From this provision it is clear that Hindu Women's Rights to Property Act, 1937, applies only to the separate property left by a Hindu male. It does not apply either to the coparcenary property or to the property of a Hindu female.

15. For the reasons mentioned above these appeals fail and they are dismissed with costs—advocates' fee one set.

Appeals dismissed.

AIR 1970 SUPREME COURT 1649
(V 57 C 350)

(From: Allahabad)*

J. C. SHAH AND V. RAMASWAMI JJ.

Ruston and Hornby Ltd., Appellant
v. Zamindara Engineering Co., Res-
pondent.

Civil Appeal No. 1274 of 1966, D/-
8-9-1969.

(A) Trade Marks Act (1940), S. 73—
(Since repealed See now Trade and
Merchandise Marks Act (1958), S. 105)
— Suit for infringement of trade mark
and passing-off action — Points of dis-
tinction and similarity pointed out.

In an action for infringement where
the defendant's trade mark is identi-
cal with the plaintiff's mark, the Court
will not enquire whether the infringe-
ment is such as is likely to deceive or
cause confusion. But where the
alleged infringement consists of using
not the exact mark on the Register,
but something similar to it, the test of
infringement is the same as in an action
for passing off. In other words, the
test as to likelihood of confusion or
deception arising from similarity of
marks is the same both in infringe-
ment and passing-off actions. (Points
of distinction between passing-off
action and action for infringement of
trade mark pointed out.) (1838) 3 My
& Cr 338 and (1941) 58 RPC 147 (161),
Ref. to. (Paras 3 to 6)

(B) Constitution of India, Art. 136—
Appeal by special leave — Suit for
permanent injunction restraining de-
fendant from infringing plaintiff's re-
gistered trade mark 'Ruston' in respect
of diesel internal combustion engines
— Defendant using words "Rustam
India" on similar engines manufac-
tured by it — Suit dismissed — High
Court in appeal holding that there
was deceptive resemblance between
'Ruston' and 'Rustam' and constitu-
ted infringement of plaintiff's trade
mark 'Ruston' — High Court however
holding that the suffix 'India' after
'Rustam' was a sufficient warning to
purchaser and that defendant could
be allowed to use the combination—
Appeal by special leave by plaintiff—
No appeal by defendant against find-
ing that use of bare word 'Rustam'
constituted infringement — Finding

*F. A. No. 208 of 1958 D/- 23-11-1965
(Allahabad).

EN/EN/E557/69/KSB/D

1970 S.C./104 X G—7

cannot be challenged before Supreme
Court — Fact that word 'India' was
added to defendant's trade mark was
of no consequence and plaintiff was
entitled to succeed in its action for in-
fringement of trade-mark — F. A. No.
208 of 1958 D/- 23-11-1965 (All),
Reversed. (Para 8)

Cases Referred: Chronological Paras
(1941) 58 RPC 147, Saville Per-
fumery Ltd. v. June Perfect
Ltd. 7

(1838) 3 My & Cr 338 = 40 ER
956, Millington v. Fox 6

M/s. K. S. Shavaksha and R. A. Shah,
Advocates, Mr. J. B. Dadachanji,
Advocate of M/s. J. B. Dadachanji and
Co., and Mrs. Bhuvanesh Kumari,
Advocate, for Appellant; M/s. S.
K. Mehta, K. L. Mehta and Miss
Sona Bhatiani, Advocates, for Res-
pondent.

The following Judgment of the
Court was delivered by

RAMASWAMI, J.: This appeal is
brought by special leave from the
judgment of the Allahabad High
Court dated November 23, 1965 in
First Appeal No. 208 of 1958.

2. The appellant is a limited liabi-
lity company incorporated under the
English Companies Act with its regis-
tered office at Lincoln, England. It
carries on business in the manufac-
ture and sale of diesel internal com-
bustion engines and their parts and ac-
cessories. Ruston Hornsby (India)
Ltd., a company registered in India
under the Companies Act, 1956 is a
subsidiary of the appellant. The res-
pondent is a firm carrying on busi-
ness in the manufacture and sale of
diesel internal combustion engines
and their parts. The appellant was a
registered proprietor of the registered
trade mark Ruston being registration
No. 5120 in Class 7 in respect of inter-
nal combustion engines. Ruston and
Hornsby (India) Ltd., is the registered
user of the said trade mark and manu-
factures in India and sells in India
internal combustion engines under the
trade mark "RUSTON". Sometime in
June, 1955 the appellant came to
learn that the respondent was manu-
facturing and selling diesel internal
combustion engines under the trade
mark "RUSTAM". On July 8, 1955 the
appellant wrote through its attorneys
a letter to the respondent and called
upon it to desist from using the trade

mark "RUSTAM" on its engines as it was an infringement of the registered trade mark "RUSTON". The defendant replied that "RUSTAM" was not an infringement of "RUSTON" as the words "RUSTAM INDIA" was used. On February 17, 1956 the appellant instituted a suit praying for a permanent injunction restraining the respondent and its agents from infringing the trade mark "RUSTON". On January 3, 1958 the Additional District Judge, Meerut, dismissed the suit holding that there was no visual or phonetic similarity between "RUSTON" and "RUSTAM". The appellant took the matter in appeal in the Allahabad High Court. By its judgment dated November 23, 1955 the High Court held that the use of the word RUSTAM by the respondent constituted infringement of the appellant's trade mark "RUSTON" and the respondent should be prohibited from using the trade mark "RUSTAM". But the High Court proceeded to hold that the use of the words "RUSTAM INDIA" was not an infringement because the plaintiff's engines were manufactured in England and the defendant's engines were manufactured in India. The suffix "India" would be a sufficient warning that the engine sold was not a "RUSTON" engine manufactured in England and the respondent may be permitted to use the combination "RUSTAM INDIA".

3. Section 21 of the Trade Marks Act, 1940 states:

"Subject to the provisions of sections 22, 25 and 26 the registration of a person in the register as proprietor of a trade mark in respect of any goods shall give to that person the exclusive right to the use of the Trade mark in relation to those goods and, without prejudice to the generality of the foregoing provision, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either—

(a) as being used as a trade mark; or

(b) to import a reference to some person having the right either as a proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade."

4. The distinction between an infringement action and a passing off action is important. Apart from the question as to the nature of trade mark the issue in an infringement action is quite different from the issue in a passing off action. In a passing off action the issue is as follows:

"Is the defendant selling goods so marked as to be designed or calculated to lead purchasers to believe that they are the plaintiff's goods?"

5. But in an infringement action the issue is as follows:
"Is the defendant using a mark which is the same as or which is a colourable imitation of the plaintiff's registered trade mark?"

It very often happens that although the defendant is not using the trade mark of the plaintiff, the get-up of the defendant's goods may be so much like the plaintiff's that a clear case of passing off would be proved. It is on the contrary conceivable that although the defendant may be using the plaintiff's mark the get-up of the defendant's goods may be so different from the get-up of the plaintiff's goods and the prices also may be so different that there would be no probability of deception of the public. Nevertheless, in an action on the trade mark, that is to say, in an infringement action, an injunction would issue as soon as it is proved that the defendant is improperly using the plaintiff's mark.

6. The action for infringement is a statutory right. It is dependent upon the validity of the registration and subject to other restrictions laid down in sections 30, 34 and 35 of the Act. On the other hand the gist of a passing off action is that A is not entitled to represent his goods as the goods of B but it is not necessary for B to prove that A did this knowingly or with any intent to deceive. It is enough that the get-up of B's goods has become distinctive of them and that there is a probability of confusion between them and the goods of

A. No case of actual deception nor any actual damage need be proved. At common law the action was not maintainable unless there had been fraud on A's part. In equity, however, Lord Cottenham L. C. in *Millington v. Fox* (1838) 3 My & Cr 338 held that it was immaterial whether the defendant had been fraudulent or not in using the plaintiff's trade mark and granted an injunction accordingly. The common law courts, however, adhered to their view that fraud was necessary until the Judicature Acts, by fusing law and equity, gave the equitable rule the victory over the common law rule.

7. The two actions, however, are closely similar in some respects. As was observed by the Master of the Rolls in *Saville Perfumery Ltd. v. June Perfect Ltd.* (1941) 58 RPC 147 at p. 161:

"The Statute law relating to infringement of trade marks is based on the same fundamental idea as the law relating to passing-off. But it differs from that law in two particulars, namely (1) it is concerned only with one method of passing-off, namely, the use of a trade mark, and (2) the statutory protection is absolute in the sense that once a mark is shown to offend the user of it cannot escape by showing that by something outside the actual mark itself he has distinguished his goods from those of the registered proprietor. Accordingly, in considering the question of infringement the Courts have held, and it is now expressly provided by the Trade Marks Act, 1938, Section 4, that infringement takes place not merely by exact imitation but by the use of a mark so nearly resembling the registered mark as to be likely to deceive." In an action for infringement where the defendant's trade mark is identical with the plaintiff's mark, the Court will not inquire whether the infringement is such as is likely to deceive or cause confusion. But where the alleged infringement consists of using not the exact mark on the Register, but something similar to it the test of infringement is the same as in an action for passing-off. In other words, the test as to likelihood of confusion or deception arising from similarity of marks is the same both in infringement and passing-off actions.

8. In the present case the High Court has found that there is a deceptive resemblance between the word "RUSTON" and the word "RUSTAM" and therefore the use of the bare word "RUSTAM" constituted infringement of the plaintiff's trade mark "RUSTON". The respondent has not brought an appeal against the judgment of the High Court on this point and it is, therefore, not open to him to challenge that finding. If the respondent's trade mark is deceptively similar to that of the appellant the fact that the word 'INDIA' is added to the respondent's trade mark is of no consequence and the appellant is entitled to succeed in its action for infringement of its trade mark.

9. We are accordingly of the opinion that this appeal should be allowed and the appellant should be granted a decree restraining the respondent by a permanent injunction from infringing the plaintiff's trade mark "RUSTON" and from using it in connection with the engines, machinery and accessories manufactured and sold by it under the trade mark of "RUSTAM" or "RUSTAM INDIA". The appellant is also entitled to an injunction restraining the respondent and its agents from selling or advertising for sale of engines, machinery or accessories under the name of "RUSTAM" or "RUSTAM INDIA". The appellant is also granted a decree for nominal damages to the extent of Rs. 100. The appellant is further entitled to an order calling upon the respondent to deliver to the appellant price-lists, bills, invoices and other advertising material bearing the mark "RUSTAM" or "RUSTAM INDIA". The appeal is allowed with costs to the above extent.

Appeal allowed.

AIR 1970 SUPREME COURT 1651
(V 57 C 351)

(From: Allahabad)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Commissioner of Income-tax, Appellant v. Jawaharlal Rastogi, Respondent.

Civil Appeal No. 16 of 1970, D/-7-5-1970.

TN/FN/C380/70/KSB/P

Income Tax Act (1961), S. 132 (8)—
 (As amended by Finance Act of 1969)
 — Search and seizure of documents
 — Documents seized retained by the
 authorities for a period of nineteen
 months without recording any reasons
 for retaining same beyond period of
 180 days and without obtaining ap-
 proval of Commissioner as required
 by S. 132 (8) — Such retention of
 documents is without authority of law
 and they should be released. AIR 1970
 SC 292 Rel. on. (Paras 6, 8 and 10)

Cases Referred: Chronological Paras
 (1970) AIR 1970 SC 292 (V 57) =

(1969) 74 ITR 836, Income Tax
 Officer, Special Investigation
 Circle B Meerut v. Seth
 Brothers 5

(1965) AIR 1965 All 487 (V 52) =
 (1966) 62 ITR 44, Seth Brothers
 v. Commr. of Income-tax 4, 5

The following Judgment of the
 Court was delivered by

SHAH, J.: Jawahar Lal Rastogi here-
 inafter called 'the assessee' is a Hindu
 Undivided Family which carries on
 the business of money-lending at
 Lucknow and is also interested as a
 partner in different firms engaged in
 the business of manufacturing barbed
 wire, pharmaceuticals, etc.

2. On September 14, 1964, the
 Income-tax Officer, A-ward, called up-
 on the assessee to furnish within 10
 days certain information with regard
 to its income and assets. On Septem-
 ber 17, 1964 the Income-tax Officer
 submitted to the Commissioner of
 Income-tax a report requesting that
 he be authorised to enter and
 search the premises of the asses-
 see. The Commissioner by his
 order dated September 19, 1964,
 authorised entry and search after
 recording reasons for his belief that
 it was necessary to carry out the search.
 On September 21 & 22, 1964, the pre-
 mises of the assessee were searched
 and a large number of documents
 were seized and were taken away to
 the Income-tax Office. The Income-
 tax Office also prepared inventories
 of the ornaments and other goods kept
 in the premises searched. After the
 seizure of the books of account and
 other documents the case was fixed
 for hearing before the Income-tax
 Officer on several occasions, but no
 substantial step was taken.

3. In May 1966 the assessee filed
 a writ petition in the High Court of

Allahabad challenging the validity of
 the search made by the Department
 contending that it "was illegal and in
 excess of the power conferred by sec-
 tion 132 of the Income-tax Act, 1961"
 and prayed that the documents seized
 may be ordered to be released. The
 High Court of Allahabad considered
 the evidence appearing from the affi-
 davits filed and observed that in the
 present case the assessee had estab-
 lished the following "points":

(1) The Income-tax Officer was ap-
 parently interested in investigating
 transactions prior to 1953. On Septem-
 ber 14, 1964, the assessee was
 directed to furnish statements relat-
 ing to four years ending on March 31,
 1960, yet the Commissioner of Income-
 tax issued letters of authorisation per-
 mitting Income-tax Officers to seize
 documents relevant to nine assessment
 years;

(2) The raid was ordered and orga-
 nised before the expiry of the period
 of the notice,

(3) More than 300 books and regis-
 ters were seized during the raid and
 the Income-tax Officers carried away
 thousands of promissory notes. Some
 of the documents seized appear to be
 irrelevant for assessment purposes
 and some of them were public docu-
 ments;

(4) There is reason to believe that
 all or almost all the documents found
 on the premises were seized and carri-
 ed away by the Income-tax Officers;

(5) Marks of identification were not
 placed on the documents in spite of
 the direction contained in the letter of
 authorisation; and

(6) The documents seized during the
 raid were detained by the Income-tax
 Officers for 10 months before the peti-
 tion was filed.

4. In the view of the High Court
 the circumstances of the case indicat-
 ed that the Commissioner of Income-
 tax and the Income-tax Officers acted
 beyond "the legitimate scope of Sec-
 tion 132 of the Act and there was
 force in the complaint of the assessee
 that the opposite parties carried out
 indiscriminate search which constitu-
 ted abuse of power conferred on In-
 come-tax authorities by Section 132 of
 the Act." In reaching its conclusion,
 the High Court relied upon the judg-
 ment of the Allahabad High Court in
 Seth Brothers v. Commissioner of In-

come-tax, (1966) 62 ITR 44 = (AIR 1965 All 487).

5. In this appeal filed by the Commissioner of Income-tax with special leave, the Solicitor-General contends that the decision of the Allahabad High Court in Seth Brothers' case, (1966) 62 ITR 44 = (AIR 1965 All 487) was overruled by this Court in Income-tax Officer, Special Investigation Circle "B", Meerut v. Seth Brothers, (1969) 74 ITR 836 = (AIR 1970 SC 292) and on that account the judgment under appeal is liable to be set aside. In Seth Brothers' case, (1969) 74 ITR 836 = (AIR 1970 SC 292) this Court examined the scheme of S. 132 in some detail and observed:

"The condition for entry into and making search of any building or place is the reason to believe that any books of account or other documents which will be useful for, or relevant to, any proceeding under the Act may be found. If the Officer has reason to believe that any books of account or other documents would be useful for, or relevant to, any proceedings under the Act, he is authorised by law to seize those books of account or other documents, and to place marks of identification therein, to make extracts or copies therefrom and also to make a note or an inventory of any articles or other things found in the course of the search. Since by the exercise of the power a serious invasion is made upon the rights, privacy and freedom of the taxpayer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorises it to be exercised x x x x x If the conditions for exercise of the power are not satisfied the proceeding is liable to be quashed, x x x

The Act and the Rules do not require that the warrant of authorisation should specify the particulars of documents and books of account a general authorisation to search for and seize documents and books of account relevant to or useful for any proceeding complies with the requirements of the Act and the Rules. It is for the officer making the search to exercise his judgment and seize or not to seize any documents or books of account. x x x x

The aggrieved party may undoubtedly move a competent court for an

order releasing the documents seized. In such a proceeding the Officer who has made the search will be called upon to prove how the documents seized are likely to be useful for or relevant to a proceeding under the Act. If he is unable to do so, the court may order that those documents be released. But the circumstance that a large number of documents seized is not a ground for holding that all documents seized are irrelevant or the action of the officer is mala fide."

It must, however, be stated that the findings that the action of the Commissioner of Income-tax and the Income-tax Officer amounted to "in-discriminate search" and was beyond the "legitimate scope of S. 132" depends upon the evidence in each case and no general rule can be laid down in that behalf.

6. In the present case the High Court has noticed two important circumstances: (1) that whereas the notice dated September 14, 1964, required the assessee to furnish statements relating to the four assessment years ending on March 31, 1960, the Commissioner of Income-tax authorised search for a period of nine assessment years even before the period fixed by the notice had expired; and (2) that contrary to the plain terms of section 132 (8) the Income-tax Officer retained with him the books of account for a period exceeding 180 days.

7. Section 132 (2) as in force on the date on which the search and seizure took place stood as follows:

"The books of account or other documents seized under sub-section (1) shall not be retained by the Inspecting Assistant Commissioner or the Income-tax Officer for a period exceeding one hundred and eighty days from the date of the seizure unless the reasons for retaining the same are recorded by him in writing and the approval of the Commissioner for such retention is obtained:

Provided x x x "

By the Finance Act of 1965, sub-section (2) was re-enacted as sub-s. (8) with the modification that for the words "Inspecting Assistant Commissioner or the Income-tax Officer" the words "authorised officer" be substituted.

8. In the present case the premises of the assessee were searched on September 21 & 22, 1964, and the documents were retained till May 1966, i.e. for a period of 19 months. Our attention has not been invited to any order of the authorities recording reasons for retaining the documents seized after the expiry of 180 days, nor is there any approval of the Commissioner for retaining such documents. The retention of the documents without complying with the requirements of the statute after expiry of the period of 180 days would be plainly contrary to law.

9. The Solicitor-General said that it was not urged before the High Court that because the authorised officer did not record reasons and the Commissioner did not approve the retention of the documents after 180 days, the revenue authorities were bound to release the documents. Counsel submitted that failure to produce evidence on a matter not put in issue may not be regarded as a ground in support of an order releasing documents. But the High Court has found that the documents seized during the raid were detained by the authorised officer for 19 months before the application was filed. If it was the case of the Department that detention of the documents after the expiry of 180 days was supported by good and adequate reasons recorded by the Income-tax Officer and the approval of the Commissioner as required by the Act was obtained, such record/ of reasons and approval would have been tendered in evidence. It cannot be said that the attention of the parties was not directed to the circumstance that the Income-tax Officer had failed to comply with the requirements of the Act.

10. The order recorded by the High Court must be sustained on the ground that the documents taken possession of were retained without authority of law for a period exceeding 180 days contrary to the terms of Section 132 (8) as amended by the Income-tax (Amendment) Act, 1965.

11. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1654
(V 57 C 352)

(From: Punjab)*

M. HIDAYATULLAH, C. J. AND
A. N. RAY, J.

Parasramka Commercial Co. Ltd.,
Appellant v. Union of India, Respondent.

Civil Appeal No. 2532 of 1966, D/-
29-3-1969.

Arbitration Act (1940), S. 14 (1) —
Award to be signed and filed—Notice
of making and signing award—Notice
may take several forms and not limited
to a letter only — Notice of amount
and charges in respect of arbitration
and award is not an essential part of
notice for purposes of limitation.

What will be considered a sufficient
notice in writing of the making and
signing of the award is a question of
fact. Reading the word 'notice' generally,
it denotes merely an intimation
to the party concerned of a particular
fact. The words "notice in writing"
cannot be limited to only a letter.
Notice may take several forms. It
must, to be sufficient, be in writing
and must intimate quite clearly that
the award has been made and signed.
Where a copy of the award signed by
the arbitrator is sent to the party in
whose favour award is made, there is
sufficient notice that the award had
been made and signed. A notice
of the amount of the fees and charges
payable in respect of arbitration and
award is not an essential part of the
notice for the purpose of limitation.

(Para 5)

Cases Referred: Chronological Paras

(1962) AIR 1962 Mys 135 (V 49),

Ratnawa v. Guri Shiddappa

Gurushantappa Magavi 4

(1958) AIR 1958 Andh Pra 497

(V 45)=ILR (1958) Andh Pra

166, Badarla Ramakrishnamma

v. Vattikonda Lakshmi Bayamma 4

(1957) AIR 1957 Andh Pra 11

(V 44)=69 Mad LW (Andh) 163,

Puppallu Ramulu v. Nagidi

Appelaswami 4

(1955) AIR 1955 Punj 145 (V 42)

=ILR (1955) Punj 402, Ganga

Ram v. Radha Kishan 4

*(Civil Revn. No. 330-D of 1954, D/-
8-8-1963—Punj.)

DN/EN/E554/69/CWM/B

(1949) AIR 1949 Pat 393 (V 36)

=ILR 27 Pat 86, Jagdish v.

Sunder

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M/s. B. P. Maheshwari and S. M. Jain, Advocates, for Appellant; Dr. V. A. Seyid Muhammad, Senior Advocate (Mr. S. P. Nayar, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This is an appeal against a judgment and order of the Circuit Bench of the Punjab High Court at Delhi (Single Judge) in a matter arising under the Arbitration Act. By an agreement dated April 28, 1948 the appellant company entered into a contract with the Chief Director of Purchase (Food) acting on behalf of the Government of India. It is not necessary to give the details of this contract, because the matter was referred to arbitration under an arbitration clause included in the agreement between the parties. The award was made and signed on April 26, 1950. The Arbitrator awarded Rs. 17,080-2-9 with costs in favour of the company. The Arbitrator, however, did not send a notice as such of the making and signing of the award but sent a copy of the award signed by him to the company. The company acknowledged the receipt of this copy by two letters which are dated May 5 and May 16, 1950. It appears that in the original which was retained in the office of the Arbitrator, it was stated that there was a covering letter giving notice of the making of the award, but the company denied that any such letter had been sent. However, nothing much turns on it as we shall show presently.

2. After the copy of the award was received by the company, it filed an application under section 14 (1) of the Arbitration Act in the Court of the Subordinate Judge, Delhi on March 30, 1951 for making the award rule of the court. It may be mentioned that on July 3, 1951, the Arbitrator sent the original award to the court also. Before the Subordinate Judge objection was taken by the Union of India that the application of the company to the court was delayed since such an application under section 14 (1) of the Arbitration Act under Art. 178 of the Indian Limitation Act had to be made within 90 days of the receipt of the notice intimating that the award had

been made and signed. This objection prevailed with the Subordinate Judge who rejected the application. A revision application was unsuccessfully made before the High Court and it is the order on the revision application which is the subject of appeal before us.

3. Originally the revision application went before a learned Single Judge of the High Court. He referred the matter to a Division Bench which in its turn referred the case for decision to a Full Bench. The Full Bench gave its opinion on November 17, 1961. Although the Full Bench discussed the matter it did not reach any conclusion in the case, because it felt that whether the application under S. 14 (1) of the Arbitration Act had been made within 90 days or not, was a question of fact which has to be decided by the learned Single Judge, and as the learned Single Judge had not gone into that question, the matter had to go back to him. When the case came before the learned Single Judge, he took some evidence and examined the question in detail. He upheld the decision of the Subordinate Judge and dismissed the revision application.

4. It has been argued before us by Mr. B. P. Maheshwari that the judgment under appeal is erroneous, because S. 14 (1) of the Arbitration Act requires that there should be a notice in writing and that notice had to be something besides the award of which a copy had been sent. He has cited a number of rulings in support of his contention that a notice in writing is incumbent before limitation under Art. 178 of the Limitation Act which applies to S. 14 (1) petitions, can start. In chief, he relies upon *Ratnawa v. Gurishiddappa Gurushantappa Magavi*, AIR 1962 Mys 135, *Puppalla Ramulu v. Nagidi Appelaswami*, AIR 1957 Andh Pra 11, *Jagdish v. Sunder*, ILR 27 Pat 86 = (AIR 1949 Pat 393), *Ganga Ram v. Radha Kishan*, ILR (1955) Punj 402 = (AIR 1955 Punj 145), *Badarla Ramakrishnamma v. Vattikonda Lakshmibayamma*, ILR (1958) Andh Pra 166 = (AIR 1958 Andh Pra 497).

5. It is not necessary to go into the reasoning which made the learned Judges in these cases to lay down that there must be a proper notice in writing of the making of the award. That

follows in fact from the words of section 14 (1) of the Arbitration Act. That section says that when the arbitrators or umpires have given their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. What will be considered a sufficient notice in writing of the making and signing of the award is a question of fact. In the cited cases emphasis sometimes has been laid upon the latter part of the sub-section which speaks of the amount of fees and charges payable in respect of the arbitration and award. Sometimes emphasis has been placed upon the opening words namely that there should be a notice in writing. Reading the word 'notice' as we generally do, it denotes merely an intimation to the party concerned of a particular fact. It seems to us that we cannot limit the words "notice in writing" to only a letter. Notice may take several forms. It must, to be sufficient, be in writing and must intimate quite clearly that the award has been made and signed. In the present case, a copy of the award signed by the arbitrator was sent to the company. It appears to us that the company had sufficient notice that the award had been made and signed. In fact the two letters of May 5 and May 16 to which we have referred quite clearly show that the company knew full well that the arbitrator had given the award, made it and signed it. In these circumstances to insist upon a letter which perhaps was also sent (though there is some doubt about it) is to refine the law beyond the legitimate requirements. The only omission was that there was no notice of the amount of the fees and charges payable in respect of arbitration and award. But that was not an essential part of the notice for the purpose of limitation. To emphasise the latter part as being the essential part of the notice is to make the first part depend upon the determination of the fees and charges and their inclusion in the notice. A written notice clearly intimating the parties concerned that the award had been made and signed, in our opinion certainly starts limitation.

6. In this view of the matter we are in agreement with the decision of the

learned Single Judge who has endorsed the opinion of the Subordinate Judge that limitation began to run from the receipt of the copy of the award which was signed by the Arbitrator and which gave due notice to the party concerned that the award had been made and signed. That is how the party itself understood when it acknowledged the copy sent to it. Therefore, the application must be treated as being out of time and the decision of the High Court to so treat it was correct in all the circumstances of the case.

7. We, therefore, do not see any reason to interfere in this appeal and it is dismissed. But we make it clear that the other part of the case, namely what is to happen to the award sent by the Arbitrator himself to the Court has yet to be determined and what we say here will not affect the determination of that question. Obviously enough that matter arises under the second sub-section of Section 14 and will have to be considered quite apart from the application made by the company to have the award made into rule of Court.

8. It was represented to us by Dr. Syed Mohammad that objections had been taken to the validity of the award and they remain still for decision. Those of course must fall to the ground with the application which we have found to be out of time. As to whether similar objections can be raised in answer to the award filed at the instance of the arbitrator is a question which we cannot go into in the present appeal and no expression of opinion must be attributed to us on that point. In the circumstances of the case we leave the parties to bear their own costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1656
(V 57 C 353)

(From Madras: ILR (1966) 2 Mad 334)
J. C. SHAH, ACTG. C. J., V. RAMA-
SWAMI AND A. N. GROVER, JJ.

K. C. Nambiar, Appellant v. The IV
Judge of Court of Small Causes,
Madras and others, Respondents.

Civil Appeal No. 2225 of 1966, D/-
18-8-1969.

DN/EN/E24/69/RGD/T

(A) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (18 of 1960) S. 4 (3) (b) (i)—“Cost of construction” means cost of original construction — Rule 12 of Rules made under S. 34 is ultra vires—ILR (1966) 2 Mad 334 Reversed.

The expression “cost of construction” in sub-section (3) (b) (i) of S. 4 for determining the first component when used in juxtaposition with the expression “market value” in sub-section (3) (b) (ii) is used to denote not the market value but the cost of the original construction. The expression “cost of building” includes not only the expenses incurred for construction of the building but also the value of advantages which the site of the building offers, such as, accessibility to markets, nearness to a railway station, special amenities, and features of architectural interest. If the expression “cost of construction” is equated with the “market value” it would necessarily include the special advantages of its situation, amenities and its architectural features. But the Legislature has provided for including in the cost of the building apart from the cost of construction, the value of allowances for favourable situation, amenities and architectural features. That is a ground for holding that the value of allowances is not included in the cost of building.

(Para 6)

The legislature did not intend by the use of the expressions “cost of construction” and “market value” used in cls. (i) and (ii) of sub-sec. (3) the same concept of determining the value of a building reproduced at the date when the Act came into force and reduced by depreciation at the prescribed rates.

(Para 11)

If the expression “cost of construction” in sub-s. (3) (b) (i) means the cost of construction of the building as originally created with such additions as may be required to be made for subsequent improvements, R. 12 which prescribes the rates at which the cost of construction is to be computed plainly goes beyond the terms of the section. ILR (1966) 2 Mad 334 Reversed.

(B) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (18 of 1960) S. 34. — Rules under — Rule 11 — Rule goes beyond terms

of S. 4 and is ultra vires. ILR (1966) 2 Mad 334 Reversed. (Para 13)

M/s. K. K. Venugopal and R. Gopalakrishnan, Advocates, for Appellant; Miss Lily Thomas, Advocate, for Respondent No. 3, Mr. S. Govind Swaminathan, Advocate General for the State of Tamil Nadu, (M/s. E. S. Govindan and A. V. Rangam, Advocates, with him), for Respondent No. 8.

The following Judgment of the Court was delivered by

SHAH, AG. C. J.: The Legislature of the State of Madras enacted the Madras Buildings (Lease and Rent Control) Act, 1960. Section 4 of the Act (insofar as it is relevant) provides:

“(1) The Controller shall, on application by the tenant or the landlord of a building and after holding such inquiry as the Controller thinks fit fix the fair rent for such building in accordance with the principles set out in sub-section (2) or in sub-section (3), as the case may be, and such other principles as may be prescribed.

(2) * * * *

(3) (a) The fair rent for any non-residential building shall be at nine per cent, gross return per annum on the total cost of such building.

(b) The total cost referred in clause (a) shall consist of—

(i) the cost of construction as calculated according to such rates for such classes of non-residential building as may be prescribed less the depreciation at such rates as may be prescribed:

(ii) the market value of that portion of the site on which the non-residential building is constructed; and shall include such allowances as may be made for considerations of locality in which the non-residential building is situated, features of architectural interest, accessibility to market, nearness to the railway station and such other amenities as may be prescribed and of the purpose for which the non-residential building is used.* (?)

Provided that such allowances shall not exceed twenty-five per cent. of the cost of construction as calculated in the manner specified in sub-clause (i).”

Section 34 confers upon the State Government power to make rules to carry out the purposes of the Act. Pursuant to the authority conferred

by the Act, the State Government has published rules. Rules 11 to 14 deal with classification of non-residential buildings, calculation of the cost of construction of the different classes of non-residential buildings, allowance for amenities in respect of non-residential buildings and calculation of depreciation of non-residential buildings. Rule 11 provides:

"R. 11—"(1) Non-residential buildings shall be classified into two categories, namely:—

- (i) Factories and godowns; and
- (ii) other non-residential buildings".

"(2) The non-residential buildings belonging to the category specified in sub-rule (1) (ii) shall be classified into four different classes according to the classifications laid down in rule 8 in respect of residential buildings."

R 12 — "(1) The cost of the construction of non-residential buildings belonging to the category specified in rule 11 (1) (i) shall be calculated at the rate of 62 naye Paise per cubic foot of the cubical content of the building.

(2) The cost of construction of the different classes of non-residential buildings belonging to the category specified in rule 11 (1) (ii) shall be calculated at the rates specified below.

Class I—Ground floor—Rs. 16 per square foot of plinth area.

First floor—Rs. 13 per square foot of plinth area.

Second floor—Rs. 12 per square foot of plinth area.

Class II—Ground floor—Rs. 13 per square foot of plinth area.

First floor—Rs. 10 per square foot of plinth area.

Second floor—Rs. 9 per square foot of plinth area.

Class III—Single-storeyed—Rs. 10 per square foot of plinth area.

Class IV—Single-storeyed — Rs. 5 per square foot of plinth area.

Note—In case of every additional floor higher up, the rate per square foot shall be one rupee less than the rate per square foot for the floor immediately below."

R. 13—"When calculating the cost of construction of non-residential buildings, allowances shall be made for the following amenities in addition to those specified in section 4 (3)—

- (1) air-conditioning;
- (2) lifts;

(3) electric fans;

(4) tube-lights;

(5) number of electric points;

(6) fans;

(7) ventilators;

(8) electric pump for water;

(9) flush-outs

(10) fixed wash-basins;

(11) stair-cases;

(12) out-houses;

(13) cattle-sheds;

(14) garden or vacant ground appurtenant to the building enjoyed by the tenant, and

(15) usufructs of trees, if any, enjoyed by the tenant."

R. 14—"The depreciation of buildings shall be calculated at the rates specified in Schedule II."

2. Dr K. C. Nambiar is the tenant of 2/137, Purasawalkam High Road, Madras at a monthly rental of Rupees 187-50. He conducts a nursing home in the premises. The landlord of the premises applied to the Controller claiming that fair rent of the premises in the occupation of Dr. Nambiar be fixed at Rs 2575/- per month. Dr. Nambiar applied to the High Court of Madras for a writ of prohibition against the Controller from proceeding with the application for fixation of fair rent. He pleaded that the "rules framed by the State Government in exercise of the power vested in them by Section 4 were inconsistent with the intention and ambit of the Act" and were on that account invalid. The petition was heard by a single Judge with several other petitions in which the validity of the rules was challenged. The learned Judge passed an order dismissing the petition, and the order was confirmed in appeal by the High Court. Dr. Nambiar has appealed to this Court with certificate granted by the High Court.

3. It was urged on behalf of Dr. Nambiar before the High Court that the expression "cost of construction" in sub-section (3) of Section 4 means the cost of the original construction and the landlord was not entitled to claim that the fair rent be fixed on the basis of cost which may be estimated to be incurred for reproducing a similar building at the date of the application or the date on which the Act was brought into force. The learned Single Judge rejected the contention. He observed that "the

statutory sense in which the word 'cost' or the phrase 'total cost' is used in sub-s. (2) (a) is not the original cost or the original expenditure incurred for the construction of the building. 'Total cost' in S. 4 (2) is a composite concept consisting of three components out of which the cost of construction for the purpose of arriving at the total cost is to be calculated according to the rates prescribed for each class of building prescribed and not the initial expenditure incurred in the construction." The learned Judge proceeded then to observe:

"Normally, the notion of depreciation is a subsequent fall in value of reduction of worth due to deterioration arising from age, use and other causes and it is deducted from the last value of the building as reduced by previous depreciation. But the depreciation calculated at the prescribed rates is under S. 4 (2) (b) to be deducted from the cost of the construction as calculated according to the rates prescribed. When the cost of construction is arrived at on such basis, the depreciation at the prescribed rate is to be deducted therefrom backwards. This mode of deduction of depreciation is no doubt a reverse process. But there seems to be nothing strange in such a manner of arriving at the cost of construction * * *"

The High Court in appeal observed:

"In the first place we are of the opinion that the language of S. 4 itself is clear that what the legislature has in mind on the question of the cost of construction, is what has been specified under the rules and Sch. I. The very fact that S. 4 (2) (b) (i) provides that the cost of construction is to be according to such rates for such class of residential buildings as may be prescribed shows that it is not actual cost of construction, but it is the cost of construction which can be determined on the basis of rates as may be specified. The words "such rates for such classes of residential buildings as may be prescribed" clearly carry with it the conception of the fixing of a statutory rate which may or may not have any relation to or connection with the actual investment. Again the provisions of allowance with regard to considerations of locality, features of architectural interest and such other matters for which allowance is made at a percentage not exceeding 10 per

cent of the cost of construction is to be determined as on the date when the Act came into force and not the actual original investment.* * * We see no warrant to hold that the Legislature intended to make a vital difference between the valuation of the site which is the market value, and the cost of construction of the building which is the original cost of construction or investment as contended for by Mr. Nambiar."

These observations interpreting sub-section (2) of section 4 apply also to the interpretation of sub-section (3) of section 4, because the relevant provisions in regard to determination of the cost of construction of non-residential buildings are identical.

4. By sub-s. (1) of section 4, the Controller is invested with authority to fix fair rent of buildings in respect of which an application is made in accordance with the principles set out in sub-ss. (2) and (3) and such other principles as may be prescribed. Under sub-s. (3) fair rent of any non-residential building is to be computed at nine per cent of the gross return per annum on the total cost of such building and the total cost of the building is to consist of three components — (i) the cost of construction; (ii) the market value of the portion of the site on which the non-resident building is constructed; and (iii) such allowances not exceeding 25 per cent of the cost of construction as may be made for locality, features of architectural interest, accessibility to market, nearness of a railway station and other amenities as may be prescribed.

5. On behalf of Dr. Nambiar it is urged that the "cost of construction" only means cost incurred for constructing the building when it was put up, and the cost of such additions as may have been subsequently made. On behalf of the landlord and the State of Madras it is urged that the expression "cost of construction" means the cost of reproducing a similar building at the date on which the Act was brought into force and therefore in determining fair rent the Controller must determine for the purpose of S. 4 (3) (b) (i) the cost of such reproduced building according to rules in that behalf and deduct therefrom the depreciation at the prescribed rate. In other words, it is intended to deter-

mine under sub-s. (3) (b) (i) the market value of the structure, at the date of the enactment of the Act.

6. The Legislature has used in sub-section (3) (b) (i) the expression "cost of construction" and in sub-s. (3) (b) (ii) "market value". It is difficult to accept that the Legislature has used two different expressions for providing that the market value of the building and market value of the site shall form components of the total cost of 9 buildings. In Black's Law Dictionary, 4th Edn., at page 415—"cost" it is stated "means the amount originally expended in performing a particular act or operation, or for production or construction, as of a building." There is, not infrequently, great difference between the cost of an article and the value of an article. Cost of an article in terms of money is what the owner has expended to obtain it; the value of the article is ordinarily its market value in a market actual or hypothetical. It may be conceded that the expression "cost" is sometimes used as meaning the value of an article. But the expression "cost of construction" in sub-s. (3) (b) (i) for determining the first component when used in juxtaposition with the expression "market value" in sub-s. 3 (b) (ii) is, in our judgment, used to denote not the market value but the cost of the original construction. There are inherent indications in cls. (i), (ii) and (iii) of sub-s. (3) (b) which go to prove that the expression "cost of construction" was not intended to mean the market value. The expression "cost of building" includes not only the expenses incurred for constructing the building but also the value of advantages which the site of the building offers, such as, accessibility to markets, nearness to a railway station, special amenities, and features of architectural interest. If the expression "cost of construction" is equated with the "market value", it would necessarily include the special advantages of its situation, amenities and its architectural features. But the Legislature has provided for including in the cost of the building apart from the cost of construction, the value of allowances for favourable situation, amenities and architectural features. That is a ground for holding that the value of allowances is not included in the cost of building.

7. Amenities such as air-conditioning, lifts, electric fans, tube-lights, number of electric points, fans, ventilators, electric pump for water, flush-outs, fixed wash-basins, staircases, out-houses, cattle-sheds, garden or vacant ground appurtenant to the building enjoyed by the tenant and usufructs of trees, if any, enjoyed by the tenant will also be included in the cost of building as allowances. But many of these amenities would be taken into account in determining the market value of the building. The learned Advocate-General appearing on behalf of the State of Madras was unable to explain why the Legislature in the determination of the cost of building for arriving at the fair rent, if the view expressed by the High Court is correct, enacted that these allowances should be included twice, once as part of component (i) and again as part of component (iii).

8. The learned Trial Judge has rightly pointed out that in determining the cost of construction, if the contention of the State be accepted in determining the first component of the cost of building will be the cost of reproducing the building at a given time reduced by the depreciation computed on the life of the building a process which reverses the normal method of making allowances for depreciation. Again, if the meaning of the expression "cost of construction" were "market value" it would mean that the market value having regard to the market conditions of real property which may go on changing year after year. But the State has accepted by Rule 12 the cost of construction is a fixed quantity related to the date on which the Act was brought into force. Therefore by prescribing the rate at which the cost of construction is to be determined under R. 12, the expression "cost of construction" is neither the original cost, nor the value of the building at a given time during the life of the Act, but an artificial value related to the assumed cost of construction on the date on which the Act was enacted.

9. The Advocate-General, however, submitted that in respect of old buildings it may not be possible to ascertain what the cost of construction of a particular building was. But that argument cannot support an interpre-

tation which the plain words used by the statute do not, warrant. Counsel for the appellant pointed out, that P. W. D. rates in respect of different classes of buildings for many years are available, and it should not be difficult for the Controller, having regard to the P.W.D. rates which would form a fairly reliable basis for determining, what the cost of construction of a particular type of building was. The argument that the "cost of construction" of a building is to be such cost as may be prescribed, invites the answer that a provision which, without any guidance, leaves it to the executive authority to fix whatever that authority thinks is the cost of construction, is invalid on the ground of excessive delegation. If the Legislature has sought to confer authority upon the executive to fix the rates and to fix the rates and to call them cost of construction, the Legislature has abdicated its authority in favour of the executive which in law is not permissible. This, however, was not the argument which was advanced before the High Court, for it was the case of the State that the rates specified in the rules were rates which were actually prevailing in 1961 in respect of different classes of buildings.

10. It was also urged that allowing depreciation at the rates prescribed in Schedule II to the Rules might unduly depreciate the value of the properties and the landlord may not get a fair return. But it has been a common feature of rent restriction legislation all over India that the landlord is not allowed the benefit of unearned increment on the value of his construction. That is why in practically every statute relating to rent restriction legislation rent is pegged down to either a fixed period or to standard rent which is generally related to the cost of construction originally incurred.

11. We are accordingly unable to agree with the High Court that the Legislature intended by the use of the expressions "cost of construction" and "market value" used in cls. (i) and (ii) of sub-section (3) the same concept of determining the value of a building reproduced at the date when the Act came into force and reduced by depreciation at the prescribed rates.

12. Some argument about the true meaning of Note (2) to Schedule II which provides for the standard rates

of depreciation was raised before us. The language used in that Note, even as explained by the illustrations, is obscure.

13. We are in this case not called upon to determine the meaning of that clause. If the expression "cost of construction" in sub-section (3) (b) (i) means the cost of construction of the building as originally created with such additions as may be required to be made for subsequent improvements, R. 12 which prescribes the rates at which the cost of construction is to be computed plainly goes beyond the terms of the section.

14. The appeal is allowed. The order dismissing the petition is discharged. The Controller will determine the fair rent according to the provisions of the Act uninfluenced by R. 12. The appellant will be entitled to his costs in this Court and the High Court.

Appeal allowed.

AIR 1970 SUPREME COURT 1661
(V 57 C 354)

(From: Patna)

A. N. RAY AND I. D. DUA, JJ.

Bhagwan Prasad Srivastava, Appellant v. N. P. Mishra, Respondent.

Criminal Appeal No. 139 of 1967,
D/-20-4-1970.

Criminal P. C. (1898), S. 197—Sanction to prosecute public servant—Emphasis is on 'act' and not 'duty'—Section not to be interpreted too widely or too narrowly.

Section 197 is neither to be too narrowly construed nor too widely. It is not the "duty" which requires examination so much as the "act" because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. There must be a reasonable connection between the act and the discharge of official duty. The act must fall within the scope and range of the official duties of the public servant concerned. AIR 1956 SC 44 and AIR 1955 SC 309 and AIR 1966 SC 220, Rel. on.

(Para 5)

It is open to the accused to place material on the record during the course of the trial for showing what his duty as a public servant was and also that the impugned acts were inter-

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related with his official duty so as to attract the protection afforded by Section 197, Criminal P. C. AIR 1969 SC 686, Rel. on. (Para 6)

Where a Civil Assistant Surgeon had filed a complaint against the Civil Surgeon, that while in operation theatre the Civil Surgeon abused the complainant before patients and hospital staff and ordered the hospital cook to "turn out this badmash", meaning the complainant and the cook actually pushed out the complainant:

Held, that there was nothing to show that this act was a part of the official duty of the Civil Surgeon and that no sanction was required under Section 197 for prosecution of the Civil Surgeon. (Para 5)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 686

(V 56), Criminal Appeal
No 152 of 1967, D/-29-11-1968,
Prabhakar V. Sinari v. Shankar
Anant Verlekar

6

(1966) AIR 1966 SC 220

(V 53) = 1966 1 SCR 210 =
1966 Cri LJ 179, Baijnath
Gupta v. State of M. P.

4

(1956) AIR 1956 SC 44

(V 43) = (1955) 2 SCR 925,
Matanjog Dobey v. H. C. Bhari

3

(1955) AIR 1955 SC 309

(V 42) = (1955) 1 SCR 1302 =
1955 Cri LJ 863, Amrik Singh
v. State of Pepsu

4

The following Judgment of the Supreme Court was delivered by

DUA, J.—In this appeal by special leave arising out of a complaint filed by the respondent Shri N. P. Mishra against the appellant Shri Bhagwan Prasad Srivastava, the only question requiring determination is if cognizance of the case by the Magistrate required previous sanction under Section 197, Criminal P. C. The Sub-Divisional Magistrate, in whose Court the complaint was instituted, upheld the preliminary objection based on the absence of previous sanction and the Second Additional Sessions Judge, on revision, agreed with this view. On further revision the Patna High Court disagreed with the view taken by the two Courts below and holding S. 197, Criminal P. C., to be inapplicable to the case directed the Sub-Divisional Magistrate to make further inquiry into the petition of complaint. Before us the view taken by the High Court is assailed.

2. The complaint was filed by the respondent Shri N. P. Mishra, Civil Assistant Surgeon, Sadar Hospital, Chapra (hereinafter called 'the complainant') against Shri Bhagwan Prasad Srivastava, Civil Surgeon, Chapra (appellant in this Court) and Shri Ramjash Pandey, cook, Sadar Hospital, Chapra. It was alleged in the complaint that on the 6th and 7th January, 1964, the appellant had used defamatory language towards the complainant, and the two accused persons had insulted and humiliated him in the eyes of the public. As a result, the complainant was put to great mental pain and agony, his reputation was harmed and his professional career prejudicially affected. The relevant averments in the complaint may now be stated with the requisite detail. The complainant claiming to be a Master of Surgery and a specialist in Ophthalmology had joined Chapra Sadar Hospital as Civil Assistant Surgeon (C.A.S.) in January, 1962. The appellant joined the said hospital as Civil Surgeon towards the end of 1962. The appellant bore ill-will and malice towards the complainant and was always on the look out for an opportunity to harm him in his profession and to humiliate and disgrace him in the eyes of the public. Some cataract operations were to be performed on January 7, 1964, in the Blind Relief Camp to be organised for that purpose. On January 6, when the complainant was making final selection of the patients for the cataract operations to be performed on the following day, the appellant informed the complainant that he had not been able to arrange for cataract knives and that the complainant should arrange for them from somewhere. The complainant requested the appellant to place orders for the knives with some local firm and give him the necessary letter of authority so that the same could be purchased on credit. The appellant apparently did not like this suggestion. He got enraged and in an insulting tone and language told the complainant that it was his job to arrange for the knives and that as a last resort he might bring his own knife. The complainant repeated his suggestion adding that in the alternative a man be sent to Patna to make local purchases. On this the appellant again addressed the complainant

in highly defamatory language in the presence of the hospital staff and the attendants. On January 7, 1964, at about 9 a.m., the complainant was in the operation theatre. Some members of the hospital staff and some attendants of the patients who were waiting outside the operation theatre were also present. The appellant came there and again asked the complainant if he had brought two more cataract knives from somewhere. The complainant replied that in the absence of the appellant's final orders the two knives could not be arranged from the local market. The appellant again got annoyed and addressed the complainant in insulting tone and defamatory language. Not satisfied with the use of such language, the appellant ordered Ramjesh Pandey, cook of the hospital, to turn out the complainant, the purport of the actual words used being "Pandey, turn out this badmash" (one who follows evil courses). To his utter humiliation the complainant was then actually pushed out by the cook. The actual words used in Hindi by the appellant have been reproduced in the judgment of the High Court. We have, therefore, not considered it necessary to reproduce them again, except the word 'badmash' of which the literal meaning in English as stated by us is generally well understood.

3. The question which falls for decision by this Court is whether the complainant's case is covered by Section 197, Cr. P. C. and previous sanction of the superior authority is necessary before the trial Court can take cognizance of the complaint.

4. Section 197, Cr. P. C., provides as under:

"(1) When any person who is a Judge within the meaning of Sec. 19 of the Indian Penal Code, or when any Magistrate or when any public servant who is not removable from his office save by or with the sanction of State Government or the Central Government, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction—

(a) in the case of a person employed in connection with the affairs of

the Union, of the Central Government; and

(b) in the case of a person employed in connection with the affairs of a State, of the State Government.

Power of Central or State Government as to prosecution.—(2) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held." The object and purpose underlying this section is to afford protection to public servants against frivolous, vexatious or false prosecution for offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duty. The larger interest of efficiency of State administration demands that public servants should be free to perform their official duty fearlessly and undeterred by apprehension of their possible prosecution at the instance of private parties to whom annoyance or injury may have been caused by their legitimate acts done in the discharge of their official duty. This section is designed to facilitate effective and unhampered performance of their official duty by public servant by providing for scrutiny into the allegations of commission of offence by them by their superior authorities and prior sanction for their prosecution as a condition precedent to the cognizance of the cases against them by the Courts. It is neither to be too narrowly construed nor too widely. The narrow and pedantic construction may render it otiose for it is no part of an official duty — and never can be — to commit an offence. In our view, it is not the "duty" which requires examination so much as the "act" because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. One must also guard against too wide a construction because in our constitutional set-up the idea of legal equality or of universal subjection of all citizens to one law administered by the ordinary Courts has been pushed to its utmost limits by enshrining equality before the law in our fundamental principles. Broadly speaking, with us no man, whatever his rank or condition, is

above the law and every official from the highest down to the lowest is under the same responsibility for every act done without legal justification as any other citizen. In construing Section 197, Cr. P. C., therefore, a line has to be drawn between the narrow inner circle of strict official duties and acts outside the scope of official duties. According to the decision of this Court in *Matajog Dobey v. H. C. Bhari*, (1955) 2 SCR 925 = (AIR 1956 SC 44), cited by *Shri Sarjoo Prasad* on behalf of the appellant there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty. In *Amrik Singh v. State of Pepsu*, (1955) 1 SCR 1302 at p. 1307 = (AIR 1955 SC 309 at p. 312), this Court said:

"It is not every offence committed by a public servant that requires sanction for prosecution under Section 197(1) of the Code of Criminal Procedure; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution."

Recently in *Bajinath Gupta v. State of M. P.*, (1966) 1 SCR 210 = (AIR 1966 SC 220), this Court further explained that it is the quality of the act that is important and if it falls within the scope and range of the official duties of the public servant concerned, the protection contemplated by Sec. 197 of the Criminal Procedure Code will be attracted.

5. The principle embodied in this section seems to be well understood; the difficulty normally lies in its application to the facts of a given case. The question whether a particular act is done by a public servant in the dis-

charge of his official duty is substantially one of fact to be determined on the circumstances of each case. In the present case the alleged offence consists of the use of defamatory and abusive words and of getting the complainant forcibly turned out of the operation theatre by the cook. There is nothing on the record to show that this was a part of the official duty of the appellant as Civil Surgeon or that it was so directly connected with the performance of his official duty that without so acting he could not have properly discharged it.

6. As suggested by this Court in *Prabhakar V. Sinari v. Shankar Anant Verlekar*, Criminal Appeal No. 152 of 1967, D/-29-11-1963 = (reported in AIR 1969 SC 686), it would be open to the appellant to place material on the record during the course of the trial for showing what his duty as Civil Surgeon was and also that the impugned acts were inter-related with his official duty so as to attract the protection afforded by Section 197, Cr. P. C. We do not find any material on the existing record suggesting that the impugned acts were done by the appellant in the discharge of his official duty or that they are directly connected with it. This appeal accordingly must fail and is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 1664
(V 57 C 355)

J. M. SHELAT, V. BHARGAVA,
C. A. VAIDIALINGAM AND
I. D. DUA, JJ.

Kshetra Gogoi, Petitioner v. State of Assam, Respondent.

Writ Petn. No. 211 of 1969, D/-19-9-1969.

Public Safety — Preventive Detention Act (1950), S. 13(2) — Fresh order of detention after expiry of previous order, served on day of expiry must disclose fresh grounds arising after expiry of previous detention — That detenu who was in jail maintained links, with his associates who had gone underground, during period of his detention, is not such fresh ground.

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A fresh detention order under Section 13 (2) can be made on the revocation or expiry of a previous detention order only in cases where fresh facts have arisen after the date of revocation or expiry. AIR 1969 SC 43, Relied on. (Para 3)

When the fresh Order contains the grounds mentioned in the expired Order and one more ground that the detenu during his detention under the expired Order had been maintaining links with his associates who had gone underground, through his friends and relatives, it is very difficult to appreciate how a person in preventive custody could continue to maintain links with his associates outside jail who had gone underground even through his friends and relatives. If the detenu was able to maintain such links, it casts a sad reflection on the persons in charge of him while he was in custody and, in any case, it would appear that his detention could serve no useful purpose. It is, in fact, very doubtful whether any such contacts could possibly have been maintained. However, even if it is accepted that such links were maintained, this additional ground mentioned does not satisfy the requirements of Sec. 13 (2) of the Act, because the only allegation is that the links were maintained during the period of preventive detention. Under Section 13 (2) what is required is that fresh facts should have arisen after the expiry of the previous detention. Facts arising during the period of detention are, therefore, not relevant when applying the provisions of Section 13 (2). The fresh order is in violation of law. (Para 4)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 43 (V 56) =
1969 Cri LJ 274, Hadibandhu
Das v. District Magistrate,
Cuttack 3

Mr. Hardev Singh, Advocate, amicus curiae, for Petitioner; Mr. Naunit Lal, Advocate, for Respondent.

The following Judgment of the Court was delivered by:

BHARGAVA, J.—The petitioner in this petition under Art. 32 of the Constitution was arrested and detained under an order made under S. 3 (1) (a) (ii) of the Preventive Detention Act, 1950 (hereinafter referred to as "the Act") on 24th April, 1968. On the 30th August, 1968, he filed a petition in the

High Court of Assam under Art. 226 of the Constitution for issue of a writ of Habeas Corpus. The same day he was released by the Government and, according to him, without being set at liberty, he was again put in detention in pursuance of a fresh order dated 29th August, 1968 passed under Section 3 (1) (a) (ii) of the Act. The grounds of detention were also served on the same day. He made his representation on 17th September, 1968 and his case was referred to the Advisory Board also on the same date. The report of the Advisory Board was received on 28th October, 1968. On 7th November, 1968, his order of detention was confirmed by the Government on the basis of the report of the Advisory Board. This petition was then received in this Court from the petitioner in July, 1969, challenging his detention under the order dated 29th August, 1968. The petition came up for hearing before a Bench of this Court on 29th Aug., 1969 when, at the request of the counsel for the State of Assam, time was granted by the Court till 8th September, 1969 to send for full material. Meanwhile, it appears that a fresh order for his detention under Section 3 (1) (a) (ii) of the Act was issued on 28th August, 1969 and this order was served on the petitioner in Delhi on 29th August, 1969, after the adjournment had been obtained from this Court. Thereupon, the petitioner, on 1st September, 1969, filed an application for amendment of the writ petition and for adding additional new grounds so as to challenge the validity of his detention under the order dated 28th August, 1969. The grounds of detention under this new order were also served on the petitioner on 29th August, 1969. When this petition came up for hearing before us on 9th September, 1969, learned counsel for the State of Assam stated that no material had been received from the Government and wanted time to be granted to meet the facts put forward in the application dated 1st September, 1969. It appears that, though an officer was sent by the Government of Assam to Delhi to serve the order dated 28th August, 1969 on the detenu which he did on 29th August, 1969, no attempt was made to obtain the material for which time had been obtained from the Court on 29th August, 1969. If a

fresh order had been passed and 'had been served on the petitioner in supersession of the previous order which was challenged in' the writ petition, the State Government should have sent full material relating to this order which it became necessary for the petitioner to challenge by amending his writ petition. Detention of a person without trial, even for a single day, is a matter of great consequence and, hence, we did not consider that in the circumstances mentioned above, there was any justification for granting further time to the State Government to obtain material and file a reply to this application dated 1st September, 1969.

2. In view of the facts mentioned above, it is clear that the validity of the order of detention dated 29th August, 1968, which was first challenged in the petition, has become immaterial because the petitioner is now under detention by virtue of the fresh order dated 28th August, 1969 served on him on 29th August, 1969. In the counter-affidavit filed it was stated that the first order of detention dated 24th April 1968 had automatically lapsed, because that order did not receive the approval of the State Government within 12 days as required by Section 3 (3) of the Act. This admission would indicate that, after the expiry of those 12 days, the petitioner's detention was not justified by any valid order passed in law until the second detention order was served on him on the 30th August, 1968 after releasing him from custody. However, in the present writ petition, we are not concerned with the effect of this procedure adopted by the State Government, because, even if it be assumed that the second order of detention was validly served on the petitioner on 30th August, 1968, the period of that detention expired on 28th August, 1969 in view of Section 11-A of the Act which prescribes a maximum period of 12 months for detention under the Act on the basis of an order passed under Section 3 of the Act. On 29th August, 1969, the detention under the second order dated 29th August, 1968 having expired, the State Government passed this third order of detention and served it on the petitioner while he was still in custody in Delhi. The question is whether the further detention under this third order is valid.

3. The provision contained in Section 11-A (2) of the Act clearly lays down the intention of Parliament that, on the basis of grounds found to exist at one time, the maximum period of detention under Section 3 should be 12 months and no more. On the expiry of that period, that order of detention would lapse; but a fresh order of detention is permitted to be passed under Section 13 (2) of the Act which is as follows:—

"13. (2) The revocation or expiry of a detention order shall not bar the making of a fresh detention order under Section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an officer, as the case may be, is satisfied that such order should be made." This provision clearly lays down that a fresh detention order can be made on the revocation or expiry of a previous detention order only in cases where fresh facts have arisen after the date of revocation or expiry. This principle was explained by this Court in *Hadibandhu Das v. District Magistrate, Cuttack*, AIR 1969 SC 43, where it was held:

"On January 28, 1968, the State of Orissa purported to revoke the first order and made a fresh order. The validity of the fresh order dated January 28, 1968, made by the State of Orissa is challenged on the ground that it violates the express provisions of Section 13 (2) of the Preventive Detention Act. In terms that sub-section authorises the making of a fresh detention order against the same person against whom the previous order has been revoked or has expired in any case where fresh facts have arisen after the date of revocation or expiry, on which the detaining authority is satisfied that such an order should be made. The clearest implication of Section 13 (2) is that after revocation or expiry of the previous order, no fresh order may issue on the grounds on which the order revoked or expired had been made. In the present case, the order dated December 15, 1967, passed by the District Magistrate, Cuttack, was revoked on January 28, 1968, and soon thereafter a fresh order was served upon the appellant. It is not the case of the State that

any fresh facts which had arisen after the date of revocation on which the State Government was satisfied that an order under Section 3 (1) (a) (ii) may be made. There was a fresh order but it was not based on any fresh facts."

In view of this decision, we have to see whether, in the present case, the requirements laid down by Sec. 13 (2) of the Act for making a fresh order were or were not satisfied. The main requirement is that the order must be made not merely on the past grounds, but on fresh facts which have arisen after the date of expiry.

4. In the present case, we have compared the grounds of detention served in pursuance of the order dated 28th August, 1969, with the grounds of detention which were served on the petitioner in pursuance of the second detention order dated 29th August, 1968, and we find that the two are identical, except that two small paragraphs have been added when serving the grounds of detention in respect of the detention order dated 28th August, 1969. These paragraphs are as follows:

"That though in preventive custody, he has been maintaining links with Shah Syed Hussain and other associates, who went underground in Nagaland, through his friends and relatives. Shah Syed Hussain and his gang since received some arms and explosives from Naga rebels for committing acts of sabotage and creating large-scale disturbances, particularly in the plains areas along Assam-Nagaland border.

That, in the circumstances, Shri Kshetra Gogoi's being at large will jeopardise the security of the State and the maintenance of public order in this region."

The first one of these two paragraphs is the only one that purports to mention some ground in addition to the grounds which were included amongst the grounds which were the basis of the order dated 29th August, 1968. We have found it very difficult to appreciate how a person in preventive custody could continue to maintain links with his associates outside jail who had gone underground even through his friends and relatives. If the present petitioner was able to maintain such links, it casts a sad reflection on the persons in charge of

him while he was in custody and, in any case, it would appear that his detention could serve no useful purpose. It appears to us to be, in fact, very doubtful whether any such contacts could possibly have been maintained. However, even if we accept that such links were maintained, this additional ground mentioned does not satisfy the requirements of Section 13 (2) of the Act, because the only allegation is that the links were maintained during the period of preventive detention. Under Section 13 (2) what is required is that fresh facts should have arisen after the expiry of the previous detention. Facts arising during the period of detention are, therefore, not relevant when applying the provisions of Section 13 (2). In the present case, the fresh order was passed on 28th August 1969, a day before the expiry, and it is obvious that no fresh facts could by that date arise and yet be held to have arisen after the date of expiry. The order dated 28th August, 1969 was therefore, not at all justified under Section 13 (2) of the Act and that order being in violation of the provisions of the Act has to be held to be invalid, so that the detention under that order is illegal. The petition is allowed. The petitioner shall be set at liberty forthwith.

Petition allowed.

AIR 1970 SUPREME COURT 1667 (V 57 C 356)

(From Madras: AIR 1967 Mad 12)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

The Commissioner of Income-tax, Madras, Appellant v. S. S. Sivan Pillai and others, Respondents.

Civil Appeals Nos. 2321-2324 of 1966, D/-29-4-1970.

Income-tax Act (1922), S. 15-C (1) and (4) — Shareholder claiming exemption under cl. (4)—Company claiming exemption under cl. (1) on its taxable profits is condition precedent—Profits by company after allowing for depreciation but showing loss after setting off unabsorbed depreciation for previous year — Payment of dividends out of profits — Shareholders cannot claim exemption under Section

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15-C (4) — AIR 1967 Mad 12, Reversed.

A company, an industrial undertaking, to which Section 15-C applied, distributed dividend to its shareholders out of the business profits earned by it in the years ending December 31, 1953 and December 31, 1954. The company, however, carried in its accounts a large balance of unabsorbed depreciation admissible under Section 10 (2) (vi) and Section 10 (2) (vi-a) and on that account it had no taxable income in the relevant assessment years. In assessing the income of the shareholders for the assessment years the Income-tax Officer rejected their claim for exemption from tax under Section 15-C (4) and brought the dividend income to tax.

Held, that the shareholders could not claim exemption from tax under Section 15-C (4). Exemption under Section 15-C (1) from payment of Income-tax is not related to the business profits of the company. It is related to its taxable profits. Even if the undertaking has earned profits out of its commercial activity, if it has no taxable profits, it cannot claim exemption from payment of tax under sub-section (1) of Section 15-C; and if the undertaking cannot claim the benefit of sub-section (1), shareholders will not get benefit under sub-section (4) for there is no dividend paid which is attributable to that part of the profits or gains on which the tax was not payable by the undertaking. The right of the shareholders to obtain the benefit of exemption under S. 15-C (4) depends upon the company obtaining the benefit of exemption under cl. (1) of Section 15-C. AIR 1967 Mad 12, Reversed. (Paras 6, 7, 9, 12)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 1167 (V 53) = (1966) 59 ITR 555, Commr. of Income-tax, Calcutta v. Jaipuria China-clay Mines (P.) Ltd. 10, 11

The following Judgment of the Court was delivered by:

SHAH, J.—Sri Ganapathy Mills Co. Ltd. distributed dividend to its shareholders out of the business profits earned by it in the years ending December 31, 1953 and December 31, 1954. The Company, however, carried in its accounts a large balance of unabsorbed depreciation admissible under Section 10 (2) (vi) and Section

10 (2) (vi-a) of the Income-tax Act, and on that account it had no taxable income in the relevant assessment years 1954-55 and 1955-56.

2. In assessing the income of the shareholders for the assessment years 1955-56 and 1956-57 the Income-tax Officer rejected their claim for exemption from tax under S. 15-C (4) of the Income-tax Act, 1922, and brought the dividend income to tax. This order was confirmed by the Income-tax Appellate Tribunal.

3. The Tribunal referred the following question to the High Court of Madras for opinion:

“Whether on the facts and in the circumstances of the case, the assessee is entitled to the benefit of S. 15-C (4) in respect of the dividend income received from Sri Ganapathy Mills Co. Ltd., Tinnevely?”

The High Court answered the question in the affirmative. The Commissioner of Income-tax has appealed to this Court with a certificate under section 66A (2) of the Income-tax Act.

4. In the year ending December 31, 1953, the Company had earned in its business transactions a profit of Rs. 87,184/-, but it had no taxable profits, for the depreciation for the current and the previous years amounted to Rs. 2,83,343/- which was an admissible allowance in the computation of income under section 10 of the Income-tax Act. Since full effect could not be given to the allowance, the Company was entitled to add to the depreciation for the following year the unabsorbed depreciation of Rs. 1,96,159/- under S. 10 (2) (vi) proviso (b). In the year ending December 31, 1954, the Company earned a profit of Rs. 4,36,821/- and the depreciation admissible for the year was Rs. 2,41,809/-. Taking into account the unabsorbed depreciation of the previous year in computing the taxable income, it was found that the Company had suffered a loss of Rs. 1,147/-. Accordingly the Company had no taxable profits in either of the two years and no tax was levied from the Company. But the Company had still distributed dividend out of profits earned by it and the taxing authorities levied tax on the dividend received by the shareholders.

5. The answer to the question referred to the Tribunal depends

upon the true interpretation of S. 15-C of the Indian Income-tax Act, 1922. Section 15-C of the Income-tax Act, insofar as it is relevant, provides:

"(1) Save as otherwise hereinafter provided, the tax shall not be payable by an assessee on so much of the profits or gains derived from any industrial undertaking to which this section applies as do not exceed six per cent per annum on the capital employed in the undertaking, computed in accordance with such rules as may be made in this behalf by the Central Board of Revenue.

(2) x x x x x

(3) The profits or gains of an industrial undertaking to which this section applies shall be computed in accordance with the provisions of section 10.

(4) The tax shall not be payable by a shareholder in respect of so much of any dividend paid or deemed to be paid to him by an industrial undertaking as is attributable to that part of the profits or gains on which the tax is not payable under this section.

x x x

The Company was an industrial undertaking to which section 15-C applied. It had in the two relevant years derived from the industrial undertaking no profits or gains within the meaning of sub-s. (1) read with sub-s. (3) of section 15-C. The profits or gains derived from the industrial undertaking within the meaning of sub-s. (1) of S. 15-C are not business profits: they are taxable profits computed in accordance with the provisions of section 10 of the Income-tax Act. Under section 15-C (1) no tax is payable by the industrial undertaking on its taxable profits equal to six per cent per annum of the capital employed. Sub-section (4) of section 15-C exempts the shareholders of an industrial undertaking to which section 15-C applies, from liability to pay tax in respect of the dividend paid or deemed to be paid as is attributable to that part of the profits or gains on which the tax is not payable under S. 15-C (1).

6. Exemption under section 15-C (1) from payment of income-tax is not related to the business profits: it is related to the taxable profits. The language of sub-section (3) is clear: the profits or gains of an industrial undertaking have to be determined under section 10 of the Act. Even if

the undertaking has earned profits out of its commercial activity, if it has no taxable profits it cannot claim exemption from payment of tax under sub-section (1) of section 15-C and if the undertaking cannot claim the benefit under sub-section (1) the shareholders will not get the benefit of sub-section (4), for there is no dividend paid which is attributable to that part of the profits or gains on which the tax was not payable by the undertaking.

7. The Company had no taxable profit in the year of account it did not accordingly qualify for exemption from payment of tax under sub-section (1), and since there was no such taxable profit, the dividend received by the shareholders could not be said to be attributable to that part of the profits or gains on which the tax was not payable under sub-section (1). On the plain terms of section 15-C the shareholders cannot obtain the benefit of exemption from payment of tax.

8. We are unable to agree with the High Court that in determining the profits of the Company the unabsorbed depreciation of the previous years will not be taken into account. Section 10 of the Income-tax Act, insofar as it is relevant, provides:

"(1) The tax shall be payable by an assessee under the head "profits and gains of business, profession or vocation" in respect of the profits or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely:

x x x x x

Clause (vi) deals with depreciation allowance in respect of buildings, machinery, plant or furniture being the property of the assessee, at a sum equivalent to such percentage on the original cost thereof as may be prescribed. Under clause (vi-a) in respect of buildings newly erected, or of machinery or plant being new which had been installed after March 31, 1948, a further sum which is deductible in determining the written down value equal to the amount admissible under clause (vi) is allowable. If the depreciation under cls. (vi) and (vi-a) cannot be given full effect in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance,

then subject to the provisions of cl. (b) of the proviso to sub-s. (2) of section 24, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance. It is clear from the terms of the proviso that unabsorbed depreciation of an year is to be deemed depreciation for the succeeding year into the account of which it is carried forward, and the aggregate of the depreciation for the year of assessment and the unabsorbed depreciation of the previous year is deemed to be depreciation allowance for the year of assessment. The High Court, however, said that in computing the profits of the year of an industrial undertaking for determining whether the benefit of exemption under S. 15-C (1) is admissible, the unabsorbed depreciation cannot be taken into account. The High Court observed:

"In effect, in computing the profits or gains for the purpose of section 15-C (1) and (4), the only allowances that could be made in respect of current profits are current year's depreciation under S. 10 (2) (vi) and current year's additional or extra depreciation under section 10 (2) (vi-a). The set off of losses under section 24 (2) and allowances in respect of unabsorbed depreciation both under section 10 (2) (vi) and 10 (2) (vi-a) would not enter into the computation under section 15-C (3).

It is true that when the net result of assessment on the company is taken there is 'nil' profit and there might be no occasion at all for the application of section 15-C. But, in our view, it does not follow from that that on that ground the benefit of that section can be denied to the shareholders if on a computation of the profits and gains of the industrial undertaking under Section 15-C (3), the company had made profits out of which dividends had been paid to its shareholders. Where the company has 'nil' profits under its final assessment, the non-application of section 15-C is not due to the fact that it made no profits and it was not entitled to the benefit of section 15-C (1). But, in view of the overall result of the assessment, there is no need for the company to claim exception under that

provision, as there is no tax liability at all. Viewed from this angle, we consider that the shareholders are entitled to take the position of the profits or gains of the company as computed under sub-section (3) of section 15-C and subject to the limits provided by that sub-section, and claim the benefit under section 15-C (4)."

The opinion of the High Court that in computing the profits of an industrial undertaking under section 10, unabsorbed depreciation for the previous years must be ignored, is inconsistent with the plain terms of S. 10 (2) (vi) proviso (b). Again the assumption that the right to claim allowance of unabsorbed depreciation arises out of section 24 (2) of the Act is in our judgment erroneous. Under the scheme of section 15-C the profits or gains of an industrial undertaking must be determined under and in the manner provided by S. 10 of the Income-tax Act. For that purpose all the allowances under sub-section (2) must be taken into account, and the resultant amount forms a component of the taxable profit. If by proviso (b) to section 10 (2) (vi) the unabsorbed depreciation of the previous year is deemed depreciation for the subsequent year, there is no room for making any distinction between the unabsorbed depreciation for the previous year and the depreciation for the current year. The right to appropriate the profits towards the unabsorbed depreciation of the previous year does not arise under Section 24 (1), it arises by virtue of Section 10 (2) (vi) proviso (b).

9. We are also unable to agree with the High Court that if an industrial undertaking has distributed dividend, the shareholders will be entitled to exemption from payment of tax on that dividend, even if the Company is not entitled to claim exemption from liability to pay tax under sub-section (1) of section 15-C. The right of the shareholders to obtain the benefit of exemption under S. 15-C (4) depends upon the Company obtaining the benefit of exemption under sub-section (1) of section 15-C, for the exemption from payment of tax on the dividend received by the shareholders is admissible only on that part of the profits or gains on which the tax is not payable by the Company under sub-s. (1).

10. Section 24 (2) proviso (b) on which reliance was placed has, in our judgment, no application. That proviso enacts:

"Provided that—

(b) where depreciation allowance is, under clause (b) of the proviso to clause (vi) of sub-section (2) of section 10, also to be carried forward, effect shall first be given to the provisions of this sub-section."

Sub-section (2) of section 24 deals with "the carry-forward of losses" and proviso (b) to section 24 (2) sets out the sequence in which the losses carried forward and the depreciation allowance which remains unabsorbed in the previous year are to be allowed. Whether any practical effect may be given to the terms of proviso (b) to S. 24 (2), in the view which this Court has taken in Commr. of Income-tax, Calcutta v. Jaipuria China Clay Mines (P) Ltd. (1966) 59 ITR 555 = (AIR 1966 SC 1187) is a matter on which we need express no opinion. If on its plain terms, proviso (b) to S. 34 (2) deals merely with priority and does not convert what is unabsorbed depreciation of the previous year which is deemed to be depreciation for the current year into loss for the purpose of carry-forward, sub-section (2) of section 24 proviso (b) presents no difficulty in the present case.

11. This Court in Jaipuria China Clay Mines' case, (1966) 59 ITR 555 = (AIR 1966 SC 1187) held that unabsorbed depreciation of past years cannot be kept out of accounts in determining the net income of an assessee for a particular year: it has to be set off against the profits from other heads. In that case the assessee had for the year 1952-53 a total business income of Rs. 14,000 odd and the depreciation amounted to Rs. 5,360/-. The assessee company had a large dividend income. The tax-payer claimed that the unabsorbed depreciation of the previous year should be deducted from the dividend income and the total income liable to tax be reduced. The Income-tax Officer rejected the claim. This Court observed that the Income-tax Act draws no distinction between the various allowances mentioned in section 10 (2); they all have to be deducted from the gross profits and gains of a business. Accordingly the unabsorbed depreciation of the past years must be added to the de-

preciation of the current year, and the aggregate of the unabsorbed depreciation and the current year's depreciation must be deducted from the total income of the year relevant to the assessment year in question. If the profits do not wipe out the depreciation, the profit and loss account would show a loss. The Court further observed that carry-forward of depreciation is provided for in S. 10 (2) (vi), and section 24 (2) only deals with losses other than the losses due to depreciation. That decision clearly establishes that depreciation in respect of a business has in the first instance to be set off as an allowance against the profits from the business, profession or vocation. If the depreciation exceeds the profits and there is no other income from any other head, the depreciation may be carried forward to the next year. If there is a profit from some other head, then the unabsorbed depreciation of a particular year under the head "profits and gains of the business, profession or vocation" will be set off against such other income.

12. In the case in hand, the Company had no other source of income. The depreciation allowance admissible in the assessment years exceeded the business profits. The Company had no taxable profit in the two years in question. The Company could not claim exemption from payment of tax provided in S. 15-C (1); and no dividend having been distributed out of the taxable profits, there was no dividend attributable to that part of the profits which were exempt from tax in the hands of the shareholders. The answer to the question submitted by the Tribunal is recorded in the negative.

13. The appeals must therefore be allowed. Having regard to the circumstances of the case, the parties will bear their own costs in this Court and in the High Court.

Appeals allowed.

AIR 1970 SUPREME COURT 1672
(V 57 C 357)

(From Orissa: ILR (1966) Cut. 152)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Orissa Cement Ltd., Appellant v.
State of Orissa and another, Respondents.

Civil Appeal No. 2191 of 1966, D/-
22-4-1970.

Sales Tax — Central Sales Tax Act
(1956), S. 9 (3) — Right of assessee
under Act to rebate provided in Section
13 (8), Orissa Sales Tax Act.

In view of Section 9 (3) of the Central Act, the rebate provided in Section 13 (8) of the Orissa Act is payable to the assessee under the Central Act, if they pay the tax assessed within the prescribed time. The power to collect the tax assessed in the same manner as the tax on the sale and purchase of goods under the general Sales Tax law of the State provided in Section 9 (3) of the Central Act includes within itself all concessions given under the Orissa Act for payment within the prescribed time. The rebate is offered to facilitate and expedite collection. It is intended to stimulate the collection. Therefore, it is a part of the process of collection. ILR (1966) Cut 152, Reversed.

(Para 5)

The following Judgment of the Court was delivered by—

HEGDE J.: In this appeal by special leave, the question for consideration is whether the appellant is entitled to the rebate provided in Section 13 (8) of the Orissa Sales Tax Act, 1947, as amended by Orissa Sales Tax (Amendment) Act, 1962 (to be hereinafter referred to as 'the Orissa Act') read with Section 9 (3) of the Central Sales Tax Act, 1956 (to be hereinafter referred to as 'the Central Act').

2. The appellant is an incorporated company and it is a registered dealer under the Central Act. The appellant company was assessed to sales tax under the Central Act for the two quarters ending 31st December 1962 and 31st March, 1963. During the first quarter its tax liability was Rupees 62,061-86 P. and during the second quarter its tax liability was Rupees 47,266-21 P. The tax levied was paid

by the assessee within the time fixed under Section 13 (4) (d) of the Orissa Act.

3. Section 13 (8) of the Orissa Act provides:

"A rebate of one per centum on the amount of tax payable by a dealer shall be allowed if such tax is paid by the dealer on or before the due date of payment."

4. Section 9 (3) of the Central Act as it stood at the relevant time provided:

"The authorities for the time being empowered to assess, collect and enforce payment of any tax under the general sales tax law of the appropriate State shall, on behalf of the Government of India, and subject to any rules made under this Act, assess, collect and enforce payment of any tax including any penalty payable by a dealer under this Act, in the same manner as the tax on the sale and purchase of goods under the general sales tax law of the State is assessed, paid and collected and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law including the provisions relating to returns, appeals, reviews, revisions, references, penalties and compounding of offences, shall apply accordingly."

5. The question for consideration is whether in view of Section 9 (3) of the Central Act, the assessee is entitled to the rebate provided in Section 13 (8) of the Orissa Act. Quite clearly the rebate for payment of the tax levied within the time prescribed under the Orissa Act was provided as a stimulus for prompt payment. The question is whether such a stimulus is a part of the manner of collection. The rebate is offered to facilitate and expedite collection. It is intended to stimulate the collection. Therefore, it is a part of the process of collection. In that view, it is proper to hold that in view of Section 9 (3) of the Central Act, the rebate provided in Section 13 (8) of the Orissa Act is payable to the assessee under the Central Act, if they pay the tax assessed within the prescribed time. The power to collect the tax assessed in the same manner as the tax on the sale and purchase of goods under the General Sales Tax law of the State provided in Section

9 (3) of the Act includes within itself all concessions given under the Orissa Act for payment within the prescribed time.

6. For the reasons mentioned above, we allow this appeal and set aside the order of the High Court and issue a direction to the respondents to grant to the appellant the rebate provided in Section 13 (8) of the Orissa Act. The respondents shall pay the costs of the appellant both in this Court as well as in the High Court.

Appeal allowed.

AIR 1970 SUPREME COURT 1673
(V 57 C 358)

(From: Madras)*

V. BHARGAVA, K. S. HEGDE AND A. N. RAY, JJ.

Tahsil Naidu and another, Petitioners v. Kulla Naidu and others, Respondents.

Civil Appeal No. 1795 of 1966, D/-18-9-1969.

(A) Hindu Law — Adoption — Madras School — Adoption by widow — Consent of sapindas is an assurance that the adoption was for spiritual benefits — In such a case motive of widow need not be enquired into— (Held that apart from consent of kinsman, there was sufficient evidence that adoption was made for spiritual benefit). AIR 1963 SC 185, Foll.

(Para 6)

(B) Hindu Law — Adoption—Adoption by widow with consent of sapindas — Consent implies conscious consent, i.e., given after applying mind that it was for spiritual benefit of husband.

The very fact that consent is given by a sapinda to the adoption by the widow implies that the adoption is considered desirable and is being resorted to by the widow for spiritual and religious considerations and not out of caprice. Every sapinda knows that, as soon as an adoption is made, spiritual benefit will accrue to the deceased husband and that the existence of the adopted son will perpetuate his line. Such consciousness is implied in

*Appeals Nos. 66 and 166 of 1958, D/-1-3-1962—Madras.)

DN/EN/E849/70/RGD/T

giving the consent. It is only when the consent is being refused by a sapinda that it becomes relevant to see whether the refusal was justified on the ground that the adoption was not being made with such objects. A consent would, no doubt, be of no value for validating an adoption if the person giving the consent has his own personal motives. (Para 11)

(C) Hindu Law — Adoption—Madras School — Adoption by widow having no authority from deceased husband— Requirement of consent of sapindas— Consent of majority would be sufficient. (Para 10)

(D) Hindu Law — Adoption—Madras school — Adoption by widow — Consent of sapindas — Consent must be of male sapindas — Absence of consent of female sapinda is immaterial. Appeals Nos. 66 and 166 of 1958, D/-1-3-1962 (Madras), Reversed.

The requirement for consent of a sapinda for adoption by a widow who has not obtained the consent of her husband in his lifetime was laid down, because Hindu Law considers a woman incapable of independent judgment and proceeds on the basis that a woman is likely to be easily misled by undesirable advisers. If a woman is incapable of exercising independent judgment in the matter of deciding whether she should adopt a son to her deceased husband, she can hardly be a competent adviser to another widow on the same matter. Consequently, absence of consent of female sapinda, when other male sapindas have consented, would not invalidate the adoption. (1867) 12 Moo Ind App 397 (PC) and AIR 1918 PC 97 and AIR 1947 PC 124 and AIR 1916 Mad 919 (2) and AIR 1925 Mad 497, Explained: Appeals Nos. 66 and 166 of 1958; D/-1-3-1962 (Madras), Reversed.

(Paras 13, 19)

Cases Referred: Chronological Paras (1963) AIR 1963 SC 185 (V 50)= 1963-2 SCR 440, Chandra-sekhara Mudaliar v. Kulandai-velu Mudaliar 5, 12

(1957) AIR 1957 Andh Pra 933 (V 44) = 1955 Andh WR 948, K. Varadamma v. Sankara Reddi 17

(1949) AIR 1949 Mad 745 (V 36)= 1949-1 Mad LJ 552 Venkata-rayudu v. Sashamma 5

- (1947) AIR 1947 PC 124 (V 34)=
74 Ind App 162, G. C. Rama-
subbayya v. Maparthi Chenchu-
ramayya 17, 18
(1925) AIR 1925 Mad 497 (V 12)=
ILR 48 Mad 1, Maharaja of
Kolhapur v. S. Sundaram Ayyar 16
(1918) AIR 1918 PC 97 (V 5) =
45 Ind App 265, Veera Basava-
raju v. Balasurya Prasada Rao 12,
17, 18
(1916) AIR 1916 Mad 919 (2) (V 3)=
ILR 39 Mad 772, Rajah Damara
Kumara Venkatappa Nayanam
Bahadur Varu v. Damara Ranga
Rao 15
(1876) 3 Ind App 154=ILR 1 Mad
69 (PC), Raghanadha v. Brojo
Kishoro 12
(1867) 12 Moo Ind App 397 = 1
Beng LR 1 (PC), Collector of
Madura v. Moottoo Ramalinga
Sethupathy 12, 16

Mr. S. T. Desai, Senior Advocate
(M/s. B. Datta and K. Jayaram, Advo-
cates, and M/s. J. B. Dadachanji, O. C.
Mathur and Ravinder Narain, Advo-
cates of M/s. J. B. Dadachanji and Co.
with him), for Appellants; Mr. A. K.
Sen, Senior Advocate (M/s. T. V. Bala-
krishnan and Naunit Lal, Advocates
with him) (for Nos. 1 and 2) and Mr.
Gopalakrishnan, Advocate (for Nos. 5,
7 and 8), for Respondents.

The following Judgment of the Court
was delivered by

BHARGAVA, J.—This appeal arises
out of a suit for partition instituted by
the two appellants claiming a share
in the joint Hindu family property as
successors-in-interest of one Kothan-
daraman alias Kumarasami Naidu who
died in the year 1943. When Kothan-
daraman died, he, his father Rangappa
Naidu, his uncle Ramasami Naidu, and
the latter's son Kullan alias Kumara-
swami formed a joint Hindu family.
Kothandaraman died leaving his widow
Nagarathinammal who was plaintiff
No. 2 and is appellant No. 2 in this
appeal. His father Rangappa Naidu
was also alive, but he died in the year
1944. On the death of Rangappa
Naidu, Ramasami Naidu, his brother,
became the 'karta' of the joint family
which included his son, Kullan alias
Kumarasami and plaintiff No. 2, the
widow of Kothandaraman. Ramasami
Naidu executed a will on 11th July,
1949 bequeathing portions of the joint
family properties to various members

of the family, because he was in actual
possession of all the properties. Sub-
sequently, in the same year 1949,
Ramasami Naidu died. Some of the
properties were transferred by persons
who took possession of the properties
in accordance with the will of Rama-
sami Naidu. Then, according to the
plaintiff No. 2, she on 26th January
1955, adopted plaintiff No. 1, Tahsil
Naidu, as a son and partition of the
property was claimed on the basis
that, after his adoption, Tahsil Naidu
was entitled to a half share in the pro-
perties of the joint family. It was
further urged that the will made by
Ramasami Naidu was void and in-
effective, and that the various trans-
fers of the properties were also not
binding on him. The suit was insti-
tuted by the two plaintiffs because
defendant No. 1 Kullan alias Kumara-
swami Naidu, who was under the
guardianship of his mother Jayammal,
defendant No. 2, refused to recognise
the adoption, challenged its validity
and did not accede to the request to
give a share in the property to the
plaintiffs. The main question that
arose in the suit for decision was
whether the adoption of plaintiff No. 1
by plaintiff No. 2 was valid.

2. It was the admitted case of the
parties that Kothandaraman had died
without giving any authority to his
wife Nagarathinammal to adopt a son.
The claim on behalf of the plaintiffs
was that, even in the absence of auth-
ority from her husband, plaintiff No. 2
was entitled to adopt a son after ob-
taining the consent of the nearest
sapindas of her husband. The case
put forward was that she gave a notice
to Jayammal and Kullan minor to
give their consent to the adoption of
plaintiff No. 1 who was the son of
Damodaran, brother of plaintiff No. 2,
and who was further the son of the
real sister of Kothandaraman. How-
ever, without waiting for any consent
being given by Jayammal, plaintiff
No. 2 proceeded with the adoption
after obtaining consent of the next
three nearest Sapindas, Rangappa
Naidu, Devarajulu and Umavadan
alias Rangan. Though, at the first
stage, there was some dispute about
the pedigree, by the time the case
came up before the High Court the
pedigree, which was set up on behalf
of the appellants in the plaint, was
accepted as correct. According to that

pedigree, when Kothandaraman died, and even when the adoption took place, his grandmother Ammakutti Ammal was also alive. She, in fact, died after the institution of the suit. Apart from her, Kullan and Jayammal, the nearest Sapindas of Kothandaraman at the time of adoption were Rangappa Naidu, Devarajalu and Umavadan. The plaintiffs, therefore, claimed that the adoption was made with their consent as, under the Hindu Law applicable in Madras, it was not necessary to obtain the consent either of the minor Kullan, or of the two females Jayammal, widow of Ramasami Naidu, and Ammakutti Ammal, grandmother of Kothandaraman.

3. The suit was resisted on behalf of the defendants challenging the validity of the adoption on two grounds. The first ground was that, in fact, the consent to the adoption was not obtained from Rangappa, Devarajalu and Umavadan as pleaded on behalf of the plaintiffs and, in any case, if the consent was obtained, it was not properly given by these Sapindas after exercising their independent judgment as required, so that the consent could not validate the adoption. The second ground was that, admittedly, Ammakutti Ammal, the grandmother of Kothandaraman, was also a sapinda and nearer in degree to the three persons consulted. Since her consent was never obtained, the adoption must be held to have been resorted to without the consent of the nearest sapinda and was consequently, invalid.

4. The trial Court held that the adoption was valid, and consequently, granted a preliminary decree for partition. The High Court of Madras, in appeal, differed from the trial Court. On the first question, the High Court did not express a definite opinion in its judgment and contented itself with stating that it is probable that the adoption was thought of by plaintiff No. 2 more with an idea of getting the properties than being actuated by a genuine religious motive and, further, that it was doubtful whether the plaintiffs had succeeded in proving that the adoption was made with the consent of the three sapindas, Rangappa Naidu, Devarajalu and Umavadan. On the second point, how-

ever, the High Court accepted the plea put forward on behalf of the defendants that it was necessary for the adoption to be valid that the consent of Ammakutti Ammal, the grandmother of Kothandaraman, should have been obtained even though she was a female sapinda. The High Court repelled the contention of the plaintiffs-appellants that it was not necessary to obtain the consent of female sapindas for a valid adoption and that Hindu law only requires consent of the nearest male sapindas. On this view the High Court allowed the appeal, set aside the decree passed by the trial Court and dismissed the suit of the plaintiffs. Consequently, the plaintiffs have come up to this Court in this appeal by certificate under Article 133 of the Constitution.

5. On the first point, Mr. S. T. Desai appearing on behalf of the appellants, drew our attention to the decision of this Court in *V. T. S. Chandrasekhara Mudaliar v. Kulandaivelu Mudaliar*, 1963-2 SCR 440 = (AIR 1963 SC 185), which appears to be the only case in which this Court had occasion to lay down the principles which applied to adoption in Madras. The Court, in dealing with that case, reviewed the various decisions given by the Madras High Court and the Privy Council and indicated the principles that must be applied when judging the effect of consent of sapindas on the validity of an adoption. In that case, a conditional consent had been given by some of the sapindas, whereas some others had refused to give consent to the adoption, and the controversy centered round the question whether the consent given by some and refusal by others was proper. The Court indicated that such a question depended for its solution on the answer to five inter-related questions which were formulated as follows:—

(1) What is the source and the content of the power of the widow to adopt a boy?

(2) What is the object of adoption?

(3) Why is the condition of consent of the sapindas for an adoption required under the Hindu law for its validity?

(4) What is the scope of the power of the sapindas to give consent to an

adoption by a widow and the manner of its exercise? and

(c) What are the relevant circumstances a sapinda has to bear in mind in exercising his power to give consent to an adoption?

The Court took into consideration the decisions till then rendered which had bearing on these questions and, consequently, we do not consider it at all necessary to again discuss all those cases. On the first question, the Court held that a widow, either authorised by her husband to take a boy in adoption, or after obtaining the assent of the sapindas, has full discretion to make an adoption, or not to make it, and that discretion is absolute and uncontrolled. She is not bound to make an adoption and she cannot be compelled to do so. But, if she chooses to take a boy in adoption, she acts as a delegate or representative of her husband and her discretion in making the adoption is strictly conditioned by the terms of the authority conferred on her by her husband; but, in the absence of any specific authority, her power to take a boy in adoption, is coterminous with that of her husband, subject only to the assent of the sapindas. Dealing with the next question, the Court held that it may safely be held on the basis of the authorities that the validity of an adoption has to be judged by spiritual rather than temporal considerations and that devolution of property is only of secondary importance. It is the answer to the third and fourth questions with which we are primarily concerned. On the third question, the Court held that the reason for the rule of obtaining consent of the sapindas is not the possible deprivation of the proprietary interests of the reversioners but the state of perpetual tutelage of women, and the consent of kinsmen was considered to be an assurance that it was a bona fide performance of a religious duty and a sufficient guarantee against any capricious action by the widow in taking a boy in adoption. Dealing with the fourth question, the Court quoted with approval the observations of Rajamannar, C.J., in *Venkatarayudu v. Sashamma*, AIR 1949 Mad 745, to the following effect:—

"As Mayne (Hindu Law, 10th Edn.) remarks at pp. 221 and 222, it is very difficult to conceive of a case, where a refusal by a sapinda can be upheld

as proper. "The practical result of the authorities therefore appears to be that a sapinda's refusal to an adoption can seldom be justified." It may be that in a case where the sapinda refused his consent to the adoption of a boy on the ground that the boy was disqualified, say, on the ground of leprosy or idiocy, the refusal would be proper. In this case, we have no hesitation in holding that the refusal by the plaintiffs on the ground that the proposed boy was not a sapinda or sagotra or a gnati was not proper." Ultimately, the Court summarised its decision as follows:—

"The power of a sapinda to give his consent to an adoption by a widow is a fiduciary power. It is implicit in the said power that he must exercise it objectively and honestly and give his opinion on the advisability or otherwise of the proposed adoption in and with reference to the widow's branch of the family. As the object of adoption by a widow is two-fold, namely, (1) to secure the performance of the funeral rites of the person to whom the adoption is made as well as to offer pindas to that person and his ancestors and (2) to preserve the continuance of his lineage, he must address himself to ascertain whether the proposed adoption promotes the said two objects. It is true that, temporal consideration, though secondary in importance, cannot be eschewed completely but these considerations must necessarily be only those connected with that branch of the widow's family. The sapinda may consider whether the proposed adoption is in the interest of the well-being of the widow or conducive to the better management of her husband's estate. But considerations such as the protection of the sapindas' inheritance would be extraneous; for they pertain to the self-interest of the sapinda rather than the well-being of the widow and her branch of the family. The sapindas, as guardians and protectors of the widow, can object to the adoption, if the boy is legally disqualified to be adopted or if he is mentally defective or otherwise unsuitable for adoption. It is not possible to lay down any inflexible rule or standard for the guidance of the sapinda. The Court which is called upon to consider the propriety or otherwise of a sapinda's refusal to consent to the adoption has

to take into consideration all the aforesaid relevant facts and such others and to come to its decision on the facts of each case."

It is these principles which we are called upon to apply in the present case to decide how far the requirements for a valid adoption have been satisfied when plaintiff No. 2 adopted plaintiff No. 1.

6. When this aspect of the case was being discussed in Court, learned counsel appearing for the respondents put forward the argument that, in the present case, the evidence shows that the motive of the widow, plaintiff No. 2 or, in any case, her dominant motive in making the adoption, was to ensure that a half share in the property of the family comes into the possession of herself and her adopted son, and that the adoption was not made with any spiritual considerations or for the performance of any religious duty. Learned counsel, thus, wanted to challenge the motive of plaintiff No. 2 in adopting plaintiff No. 1. On the other side, the argument was that, once the consent of the nearest sapindas is obtained by a widow, before making an adoption, the question of motive of the widow making the adoption becomes irrelevant and should not be enquired into. The principles laid down in the case cited above show that the consent of a kinsman was considered to be an assurance that the adoption was in pursuance of a bona fide performance of religious duty and would be a sufficient guarantee against any capricious action by the widow in taking the boy in adoption. This principle laid down by this Court, thus, does indicate that the motive of a widow need not be enquired into, because the very fact of the consent being given by the sapindas is a guarantee that the adoption is being made for proper reasons. In the present case, however, we find that, even on facts, the submission made on behalf of the respondents cannot be accepted, because there is evidence to show that the adoption was made by plaintiff No. 2 with the object of proper performance of ceremonies for the benefit of her deceased husband and other ancestors, though plaintiff No. 2 also had in mind the advantage she would receive because her own adopted son would obtain rights to the pro-

perty and she may be better looked after. The intention of the widow, in making the adoption, was clearly expressed by her in the notice Ext. A-2 sent on 6th December, 1954 by her counsel to defendant No. 2 Jayammal who was the guardian of defendant No. 1 Kulla Naidu, the latter being the person who was then holding the family property. It was stated in that notice "that my client is very anxious to adopt a son to her husband Kothandarama Naidu alias Kumaramsami Naidu for securing a good and (son?) to her late husband performing his ceremonies offering oblations perpetuating the progeny (Line) and to save the soul of my client's husband from what is known as 'Puth Narakam'". Similar expression of her intention is contained in another letter Ext. A-4 which was sent by the Advocate on her behalf to one of the Sapindas, Devarajulu Naidu, asking for his consent to the adoption. It has also come in evidence that letters, similar to the one sent to Devarajulu Naidu were also sent to the other two nearest Sapindas Rangappa Naidu and Umavadan in order to obtain their consent. In addition, even in Court, plaintiff No. 2 appeared as a witness and stated on oath that "the adoption was to my husband and for perpetuating and to do the ceremonies". It was argued on behalf of the respondents that, even though these expressions of the reason for adoption by the widow exist in the documents, and in oral evidence, the further facts elicited show that her dominant motive was in fact to obtain possession of property and that the consideration of spiritual benefit to her husband did not exist. It is true that, in cross-examination some facts have been elicited which indicate that considerations relating to material benefit also existed when plaintiff No. 2 decided to make the adoption. She herself admitted that the subject of adoption was broached to her about a year before the adoption by one Ethirajulu Naidu who said that, if she adopted a boy, she would get the property and she could depend on it. According to her, the same person advised her to take plaintiff No. 1 in adoption. Even the consenting sapinda Rangappa, who appeared as a witness, admitted in cross-examination that the second plaintiff had no one to feed her, and her relatives

did not call her; and that was the reason why she made the adoption. These answers elicited in cross-examination do not, however, in our opinion, show that the question of spiritual benefit or performance of religious ceremonies was not one of the considerations in making the adoption. In fact, on the evidence, it appears that Rangappa Naidu, when he gave his consent had been told why plaintiff No. 2 was going to make the adoption in the written letter sent to him; and it seems that his consent was given in view of that consideration, though, in addition, as he has stated on oath, he also took into account the fact of material benefit to plaintiff No. 2.

7. This takes us to the crucial point whether, in this case, the consent of the sapindas that was obtained by plaintiff No. 2 before adopting plaintiff No. 1 was a proper consent which would validate the adoption. Of the three consenting sapindas, Rangappa Naidu was the only one who was examined in court and he clearly stated in his examination-in-chief that he gave his consent in writing, vide letter Ext. A-7. He added that printed invitations were issued in his name and he and his cousin Devarajulu, were present at the adoption. A deed of adoption was written and executed and he and Devarajulu both attested it. He also definitely stated that he made no profit at all out of this adoption, nor was he given any promise that he would get any property by giving his consent to the adoption. To challenge this evidence, learned counsel for the respondents drew our attention to some of the statements made in cross-examination. Rangappa Naidu, when questioned, seems to have admitted that he signed the letter of consent at the place of adoption, even though his consent letter Ext. A-7 purports to have been sent much earlier than the date of adoption. It seems to us that, being an old man of 80 years of age, he had some confusion in his mind about making the signatures on various documents. In his examination-in-chief, he has clearly stated that he had signed the deed of adoption at the time of adoption and it seems that, when cross-examined, he became confused and gave his answer under the impression that that deed of adoption was also the consent letter signed by

him. In our opinion, the statement made in cross-examination that he signed the letter of consent at the place of adoption was really intended to refer to his signatures on the deed of adoption which signatures he must have made after expressing again his consent to the adoption. That his mind was confused appears from the further circumstance that he stated in cross-examination that the name of the boy to be adopted was not mentioned in the invitation issued in his name, though, in fact, the name is actually mentioned. We are, therefore, unable to accept the submission made on behalf of the respondents that the consent of Rangappa Naidu has not been properly proved in this case.

8. Apart from the consent of Rangappa Naidu, the plaintiffs also relied on the fact that consent was also given by the only other two equally remote sapindas Devarajulu and Umavadan. The High Court, in its judgment, appears to have held that the consent of these persons was not proved satisfactorily by the plaintiffs, though the trial Court had taken the contrary view. It is true that, in this case, Devarajulu and Umavadan were not examined. The consent letters signed were, however, put on the file. Devarajulu's signature on the consent letter was proved by Damodaran Naidu who obtained the letter of consent and who is the natural father of plaintiff No. 1. Damodaran Naidu clearly proved that this letter was signed, in his presence by Devarajulu. The High Court expressed the view that this consent letter cannot be taken to be proved on the ground that Devarajulu himself was not examined as a witness, and incorrectly ignored the fact that the document was proved by the evidence of Damodaran Naidu. Reference, in this connection, was also made to the statement of plaintiff No. 2 herself that she had obtained the consent of Devarajulu about a month before she went to the Vakil for advice about adoption and that she did not take the consent from him in writing. The fact that she did not herself obtain the written consent from Devarajulu does not, however, detract from the value to be attached to the written consent which was obtained by her brother Damodaran and not by herself. No doubt

there are some petty discrepancies between the evidence of these witnesses, but we do not think that they are of such a nature as would justify our disbelieving them. In our opinion, the consent of Devarajulu to the adoption was also properly established.

9. In the case of Umavadan, of course, there is a discrepancy that, according to plaintiff No. 2 herself, she obtained his consent when she met him 10 days after the adoption, though the consent letter by him purports to have been signed earlier. This admission was made by plaintiff No. 2 in her cross-examination, and, in view of this admission, we do not think we will be justified in differing from the decision of the High Court that Umavadan's consent has not been properly established. In his case, there was also some argument as to his capacity to give consent. The case seems to have been put forward that he was deaf and dumb and, consequently, incapable of giving evidence, though plaintiff No. 2 herself in her cross-examination made a qualification that Umavadan could hear, though he was dumb. It also appears that he can write and make his signature. It is possible that he may have given his consent in writing when asked orally or in writing, because he could both hear and read; but, as we have said earlier, in view of the admission of plaintiff No. 2 that she obtained his consent 10 days after the adoption, we must disregard the consent given by him. Thus, the adoption is supported by the consent given by two out of three equally near sapindas.

10. The effect of this consent was challenged on two grounds. One was that the consent should have been obtained from all the three and not merely two. In our opinion, the consent of the majority would be sufficient to satisfy the requirement that a widow, in making the adoption should consult the nearest sapindas. It is not essential that the consent should have been obtained from all the three, particularly when Umavadan was at least partially incapacitated as being dumb.

11. The second ground, on which the value of the consent by these sapindas was challenged, was that no evidence has been produced to show that, when giving their consent, they had consciously applied their mind to

the question whether the widow was making the adoption for the performance of a religious duty or for spiritual benefit to the husband of the adoptive mother and his ancestors. As we have indicated earlier, out of the two consenting sapindas, only Rangappa Naidu has been examined and, in his evidence, he has not made any such specific statement. That, in our opinion, is not very material, because, as the principles laid down in various cases show, the very fact that consent is given by a sapinda implies that the adoption is considered desirable and is being resorted to by the widow for spiritual and religious considerations and not out of caprice. Every sapinda knows that, as soon as an adoption is made, spiritual benefit will accrue to the deceased husband and that the existence of the adopted son will perpetuate his line. Such consciousness is implied in giving the consent. It is only when the consent is being refused by a sapinda that it becomes relevant to see whether the refusal was justified on the ground that the adoption was not being made with such objects. The mere omission of counsel in asking Rangappa Naidu whether he had considered the question of spiritual benefit at the time of giving consent cannot, therefore, imply that the consent was given for other considerations. A consent would, no doubt, be of no value for validating an adoption if the person giving the consent has his own personal motives. In the present case, Rangappa Naidu clearly stated that he was not to get any benefit at all out of the adoption of plaintiff No. 1 by plaintiff No. 2. There is also, however, the further fact that, according to the evidence, letters were sent to both Rangappa Naidu and Devarajulu Naidu in which the reason for adoption was expressed by the counsel for plaintiff No. 2. As we have noticed earlier, they gave their written consent in response to those letters, and it can be presumed that the consent was given in view of the object indicated in those letters asking for their consent. There is the further circumstance that, according to the evidence, both Rangappa Naidu and Devarajulu were present at the adoption and signed the adoption deed. They are both literate. The adoption deed clearly mentions the purpose of adoption which is the proper purpose

for a widow in making the adoption; and it would not be unjustified to infer that both these persons had consented to the adoption again at that time in view of the object mentioned in the deed of adoption. On facts also, therefore, it appears to be justified to hold that the consent was given by these two sapindas for proper reasons and the fact that they had given their consent would ensure the validity of the adoption.

12. On the second question, one aspect that has considerable bearing is the reason which led the law-givers in the Hindu Law to insist on the right of a widow to adopt a son being contingent either on conferment of authority on her by her husband, or, in the absence of such authority, on the assent of the nearest sapindas. This question was also considered to some extent by this Court in the case of (1963) 2 SCR 440 = (AIR 1963 SC 185), Chandrasekhara Mudaliar (supra) where the Court began by noticing that the basis for the doctrine of consent may be discovered in the well-known text of Vasisthas:

"Let not a woman give or accept a son except with the assent of her Lord."

The Court then also quoted two texts of Yagnavalkya in Chapter 1, verse 85 and in Chapter 2, verse 130 which are ordinarily relied upon to sustain the said doctrine:

"Let her father protect a maiden; her husband a married woman; sons in old age; if none of these, other gnatis (Kinsmen). She is not fit for independence."

"He whom his father or mother gives in adoption is Dattaka (a son given)."

After noticing briefly the summary of the evolution of the law by subsequent commentators, the Court proceeded to hold that the said doctrine is mainly founded on the state of perpetual tutelage assigned to women by Hindu law expressed so tersely and clearly in the well-known text of Yagnavalkya in Chapter 1, verse 85, quoted above. The Court then took notice of the decision in *Collector of Madura v. Mootoo Ramalinga Sathupathy* and *Connected Cases* (1867) 12 Moo Ind App 397 (PC) (popularly known as, and hereinafter referred to as, the 'Ramnad Case') and referring to it as the leading decision approved of the

observations of Sir James William Colvile who made a real contribution to the development of this aspect of Hindu law which were to the following effect.

"But they (the opinions of Pandits) show a considerable concurrence of opinion, to the effect that, where the authority of her Husband is wanting a Widow may adopt a Son with the assent of his kindred in the Dravida Country."

The Court also indicated that the reason for this rule was clearly stated in that judgment as follows:

"The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption."

In *Veera Basavaraju v. Balasuraya Prasada Rao*, 45 Ind App 265 = (AIR 1918 PC 97) their Lordships of the Privy Council reiterated the observations made in the case of *Raghanadha v. Brozo Kishoro* (1876) 3 Ind App 154 (PC) to the following effect:

"But it is impossible not to see that there are grave social objections to making the succession of property — and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, 'property.' Thus, the entire case-law on the subject clearly indicates that the requirement for consent of a sapinda for adoption by a widow who has not obtained the consent of her husband in his lifetime was laid down, because Hindu law considers a woman incapable of independent judgment and proceeds on the basis that a woman is likely to be easily misled by undesirable advisers. This aspect, in our opinion, has considerable bearing on the question whether a widow making an adoption must or need not obtain the consent of another senior woman in the family who is herself a widow.

13. It seems to us that, if a woman is incapable of exercising independent judgment in the matter of deciding whether she should adopt a son to her

deceased husband, she can hardly be a competent adviser to another widow on the same matter. In the present case, for example, if the grand-mother Ammakutti were to decide to adopt a son she would have to obtain consent of Sapindas in the absence of authority from her deceased husband and that requirement would arise because of her incapacity to exercise independent judgment. If she cannot exercise an independent judgment in the matter of making an adoption herself, it would follow that she would not be able to exercise an independent judgment to advise plaintiff No. 2, her grandson's widow. The advice of a person incapable of independent judgment would hardly ensure that the adoption to be made by a widow is proper and justified. On the principles thus recognised in Hindu law, it would be justified to hold that a Hindu widow, even if she happens to be the nearest sapinda to the widow seeking to make the adoption, would not be a competent adviser and, consequently, there can be no requirement that her consent must be obtained for validating the adoption. The principles clearly point to the conclusion that the consent must be obtained from the nearest male sapinda.

14. Learned counsel appearing for the respondents, in support of the decision of the High Court, drew our attention to the decision of their Lordships of the Privy Council in Ramnad Case where it was held:

"Upon the whole, then, their Lordships are of opinion that there is enough of positive authority to warrant the proposition that, according to the law prevalent in the Dravada Country, and particularly in that part of it wherein the Ramnad zemindary is situate, a Hindoo widow, not having her husband's permission, may, if duly authorised by his kindred, adopt a son to him."

He emphasised the fact that, in laying down this principle, the word used was "kindred" without any qualification whether the kindred should be a male or female. Reliance was also placed on the fact that, in that case, the Privy Council held the adoption made by the widow to be valid, *inter alia*, on the ground that the consent of a senior female kindred had been obtained. In that case, the widow had adopted a son with the consent of a

distant agnate—a samanodaka—who was the natural male protector of the widow in the absence of nearer male relations, as well as with the consent of the mother-in-law and other persons who were proved beyond all question to have assented to the adoption. This second aspect of the decision of the Privy Council in attaching value to the consent of the mother-in-law for purposes of holding the adoption to be valid was, however, based on the peculiar facts and circumstances of that case. Their Lordships found that the mother-in-law was unquestionably the heir to the property next in succession to the widow who was making the adoption, and the mother-in-law had been specifically nominated by the deceased husband to look after his widow. He had addressed a letter to the Collector of the District in which he specifically stated that he had made arrangement that his mother, who was his guardian in every respect, and who had held chief right to the zemindary, was to enjoy the zemindary and all other things; was to pay peishkist to the Cirkar, and was to maintain his royal wife, his daughter, and her younger sister; a small child; when the children grew up and attained proper age, she was to make an arrangement with regard to their right to the zemindary, and continue the same. In that case, therefore, it is clear that the opinion of the mother-in-law was considered of some importance by the Privy Council because of this special authority granted to her by the husband of the widow in his own lifetime. The case cannot be taken as deciding that, in every case, the consent of a mother-in-law would be competent to make an adoption valid, or that, in order to make a valid adoption, her consent must be obtained on the ground that she is the nearest kindred alive.

15. On this aspect of the Ramnad Case, in order to strengthen his argument, learned counsel referred to a decision of the Madras High Court in *Rajah Damara Kumara Venkatappa Nayanam Bahadur Varu v. Damara Ranga Rao*, ILR 39 Mad 772 = (AIR 1916 Mad 919 (2)) in which it was held that an adoption by a junior widow without the consent of the senior widow was bad and could not be held to be valid. It was argu-

ed by the counsel in that case that the senior widow was entitled to be consulted as one of the kindred, while, on the other side, it was argued that a widow is not a sapinda but only succeeds as one of the enumerated heirs. Wallis, C. J., in giving his decision, said:

"I do not think it necessary to go into this question, but having regard to the decision of their Lordships in Ramnad Case that the assent of the mother-in-law Mothuveroyee in that case was operative in support of the adoption, I should be disposed to hold that the senior widow was one of the kinsmen whom it was the duty of the junior widow to consult and that the adoption was bad for failing to consult her."

We are unable to accept the view expressed by Wallis, C. J., that the principle laid down in Ramnad Case justified an inference that it was necessary to obtain the consent of the nearest sapinda if she happened to be a widow. It is true that, in the Ramnad Case, the adoption made by the widow was held to be valid, after attaching some weight to the opinion of the mother-in-law, but that was primarily because she had been given a special position by the writing left by the widow's husband when addressing his letter to the Collector. Another point to be kept in view when considering this Madras decision is that it is a well-recognised principle in Hindu law that, if there are two widows, the senior widow has the preferential right to make an adoption and it may be a good consideration, when judging the validity of an adoption by a junior widow, to see whether she did so after obtaining the consent of the senior widow whose preferential right would thus be defeated.

16. A similar interpretation of the Ramnad Case was accepted in another decision of the Madras High Court in *Maharaja of Kolhapur v. S. Sundaram Ayyar*, ILR 48 Mad 1 at p. 204 = (AIR 1925 Mad 497 at p. 557) where it was held that the consent of the Queen-mother was sufficient in Hindu law to validate the adoption made by the widow Rani, her daughter-in-law. In arriving at this decision, Kumaraswami Sastri, J., held:

"It is clear from the decision of their Lordships of the Privy Council

in (1868) 12 Moo Ind App 397 (PC) (Ramnad Case) that the consent of Avu Bai Saheba, the mother of Sivaji, would validate the adoption in the absence of any other Sapindas."

That case, again, had a special feature of its own, viz., that the Court found that there were no sapindas, except Avu Bai Saheba in existence. It was held that, if there was no male sapinda at all, it would be wrong to hold that the widow would not be capable of making an adoption at all and it was for this reason that it was held that the consent of the female sapinda, viz., the mother-in-law was sufficient to validate the adoption.

17. This interpretation of the decision of the Privy Council in the Ramnad Case cannot, however, be accepted as correct in view of the subsequent decisions by the Privy Council itself where the interpretation put was different. Mr. Ameer Ali, speaking for the Judicial Committee, in the case of *Veera Basavaraju*, 45 Ind App 265 = (AIR 1918 PC 97), (Supra), said:

"The Ramnad Case established the proposition that, in the Dravada Country, under the Dravidian branch of the Mitakshara law there in force, in the absence of authority from her deceased husband a widow may adopt a son with the assent of his male agnates."

In that case, thus, the Privy Council held that the reference to kindred or kinsmen, whose consent is to be obtained by a widow for a valid adoption, in Ramnad Case was intended to cover male agnates only. In another subsequent case of *G. C. Ramasubbayya v. M. Chenchuramayya*, 74 Ind App 162 = (AIR 1947 PC 124) the Privy Council referred to this decision of Mr. Ameer Ali, and, after quoting the extract reproduced by us above, held:

"The words 'kindred and kinsmen', words of general significance, used in the Ramnad Case, are here interpreted to mean 'male agnates,' and this interpretation is amply borne out by the facts of that case as already stated. Similar expressions appearing in the other cases should also be similarly interpreted."

Thus, the interpretation placed on the decision in the Ramnad Case by Mr. Ameer Ali in *Veera Basavaraju's case*, 45 Ind App 265 = (AIR 1918 PC 97)

(supra) was further affirmed by the Privy Council in this latest case of G. C. Ramasubbayya 74 Ind App 162 = (AIR 1947 PC 124) (supra). In view of these decisions of the Privy Council, we do not think that we can accept the interpretation put on the decision in Ramnad Case in the judgments of the Madras High Court. On the other hand, the correct interpretation of that case was further followed by the High Court of Andhra Pradesh in K. Varadamma v. Sankara Reddi, AIR 1957 Andh Pra 933.

18. It was urged by learned counsel that the two decisions of the Privy Council in the cases of Veera Basavaraju, 45 Ind App 265 = (AIR 1918 PC 97) and G. C. Ramasubbayya 74 Ind App 162 = (AIR 1947 PC 124) (supra) were not concerned with the question whether it is necessary to obtain the consent of the nearest female sapinda or not. In the former case, the adoption had been made with the assent of the remote sapinda without the consent of the nearest sapinda. In the latter case, the question was whether the consent of the daughter's son, who would, under Hindu law, be a preferential heir to the deceased husband, was necessary when consent was obtained from a sapinda who, in the order of succession, would come after the daughter's son. It was urged that the Privy Council in neither of these two cases was called upon to pronounce on the question whether, by using the expression "kindred or kinsmen" in Ramnad Case, it was intended to refer to male agnates only, or to all agnates whether male or female. Even though this is correct, we consider that the subsequent interpretation put on the decision in Ramnad Case in these decisions by the Privy Council is entitled to great weight. Further, the view expressed in these decisions bears out our opinion which we formed on the basis of the position given to a woman in Hindu law as a person incapable of exercising independent judgment. Consequently, we must hold that the High Court was wrong in holding the adoption of plaintiff No. 1 by plaintiff No. 2 in the present case as invalid and the decision of the High Court must be set aside.

19. As a result, we set aside the decision given by the High Court. The case will now go back to the High Court for deciding other

issues which were in dispute before that Court and which the High Court left undecided because of its view that the suit of the plaintiffs had to be dismissed on the ground that the adoption of plaintiff No. 1 by plaintiff No. 2 was invalid. The costs of this appeal shall be payable by the respondents to the appellants.

Appeal allowed.

AIR 1970 SUPREME COURT 1683 (V 57 C 359)

(From Madras: AIR 1965 Mad 484)
S. M. SIKRI, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

The Mylapore Hindu Permanent Fund Ltd., Madras, Appellant v. K. S. Subramania Iyer, Respondent.

Civil Appeal No. 596 of 1967, D/-6-5-1970.

Tenancy Laws — Madras City Tenants' Protection Act (3 of 1922) (as amended by Act 19 of 1955), S. 12 Proviso — "A stipulation made by the tenant in writing registered as to the erection of buildings" — Registered lease deed of vacant land — Stipulation limiting quantum of compensation payable to tenant in respect of buildings constructed by him is covered by proviso. AIR 1965 Mad 484, Reversed.

A term in a registered lease deed, in and by which the lessee of a vacant piece of land, agrees to surrender on termination of the lease, not only the land but also the superstructure put up by him for the price agreed to between the parties and provided for in the lease is "a stipulation made by the tenant in writing registered as to the erection of buildings" so as to attract, in favour of the landlord, the proviso to S. 12 of the Act. The stipulation overrides the tenant's rights under S. 3 as he will not be eligible to claim compensation. It follows that as he is not entitled to compensation under S. 3 but only to the value of the building as per agreement, the tenant cannot claim benefit of S. 9. AIR 1965 Mad 484, Reversed. (Paras 25 and 30)

The term is not one under which the tenant has in any manner contracted himself out of the right conferred by the Act. On the other hand, by allowing the building to stand on the

property and agreeing to receive the amount of compensation provided for in the lease deed the object of the legislation is fully satisfied. The first part of S. 12 protects a tenant against the deprivation or limitation of his rights under the Act and the rights conferred by the Act do not directly relate to covenants relating to erection of buildings (Para 25)

The decision of Supreme Court in AIR 1964 SC 1440 does not lay down that only stipulations regarding restrictions about the size, nature of the buildings constructed, the building materials to be used therein, and the purpose for which the building is to be utilised, exhaust completely all the stipulations that are protected by the proviso to S. 12. They are only illustrative examples of the stipulation. AIR 1964 SC 1440, Explained.

(Para 24)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 435 (V 56)=

1969-2 SCR 158, V. S. Mudaliar
v. N. A. Raghavacharry 29, 30

(1966) AIR 1966 SC 361 (V 53)=

1966-1 SCR 110, R. V. Naidu v.
Narain Das 27, 29

(1964) AIR 1964 SC 1440 (V 51)=

1964-6 SCR 1015, Vajrapani
Naidu v. New Theatre Carna-
tie Talkies 9, 11, 12, 19,
20, 25

(1964) AIR 1964 Mad 285 (V 51)=

1963-2 Mad LJ 559, Palaniappa
Gounder v. Sridharan Nair 31

The following Judgment of the
Court was delivered by

VAIDIALINGAM, J.: The short question that arises for consideration in this appeal, by certificate, is whether a term in a registered lease deed, in and by which the lessee of a vacant piece of land, agrees to surrender, on termination of the lease, not only the land but also the superstructure put up by him, for the price agreed to between the parties and provided for in the lease, is a "stipulation made by the tenant in writing registered as to the erection of buildings" so as to attract, in favour of the landlord, the proviso to S. 12 of the Madras City Tenants' Protection Act, 1921 (Madras Act III of 1922), as amended by the Madras City Tenants' Protection (Amendment) Act, 1955 (Act XIX of 1955)—hereinafter called the Act. In this appeal we are not concerned with the later amendment made to the Act.

2. The appellant was the owner of a vacant site bearing No. 4/7, Pon-nambala Vathiar Street, Mylapore, Madras-4. The respondent made a request to the appellant, by his letter Exhibit A-2, dated January 30, 1947, to lease in his favour the said vacant site for a period of ten years on a monthly rental of Rs. 30. In that letter the respondent stated that he wanted to put up a building on that site at a cost of not more than Rupees 6,500 and that, after the expiry of the lease period it was open to the appellant to continue the lease or not; but, in case the lease period was not extended, the respondent made a request that he should be paid back the amount of Rs. 6,500 or any less amount that might have been incurred for putting up the superstructure on the plot. After further correspondence between the parties, the appellant finally wrote, on April 22, 1947, to the respondent a letter, Exhibit A-6, by which they intimated to the respondent that on vacating or giving possession of the land and building that may be put up by the lessee the appellants will pay the valuation of the building on the date of surrender or a sum of Rs. 5,000, whichever is less. The appellant further intimated that if the respondent was agreeable, the draft lease agreement sent by them might be approved for being finalised. It was, under those circumstances, that finally the lease arrangement, Exhibit A-1, was jointly entered into by the parties by a registered document dated April 30, 1947.

3. Under Exhibit A-1 the respondent took the land on lease for a period of ten years commencing from May 1, 1947. The document provided that the lessee was to pay a ground rent of Rs. 45 per month. Clauses 2, 4 and 9 of the lease deed are relevant and may be set out:

"2. The lessee is permitted to put up a building at a cost of not more than Rs. 10,000 on the plot leased to him, after approval of the plan of the proposed building by the Board of Directors of the lessors, and the construction to be put up must be in accordance with the plan approved by the Directors of the lessors.

4. The lease shall be in force for a term of ten years commencing from the first day of May, 1947 and on the

expiry thereof the lessee shall surrender possession of the entire property and the construction if any thereon. On vacating or giving possession as above the lessors shall pay the valuation thereof, then current or the sum of Rs. 5,000, whichever is less.

9. In case of breach or infringement of any of the conditions above mentioned by the lessee, the lessors are at liberty to determine the lease irrespective of the period provided herein by giving three months' notice to the lessee and the lessors may take possession of the property themselves without any compensation."

There were other clauses relating to the payment by the lessee of all taxes that may be imposed on the property so long as he was in possession and prohibiting the lessee from sub-letting, assigning or transferring the plot to any one without the permission in writing of the lessors. There were also provisions regarding payment of advance rent and also the date within which the monthly rent was to be paid.

4. There is no controversy that the respondent put up a building at his own cost for the purpose of his business in accordance with the terms and conditions of the lease deed. On the expiry of the lease period of 10 years, the appellant, by notice dated August 1, 1957 (Exhibit A-36), called upon the respondent to surrender possession of the land as well as the building in accordance with the provisions of the lease deed dated April 30, 1947 and offering to pay a sum of Rs. 5,000 for the building. The respondent sent a reply, Exhibit A-37, dated August 27, 1957, declining to surrender possession either of the land or the building. He stated that in view of the rights conferred on him as a tenant of the land under the Act as amended by Act XIX of 1955, he was entitled to continue in undisturbed occupation as a tenant of the leasehold and that if eviction proceedings are taken by the appellant he will be obliged to apply under the Act for directing the landlord to convey to him the land at a price to be fixed by the Court as per the provisions of the Act. The respondent declined to accept the amount of Rs. 5,000 offered by the appellant as the value of the house put up by him on the property.

5. The appellant instituted on April 22, 1958 O. S. No. 796 of 1958 in the City Civil Court, Madras, seeking to recover possession from the respondent of the land and building and also offering to pay the sum of Rs. 5,000 as the value for the building in accordance with the terms of the lease deed. There was also a claim for mesne profits. The respondent contested the suit on various grounds. In particular, the respondent pleaded that under the Act he is not bound to surrender possession of the land with the building, as claimed by the plaintiff. On the other hand, according to the respondent, notwithstanding the expiry of the lease period, he was entitled to continue in possession of the land and that he had a right under Section 9 to call upon the plaintiff to sell the land to him for a price to be fixed by the Court in accordance with the provisions of the Act. For this purpose, the respondent filed an application, I. A. No. 484 of 1958, under Section 9 requesting the Court for an order that the landlord be directed to sell the land for a price to be fixed by the Court.

6. The Learned City Civil Judge, by his judgment and decree dated December 10, 1959, upheld the contentions of the respondent. The learned Judge held that notwithstanding the agreement entered into by the tenant to surrender the land and also the building on receiving the value mentioned in Exhibit A-1 after the termination of the lease period, such an agreement no longer held good in view of the protection conferred on tenants by the Act. The learned Judge further held that the respondent was entitled to exercise his option under Section 9 to purchase the land for the price fixed by the Court. In this view the learned Judge disallowed the plaintiff's prayer for recovery of possession of the land and building and allowed I. A. No. 484 of 1958 filed by the respondent under Section 9. But the learned Judge, however, directed that it was only if default was committed by the respondent in paying the value that may be fixed by the Commissioner in I. A. No. 484 of 1958 the appellant would be entitled to get a decree for possession on payment of Rs. 5,000 to the respondent as compensation for the superstructure, under Section 3 of the Act.

7. The appellant carried the matter in appeal to the Madras High Court in A. S. No. 208 of 1960. By judgment dated January 30, 1963, the learned Single Judge, Ramakrishnan, J., set aside the decree of the City Civil Judge after holding that the tenant was bound by the terms and conditions under Exhibit A-1 and, as such, was liable to surrender possession not only of the land but also of the building, on receipt of the sum of Rs. 5,000 from the landlord as per clause 4 of Exhibit A-1. That is, the learned Judge took the view that the terms contained in clause 4 read with clause 2 of Exhibit A-1 amounted to stipulations as to the erection of buildings, attracting the proviso to Sec. 12 and those stipulations will have to be enforced as against the tenant. Ultimately, the learned Single Judge decreed the plaintiff's claim for recovery of possession of the land and building on his depositing the sum of Rupees 5,000 representing the value of the superstructure. There was a further direction given to the trial Court for ascertaining the quantum of mesne profits.

8. The respondent carried the matter in appeal before the Division Bench of the High Court under cl. 15 of the Letters Patent. By decree and judgment dated December 1, 1964, the Letters Patent Bench reversed the decree of the learned Single Judge and dismissed the appellant's suit, with costs throughout. According to the learned Judge of the Letters Patent Bench, clauses 2 and 4 of the lease deed did not and could not deprive the rights conferred on a tenant under the Act, of claiming compensation for the building under Section 3 or his exercising the option to purchase the land under Section 9. The further view of the Division Bench is that the matters referred to in clauses 2 and 4 in Exhibit A-1 cannot be considered to be "stipulations as to the erection of buildings", so as to attract the proviso to Section 12 of the Act.

9. It may be stated, at this stage, that the Division Bench has, by and large, taken the view that the position is concluded against the appellant-landlord by the decision of this Court in *N. Vajrapani Naidu v. New Theatre Carnatic Talkies*, 1964-6 SCR 1015= (AIR 1964 SC 1440), wherein this

Court had upheld a decision of the Madras High Court that a stipulation in the lease for demolition of the building and surrender of vacant possession of the site was not one within the proviso to Section 12 of the Act. We shall refer to that decision at the appropriate stage and consider whether the point in issue before us is covered by the same, as assumed by the Letters Patent Bench of the High Court. But we may indicate that the appellant had raised a contention in the suit, as well as before the High Court that the lease in favour of the respondent was not of a vacant piece of land but of a land together with a building and hence the Act had no application to that lease arrangement. So far as this aspect is concerned, it has been now concurrently held by all the Courts that the lease under Exhibit A-1 was of only a vacant piece of land. Therefore, we have to discuss the problem arising before us on the basis that the lease was only of vacant land. If clause 4 read with clause 2 of the lease deed Exhibit A-1 is construed as a stipulation 'as to the erection of buildings' within the proviso to Section 12, the appellant will have to succeed. If not, the respondent will be entitled to the rights conferred on him under the Act and pursue the relief asked for by him in the application filed by him under Section 9 of the Act.

10. The Act was passed with a view to give protection to tenants who, in certain areas, had constructed building in others' lands in the hope that they would not be evicted so long as they paid the fair rent of the land. Originally the Act applied only to tenancies of land created before its commencement, viz., February 8, 1922. But, by the Amending Act XIX of 1955, which came into force on September 10, 1955, the Act has been made applicable in the City of Madras to tenancies of land created before the commencement of the Amendment Act of 1955. Therefore, it follows that the suit lease is one to which the Act will apply. It is not really necessary for us to elaborately consider the scheme or the various provisions of the Act as amended from time to time, as they have all been referred to in decisions of this Court to which we will advert later. It is enough to note that under the Act, 'land' does not include build-

ings (S. 2 (2)); 'Landlord' means any person owning any land (S. 2 (3)); 'Tenant' in relation to any land is a person liable to pay rent in respect of such land, and includes any person who continues in possession of the land after the determination of the tenancy agreement (S. 2 (4)). Section 3 provides that every tenant shall, on ejection, be entitled to be paid as compensation the value of any building which may have been erected by him and for which compensation has not already been paid. Section 4 provides, among other matters, for the Court ascertaining the amount of compensation payable under Section 3 in a suit for ejection of a tenant in which the landlord succeeds. Section 5 deals with computation of the compensation awardable under Section 4. Section 9 (1) provides that a tenant who is entitled to compensation under Section 3 and against whom a suit in ejection has been instituted may, within the time prescribed therein, apply to the Court for an order that the landlord should be directed to sell the whole or part of the land for a price to be fixed by the Court. Section 12 provides:

"Nothing in any contract made by a tenant shall take away or limit his rights under this Act provided that nothing herein contained shall affect any stipulations made by the tenant in writing registered as to the erection of buildings, in so far as they relate to buildings erected after the date of the contract."

Section 13 provides that in its application to the City of Madras and to other notified areas, the Transfer of Property Act, 1882, shall, to the extent necessary to give effect to the provisions of the Act, be deemed to have been repealed or modified.

11. Mr. M. Natesan, learned counsel for the appellant, urged that in this case, clauses 2 and 4 of the lease deed read together would amount to a 'stipulation as to the erection of buildings' within the proviso to Section 12 of the Act and, as such, the respondent is bound to surrender, on expiry of the lease period, possession of the land and also the building after receiving the sum of Rs. 5,000 as the value of the superstructure. The counsel pointed out that in this case the respondent-tenant in Exhibit A-1,

a document which is in writing, registered, has agreed to surrender possession of the entire property and the constructions thereon, on the expiry of the period of the lease, on receiving the sum of Rs. 5,000 as the value of the superstructure. In this case, that term really relates to the building which has been put up by the tenant after the date of the contract and clauses 2 and 4 amount to a stipulation made by the tenant as to the erection of buildings. That is, according to the learned counsel, the tenant's agreement to receive the sum of Rs. 5,000 as the value of the superstructure that may be put up by him on the land demised under the lease and to surrender possession of the land and building, is a stipulation as to the erection of buildings, coming under the proviso to Section 12 and, as such, the respondent is not entitled to any rights under the Act. The counsel also pointed out that the Letters Patent Bench has not properly appreciated the scope of the decision of this Court in Vajrapani's case, 1964-6 SCR 1015 = (AIR 1964 SC 1440). Counsel further urged that in this case, as the tenant had agreed to receive the particular amount of compensation under Exhibit A-1, there was no question of his claiming any further right to compensation under Section 3 in which case alone Section 9 would apply. As Section 3 did not apply, he pointed out, the application filed by the respondent under Section 9 was not maintainable.

12. Mr. S. C. Manchanda, learned counsel appearing for the respondent-tenant, on the other hand, urged that the clauses in the lease deed, Exhibit A-1, relied on by the appellant, cannot be considered to be a stipulation as to the erection of buildings, so as to attract the proviso to Section 12 and that, on the other hand, the opening part of Section 12 which preserves the rights conferred on a tenant under the Act, has full force and effect. The counsel further urged that neither the right to claim compensation in the manner provided under the Act, by Section 3, nor the right to exercise the option to purchase the land, conferred on a tenant under Section 9 can be either taken away or limited by any contract and, if so, the respondent's application, filed under Section 9, to direct the appellant to sell the land,

was properly entertained and allowed by the Letters Patent Bench. The counsel also pointed out that the decision in Vajrapani's case, 1964-6 SCR 1015 = (AIR 1964 SC 1440), fully covers the point in issue and concludes the case in favour of the tenant.

13. Before we proceed to discuss the above contentions of the learned counsel, it is necessary to point out that on the date when the registered lease arrangement was entered into, between the parties (April 30, 1947), the Act did not apply to such leases. It is only by the Amendment Act XIX of 1955, which came into force on September 10, 1955, that the Act has been made applicable to the present lease. Therefore, on the date when the lease arrangement was entered into, neither party would have contemplated entering into any arrangement taking away or limiting the rights conferred on a tenant by the Act. Now that the Act has been made applicable to the present lease, without anything more and as is made clear by the opening words of Section 12—the respondent-tenant will be entitled to avail himself of the rights conferred on him under the Act and any contract limiting or taking away such rights will have no effect, unless the appellant-landlord is able to establish that his claim for recovery of possession of the land and building is saved by the proviso to Section 12 of the Act.

14. We shall now consider what the rights given to a tenant under the Act are. Broadly speaking, two kinds of rights have been conferred on lessees under tenancies falling within the scope of the Act. The first is a right to be paid compensation for the buildings erected by them on the leased land before they are evicted under Section 3 of the Act. The second right is the one conferred under Section 9 to the tenant to exercise the option to require the landlord to sell to him the land covered by the lease for a price to be computed in accordance with the said section. It should be further pointed out that under Section 9 (1) (a) 'any tenant who is entitled to compensation under Section 3' is alone made eligible, when a suit in ejectment against him has been instituted, to exercise the option given to him under the said section. Therefore, before a tenant can apply to the

Court for an order that the landlord should be directed to sell the land for a price to be fixed by it, he must satisfy the essential requirement that he is a 'tenant who is entitled to compensation under Section 3'. Without anything more if a land has been leased to a tenant and if the latter puts up a building on the property, he will be entitled on ejectment to be paid compensation for the value of the building under Section 3, to be computed in the manner prescribed under the Act. Or, in the alternative, he can fall back upon his right to have the land sold to him in accordance with Section 9 of the Act.

15. Therefore, the question naturally arises whether the respondent, in this case, having entered into an agreement with the landlord under Exhibit A-1, to receive the amount specified therein as the value of the building and surrender possession of the land and the said building, is entitled to ignore those terms and fall back upon Section 3 of the Act and claim compensation in accordance with the Act. If he can, then it is needless to state that he will be eligible to file an application under Section 9. Ultimately, the question resolves itself to this: Whether a stipulation made by a tenant in the registered lease-deed limiting the quantum of compensation payable to him in respect of the buildings constructed by him on the land is covered by the proviso to Section 12 of the Act.

16. There is no controversy that in this case the tenant has entered into a written agreement which has been registered and he has put up the building on the land after the date of the contract.

17. Section 12 of the Act consists of two parts: The first part is a general provision saving to tenants comprehended by the Act the rights conferred by its operative terms notwithstanding any contract. Such rights would, amongst others, include the right to claim compensation under Sections 3 and 4 and the right to exercise option to purchase the land from the lessor by an order of Court under Section 9 of the Act. The second part consists of the proviso which, so to say, makes an inroad into the generality of the saving, by saving contradictory stipulations from the operation of the statutory rights created

by the Act. It is needless to state that if Section 12 had stopped with the first part, the respondent would be entitled to the benefit of every right conferred upon tenants by the Act. There is no controversy that the proviso is intended to cut down the scope of that saving; so to say, from and out of the prohibition against the operation of any stipulation in a contract limiting the rights conferred on tenants by the Act, an exception is carved out. The controversy before us is centered round the scope and limits of that exception.

18. We have already referred to the fact that Section 13 provides that in its application to the City of Madras and to any other area to which the Act is extended, the Transfer of Property Act, 1882, shall, to the extent necessary to give effect to the provisions of the Act, be deemed to have been repealed or modified. If the provisions of the Act do not apply, the position would be that normally, under Section 108 of the Transfer of Property Act, before the expiry of the lease, a lessee can remove all structures and buildings erected by him on the demised land. Further, under Section 108, there is nothing to prevent the lessees' contracting to hand over any building or superstructure erected on the land by him to the lessors, without receiving any compensation. That is, though under S. 108 the lessee has a right to remove the building, by contract, he may agree to hand over the same to the lessor without the right to receive compensation at the end of the lease, the matter being entirely one of contract between the parties. But this normal rule under the Transfer of Property Act will not apply to the case before us as the provisions of the Act govern the rights of the parties.

19. With the background mentioned above, we shall now proceed to refer to the decisions to which our attention has been drawn, by learned counsel on both sides. Quite naturally, Mr. Manchanda placed considerable reliance on the decision of this Court in Vajrapani's case, 1964-6 SCR 1015 = (AIR 1964 SC 1440), which decision, we have already stated, has been treated by the Letters Patent Bench also as concluding the case against the appellant-landlord. On the other hand, Mr. Natesan, for the

appellant, has urged that the question that arose before this Court in the said decision was a very limited one, viz., whether a stipulation, made by a tenant, for giving vacant possession of the land after demolition of the building which he had been authorised to construct thereon, is not one 'as to the erection of buildings' within the proviso to Section 12 and it was answered in the negative. That decision, according to the counsel, has no application to the facts of this case where the object of the Act, viz., of preserving a building constructed on the land, has been given effect to by the terms of the contract entered into between the parties. As the Letters Patent Bench has proceeded on the basis that the said decision concludes the point against the appellant, it is necessary to refer to the facts of that case in some detail.

20. In Vajrapani's case, 1964-6 SCR 1015 = (AIR 1964 SC 1440), the appellant had granted a lease of an open site in the town of Coimbatore to one Abirama Chettiar under a registered lease deed dated Sept. 19, 1934 for 20 years at an annual rent of Rs. 1,080 for putting up a building suitable for use as a theatre. After the expiry of the term of 20 years stipulated under the deed, the lessee had an option of renewal for another period of 20 years on fresh terms and conditions. The deed further provided that 'if after the termination of the stipulated period the lessees fail to pay the arrears of rent that will fall due till that date and hand over possession of the site to the lessors after making it clear by dismantling the constructions therein and by demolishing the walls, etc., the lessors shall, besides realising the arrears of rent due to them according to law, have the right to take possession through Court of the site in which the aforesaid buildings are put up after dismantling the construction and demolishing the buildings therein.' The original lessee constructed a theatre on the site and assigned his rights to the new theatre Carnatic Talkies Ltd., which was the respondent in the said appeal. The assignee was recognised as tenant under the original lease deed of 1934. The lessors called upon the lessees to surrender vacant possession of the site on the expiry of the lease period and, on the lessee declining to comply with

the said requisition, a suit was instituted by the lessors for recovery of possession of the land. During the pendency of the litigation the Act, as amended by Madras Act XIX of 1955, was extended to Coimbatore and the tenant filed an application under Section 9 for an order directing the lessors to convey the site covered by the lease deed for a price to be fixed by the Court. The learned Single Judge of the Madras High Court allowed the application of the tenant under Section 9 on payment of full market value of the land. The landlord unsuccessfully appealed to a Division Bench under cl. 15 of the Letters Patent and came up to this Court on certificate granted by the High Court.

21. The question that was debated before this Court, on behalf of the appellant-landlord was that the application filed by the tenant under Section 9 was not maintainable as the proviso to Section 12 is attracted to the stipulation made by the tenant to demolish the building and surrender vacant possession of the land. After stating that the Act was passed to prevent loss to tenants who had constructed buildings on lands taken on lease by them consequent upon the enforcement of the strict provisions of the Transfer of Property Act, this Court considered the scheme of the Act with particular reference to Sections 3, 9 and 12. It was contended on behalf of the landlord-appellant that the stipulation relating to delivery of vacant possession of the site on the expiry of the period of lease, after removing the buildings is a stipulation as to the erection of buildings, coming, within the proviso to Section 12 and, as such, the restriction on the liberty of contract between the landlord and tenant imposed by the opening clause of Section 12 stood removed. It was further contended on this basis that the lessee was bound by the terms of the lease and that he was not entitled to claim the benefit of Section 9 of the Act.

22. The majority constituting the Bench did not uphold this contention of the landlord and said:

"A covenant in a lease which is duly registered that the tenant shall on expiry of the lease remove the building constructed by him and deliver vacant possession, is undoubted-

ly a stipulation relating to the building, but it is not a stipulation as to 'the erection of building'. Section 12 has manifestly been enacted to effectuate the object of the Act which is set out in the preamble, viz., 'to give protection to tenants who.....have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent for the land'. The Legislature has sought thereby to protect the tenants against any contractual engagements which may have been made expressly or by implication to deprive themselves wholly or partially of the protection intended to be conferred by the statute. And the only class of cases in which the protection becomes ineffective is where the tenant has made a stipulation in writing registered as to the erection of buildings, erected after the date of the contract of lease. The restriction is, therefore, made only in respect of a limited class of cases which expressly attract the description of the stipulations as to the erection of buildings. Having regard to the object of the Act, and the language used by the Legislature, the exception must be strictly construed, and a stipulation as to the erection of buildings would not, according to the ordinary meaning of the words used, encompass a stipulation to vacate and deliver possession of the land on the expiry of the lease without claiming to enforce the statutory rights conferred upon the tenant by Section 9. The stipulations not protected in Section 12 are only those in writing registered and relate to erection of buildings such as restrictions about the size and nature of the building constructed, the building materials to be used therein and the purpose for which the building is to be utilised."

Based upon the concluding portion of the above extract, Mr. Manchanda has urged that the proviso to Section 12 will apply only to those stipulations as to the restrictions as to the size, the nature of the building constructed, the building material to be used therein and the purpose for which the building is to be utilised. The Letters Patent Bench has also adopted the same test for holding against the appellant.

23. The minority judgment, on the other hand, in the said decision, held that a stipulation by the lessee to re-

move the buildings, which he has been permitted to erect, when surrendering the land on the termination of the tenancy, is a stipulation as to the erection of buildings coming within the proviso to Section 12 of the Act. A perusal of the minority judgment further shows that it was conceded by Mr. Setalvad, learned counsel appearing for the appellant-landlord, that a stipulation limiting the quantum of compensation payable in respect of buildings constructed by a tenant, provided for by Section 3 is within the meaning of the proviso to Section 12 as being one with respect to the erection of buildings. This concession is no doubt not referred to in the majority judgment but, apart from the concession, the minority judgment has discussed this aspect further and it was held ultimately that the stipulation in the lease deed before them whereunder the tenant agreed to dismantle the buildings put up by him on the leased land was a stipulation as to the erection of buildings and covered by the proviso to section 12. But, in accordance with the majority view, the appeal was dismissed.

24. Though *prima facie* the last part of the extract in the majority judgment, quoted above, and relied on by Mr. Manchanda, may appear to support his contention as also the view taken by the Letters Patent Bench, we are however not inclined to hold that the majority judgment in the above decision intended to lay down that only stipulations regarding restrictions about the size, nature of the building constructed, the building materials to be used therein and the purpose for which the building is to be utilised, exhaust completely all the stipulations that are protected by the proviso to section 12. Those observations cannot be taken out of the context in which they appear. A reading of the extract quoted above from the majority judgment clearly shows that the object of the statute was to protect tenants against any contractual engagements which may have been made expressly or by implication to deprive themselves wholly or partially of the protection intended to be conferred by the statute. Having regard to this object, the learned Judges have come to the conclusion that a stipulation to vacate and deliver possession of the land after demolish-

ing the building constructed by the tenant will not amount to a stipulation as to the erection of buildings, coming under the proviso to S. 12. On the other hand, the majority view is that the stipulation, that came up for consideration before them, would really amount to a stipulation by a tenant giving up his right to enforce the statutory right conferred on him under section 9. It is also significant to note that in the earlier part of the judgment, the majority judgment has emphasised that on account of the inflationary pressure in the wake of the First World War many tenants who had constructed buildings on lands taken on lease by them were sought to be evicted by the landlords and, with a view to prevent loss to such tenants, the Act was passed. The concluding part of the observations in the extract, relied on by Mr. Manchanda will have to be read in this background and, so read, in our opinion the position becomes clear that the learned Judges were only referring to the size and nature of the building, materials used for building, etc., as illustrative examples of stipulations which will be covered by the proviso to S. 12 of the Act.

25. The provision in the lease deed which came up for consideration in the above decision, in and by which the tenant agreed to surrender possession of the land after demolishing the building, will, in our opinion, really amount to the tenant contracting himself out of the right to claim either compensation for the building under section 3 or to exercise his option under section 9 to purchase the land and that such a provision will be hit by the first part of section 12 which, as we have already indicated, preserves the rights given to a tenant under the Act. Therefore, in our opinion, the decision in Vajrapani's case, 1964-6 SCR 1015 = (AIR 1964 SC 1440) has been misunderstood by the learned Judges of the Letters Patent Bench and the said decision is no authority for the proposition that the stipulation contained in the lease deed before us cannot come within the proviso to section 12. The case before us is not one under which the tenant has in any manner contracted himself out of the rights conferred on him by the statute. On the other hand, by allowing the building to stand on the pro-

party and agreeing to receive the amount of compensation provided for in the lease deed, the object of the legislation is fully satisfied. It must also be emphasised that the first part of Section 12 protects a tenant against the deprivation or limitation of his rights under the Act and the rights conferred by the Act do not directly relate to covenants relating to erection of buildings.

26. We may add that clause 2 of Exhibit A-1 clearly provides that the lessee can put up a building whose cost should not exceed Rs. 10,000/- and the plan of the proposed building has also to be approved by the Directors of the appellants and the construction to be put up by the tenant must be in accordance with the plan approved by the directors of the lessors. Though clause 2 does not, in so many words, refer to the size and nature of the building to be constructed or the building materials to be used therein, they are all implicit in the said clause where the cost has been mentioned and the plan of the building has to be approved by the directors of the appellants. Apart from the fact that in view of the upper limit of the cost having been fixed, which itself will place a limitation on the size and nature of the building that could be constructed, as also the building materials that could be used therein, there is the further stipulation that the plan has to be approved by the directors of the lessors as the plan will clearly and accurately give a correct idea about the size and nature of the building proposed to be put up on the land. It is only as per the plan so approved by the lessors that the building has to be put up on the land. This stipulation clearly shows that there is a restriction about the size and nature of the building. And it is in respect of such a building put up by the tenant in accordance with clause 2 that the value is fixed under clause 4. Therefore it follows that clause 2 read with clause 4 amount to stipulations as to the erection of buildings and, in this view the proviso to section 12 will apply. This aspect has not been adverted to by the Letters Patent Bench.

27. In *R. V. Naidu v. Naraindas*, 1966-1 SCR 110 = (AIR 1966 SC 361) this Court had to deal with a clause

in the lease deed which provided that the tenants 'shall not raise any building whatsoever in the vacant site', but the lessee committed a breach of the covenant by putting up a building on the land. In the suit filed by the landlord for ejectment, the tenant claimed the right of option to purchase the land under section 9 of the Act. The Letters Patent Bench of the Madras High Court rejected the claim of the tenant and declined to grant relief on his application filed under section 9. In dealing with the claim of the tenant who was the appellant, this Court noted that the lease was not by a registered document and, therefore, the proviso to section 12 has no application. But this Court has emphasised that a tenant, entitled to purchase under section 9, must be a tenant entitled to compensation under section 3. In view of the fact that the lease deed was not registered and as the proviso to section 12 was ruled as not applicable, this Court held that the covenant in the lease deed prohibiting the tenants from putting up constructions will have to be ignored and the tenants declared entitled to compensation under S. 3 of the Act and in turn also to exercise the option to purchase the land under section 9. Ultimately, this Court held that the tenants, in that case, must be held entitled to their rights under sections 3 and 9 in spite of the covenant not to build and breach of it by them.

28. It is to be noted that this decision had to deal with a case where the lease deed was not a registered document and, as such, the application of the proviso to section 12 was summarily ruled out. *Hidayatullah, J.* (as he then was), in his separate judgment, while agreeing with conclusion reached by the other learned Judges, has emphasised that by the first part of section 12, the tenant is protected against his own contract and the landlord is protected by the second part of the said section; but in the case before them the landlord could not seek protection of the second part because the lease deed was not registered.

29. In *V. S. Mudaliar v. N. A. Raghavachari*, 1969-2 SCR 158 = (AIR 1969 SC 435) by registered lease a vacant land was let to a tenant on the specific condition that the tenant

'should not erect any kind of permanent superstructures on the vacant site so as to entitle him to claim in future the value thereof. . . ' In contravention of this stipulation and without any authority from the landlord, the tenant put up a permanent superstructure on the land. The lease was for a period of 5 years. As the tenant refused to vacate the land on the expiry of the lease term, the landlord filed a suit for recovery of possession of the land. The tenant claimed protection under the Act and also filed an application under section 9. The High Court of Madras decreed the suit of the landlord and rejected the application filed by the tenant under section 9. This Court, after again advertng to the scheme of the Act with special reference to Ss. 3, 9 and 12 distinguished the decision of this Court in Naidu's case, 1966-1 SCR 110 = (AIR 1966 SC 361) on the ground that the stipulation which was almost identical with the one before them was contained in an unregistered lease deed and ultimately held that a stipulation by a tenant, made in a registered lease deed that he would not build any permanent structure on the land so as to entitle him to claim in future the value thereof, is a stipulation 'as to the erection of a building' within the proviso to section 12 and, as such, upheld the decision of the High Court which declined to grant relief to the tenant. In the said decision, this Court again emphasised that sections 3 and 9 are subject to and controlled by the proviso to S. 12. Though section 3 provides that a tenant shall, on ejection, be entitled to be paid as compensation the value of any building erected by him, the right conferred on the tenant by section 3 is controlled by the stipulation in the registered lease deed that he shall not erect permanent structures of any kind on the land so as to entitle him to claim in future the value thereof. This Court further held that the said stipulation in the registered lease deed overrides the tenant's rights under section 3 and that if a tenant erects a permanent structure in contravention of the stipulation, he is not entitled to any compensation under section 3. It was further held that as the said tenant was not entitled to any compensation under S. 3, he cannot claim the benefit of S. 9.

30. If a stipulation, contained in a registered lease deed that the tenant shall not erect permanent structures on the land so as to entitle him to claim the value thereof and if such a stipulation overrides the tenant's rights under Sec. 3 disentitling him to claim compensation under S. 3 in respect of buildings put up by him in contravention of the said stipulation, as held in *Mudaliar's Case*, 1969-2, SCR 158 = (AIR 1969 SC 435); we have no hesitation in holding that Clause 4 read with Clause 2 of Exhibit A-1, under which the respondent has agreed to limit the quantum of compensation payable in respect of the buildings constructed by him is a 'stipulation as to the erection of buildings', attracting the proviso to section 12 of the Act. In this view, we further hold that the said stipulation overrides the tenant's rights under section 3, as he will not be eligible to claim compensation under the Act. It follows that as he is not entitled to compensation under section 3, but only to the value of the building as per the agreement Exhibit A-1, the tenant cannot claim the benefit of section 9. Therefore, it follows that the decree and judgment of the Letters Patent Bench under appeal has to be set aside.

31. Before we conclude we may also state that Mr. Natesan drew our attention to a Division Bench Judgment of the Madras High Court in *Palaniappa Gounder v. Sridharan Nair*, 1963-2 Mad LJ 559 = (AIR 1964 Mad 285). We do not propose to consider that decision as it is seen that the learned Judges had to consider the question whether a term in the contract as to transfer of ownership of the building without any claim for compensation, at the termination of the lease, could be construed to be a stipulation made by the tenant as to the erection of buildings. The clauses that arise for consideration before us to which reference has been made, are entirely different. Though under Exhibit A-1 the respondent is bound to surrender possession of the land and the building, after receiving the sum of Rs. 5,000/- as the value of the building, during the arguments. Mr. Natesan, learned counsel for the appellant-landlord has quite fairly stated that his clients are prepared to pay a sum of Rs. 10,000/- as the value of

the building provided the respondent-tenant surrenders vacant possession of the building and the land to the landlord within a period of six months from the date of this judgment, without putting the appellant to the necessity of taking out execution proceedings. We are of the view that the appellants' offer is quite reasonable. Accordingly, while allowing the appeal and setting aside the decree and judgment of the Letters Patent Bench, we restore the judgment and decree of the learned Single Judge of the Madras High Court in A. S. No. 208 of 1960 dated January 30, 1963, subject to the following conditions:

(1) The appellant will deposit in the trial Court, within three months from this date the sum of Rs. 10,000/- (rupees ten thousand) as offered by their counsel as the value of the building.

(2) The respondent is directed to surrender possession of the land and building within a period of six months from the date of this judgment.

(3) If the respondent so surrenders vacant possession of the building and the land within six months or at any earlier time, on such surrender of possession he will be entitled to withdraw from Court the sum of rupees 10,000/- (rupees ten thousand deposited by the appellants).

(4) If the respondent does not deliver possession of the land and building within the period mentioned above, the appellants can levy execution and recover possession of the properties; but, under that contingency the respondent will be entitled only to a sum of Rs. 5,000/- as the value of the building and the balance amount can be withdrawn by the appellants.

(5) If the respondent surrenders possession of the building and the land within the period mentioned in this judgment, there will be no liability for mesne profits and the direction given by the learned Single Judge in that regard will stand cancelled. If however, possession is not delivered within time, the enquiry into mesne profits, as ordered by the learned single Judge, will proceed.

(6) If the respondent delivers possession of the land and the building within six months, parties will bear their own costs throughout. If on the other hand the respondent commits

default in the matter of delivery of possession, the appellants will be entitled to their costs throughout.

Order accordingly.

AIR 1970 SUPREME COURT 1694 (V 57 C 360)

(From Kerala: AIR 1968 Kerala 301)

S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.

A. K. Gopalan and another, Appellants v. Noordeen, Respondent.

Criminal Appeal No. 71 of 1968, D/- 15-9-1969.

Contempt of Courts Act (1952), section 1 — Proceedings cannot be said to be imminent only when F. I. R. is filed but accused are not arrested — Statement published after arrest of accused is publication when proceedings are imminent. AIR 1968 Ker 301, Reversed.

Lodging of a first information report does not by itself establish that proceedings in a court were imminent. It would depend on the facts proved in a particular case whether the proceedings are imminent or not. Where there are no other facts which tend to establish the imminence of proceedings in a court except the lodging of F. I. R. and the accused were not arrested and if it be relevant there was no proof that arrest was imminent when the impugned statement was made, it cannot be said that proceedings were imminent when the statement was made. Ordinarily until an accused is arrested it cannot be said that any proceedings in a court are imminent against that person because he may never be arrested or he may be arrested after a lapse of months or years. Cri App 107 of 1958, D/- 23-1-1961 (SC) Rel. on; AIR 1968 Kerala 301, Reversed.

(Para 7)

But when such a statement though made before the arrest of the accused, was published after the arrest of the accused, the publication is when proceedings are imminent, and can be subject matter of a charge for contempt of courts.

(Para 11)

Dictum—(Per Sikri and P. Jaganmohan Reddy JJ.)

It would be an undue restriction on the liberty of free speech to lay down that even before any arrest has been

made there should be no comments on the facts of a particular case. In some cases no doubt, especially in cases of public scandal regarding companies, it is the duty of a free press to comment on such topics so as to bring them to the attention of the public.

(Para 8)

Per Mitter J. (Contra) — The consensus of authorities, both in England and in India is that contempt of court may be committed by any one making comment or publication of the exceptionable type if he knows or has reason to believe that proceedings in court, though not actually begun, are imminent.

(Para 16)

A contempt of court may be committed by a person when he knows or has good reason to believe that criminal proceedings are imminent. The test is whether the circumstances in which the alleged contemner makes the statement are such that a person of ordinary prudence would be of opinion that criminal proceedings would soon be launched. Case law Ref.

(Para 24)

Held on facts that when the statement was made after lodging of F. I. R. but before the arrest of the accused, it was not possible to hold that at that time such proceedings were not imminent or that the maker of the statement had no reasonable cause to believe that they were not imminent.

(Para 17)

Cases Referred: Chronological Paras

(1968) 3 All ER 439 = 1968-1	
WLR 1761, R. v. Savundranayan and Walker	8, 19, 24
(1962) 1962-3 All ER 326, Attorney-General v. Butterworth	24
(1961) Cri App No. 107 of 1958, D/- 23-1-1961 (SC), Surendra Mohanty v. State of Orissa	5, 7, 21, 24
(1957) 1957-1 QB 73 = 1956-3	
All ER 494, Regina v. Odhams Press Ltd.	19
(1943) AIR 1943 Lah 329 (V 30) = ILR 25 Lah 111, In the matter of "Tribune" Lahore	20
(1939) AIR 1939 Mad 257 (V 26) = ILR (1939) Mad 466 = 40 Cri LJ 533 (SB), Tuljaram Rao v. Sir James Taylor	20
(1927) 1927-1 KB 845 = 96 LJKB 352, R. v. Daily Mirror	19
(1903) 1903-2 KB 432 = 89 LT 439, Rex v. Parke	18

Mr. A. S. R. Chari, Sr. Advocate (Mr. B. R. G. K. Achar, Advocate, with him) for Appellants; Mr. A. C. Jose, Advocate, M/s. S. K. Mehta and K. L. Mehta, Advocates of M/s. K. L. Mehta and Co. and Miss Sona Bhatiani, Advocate, for Respondent; Mr. M. R. K. Pillai Advocate, for Advocate General, for State of Kerala.

The following Judgments of the Court were delivered by

SIKRI, J.: (For himself and P. Jaganmohan Reddy J.) — In this appeal by certificate of fitness granted by the Kerala High Court two questions arise (1) Whether on the day when the appellant, A. K. Gopalan, made the statement complained of or when it was published in "Deshabhimani" any proceedings in a court could be said to be imminent; and (2) whether this statement amounts to contempt of court.

2. The facts in brief are that on September 11, 1967, the ruling parties in Kerala State staged what is called 'Kerala Bandh'. A serious incident took place on that day during the course of which one C. P. Karunakaran lost his life at a place called Kuttoor. A first information report was lodged on that very day. On September 12, 1967 the first information report was transferred to another police station. On September 20, 1967, the appellant, A. K. Gopalan, made the following statement:

"Tearful story.

It was the story of a young man who had to sacrifice his life to the naked goondaism of Congressmen, that was heard from the trembling lips of so many people in Kuttoor. Had this tragedy occurred in the course of a sudden fight one could have understood it. But what I was able to make out was that it was in prosecution of a deliberate conspiracy to commit murder. It appears that a prominent Congress leader of the Cannanore District had given instructions for this the previous day. It was as a result of being pounced upon and stabbed while he was in a peaceful and disciplined manner calling for the observance of the Bandh by the closure of shops that Comrade C. P. Karunakaran suffered martyrdom. Comrade Kunhikannan who was with him also suffered serious injuries. The police have seized an unlicensed loaded gun and other weapons from the shop of

a congressman at the scene of occurrence.

Murder too was planned.

Is it not to be inferred from all this that there was a pre-arranged plan to commit murder? The enlightened people of the locality were determined to press forward to the chosen destination of that class for whom Comrade Karunakaran has sacrificed his life."

3. On September 23, 1967 K. P. Noordeen was arrested along with his two brothers. On September 24, 1967 the Magistrate remanded the accused to police custody. In its issue dated September 25, 1967, the Malayalam Daily newspaper called "Deshabhimani" of which P. Govinda Pillai, the second appellant, was the editor and M. Govindankutty was the printer, printed the statement which we have reproduced above. On September 29, 1967, all the three accused were produced before the Magistrate. On October 5, 1967, bail was refused by the District Magistrate but was granted by the Sessions Judge. On November 1, 1967, Noordeen filed the petition under Ss. 3 and 4 of the Contempt of Court's Act (32 of 1952) impleading the three respondents, A. K. Gopalan, P. Govinda Pillai and M. Govindankutty.

4. The High Court held all the three respondents guilty of contempt of court and convicted them accordingly. The High Court imposed a sentence of fine of Rs. 200 on the first respondent and of administering an admonition to respondents 2 and 3. The High Court discharged respondents two and three after due admonition. The appellants A. K. Gopalan and P. Govinda Pillai having secured certificate of fitness under Article 134 (1) (c) the appeal is now before us.

5. This Court in Surendra Mohanty v. State of Orissa, Cri Appl. No. 107 of 1958, D/- 23-1-1961 (SC) examined the question whether the publication of a statement at a time when the only step taken was the recording of first information report under S. 154, Cr. P. C., could be contempt of court. As the judgment in this case has not been reported we think that we should reproduce the main portion of the judgment. Kapur, J., speaking on behalf of the court, observed:

"Before the publication of the comments complained of, only the first information report was filed in which

though some persons were mentioned as being suspected of being responsible for causing the breach in the bund, there was no definite allegation against any one of them. In the charge-sheet subsequently filed by the police these suspects do not appear to be amongst the persons accused. It was, therefore, argued that by the publication there could not be any tendency or likelihood to interfere with the due course of justice. The learned Additional Solicitor-General for the State submitted on the other hand that if there was a reasonable probability of a prosecution being launched against any person and such prosecution be merely imminent, the publication would be a contempt of court.

The Contempt of Courts Act confers on the High Courts the power to punish for the contempt of inferior courts. This power is both wide and has been termed arbitrary. The courts must exercise this power with circumspection, carefully and with restraint and only in cases where it is necessary for maintaining the course of justice pure and unaffected. It must be shown that it was probable that the publication would substantially interfere with the due course of justice; commitment for contempt is not a matter of course but within the discretion of the court which must be exercised with caution. To constitute contempt it is not necessary to show that as a matter of fact a judge or a jury will be prejudiced by the offending publication but the essence of the offence is conduct calculated to produce an atmosphere of prejudice in the midst of which the proceedings will have to go on and a tendency to interfere with the due course of justice or to prejudice mankind against persons, who are on trial or who may be brought to trial. It must be used to preserve citizens' right to have a fair trial of their causes and proceedings in an atmosphere free of all prejudice or prepossession. It will be contempt if there is a publication of any news or comments which have a tendency to or are calculated to or are likely to prejudice the parties or, their causes or to interfere with due course of justice.

As to when proceedings begin or when they are imminent for the purposes of the offence of contempt of court must depend upon the circumstances

of each case, and it is unnecessary in this case to define the exact boundaries within which they are to be confined.

The filing of a first information report does not, by itself, establish that proceedings in a court of law are imminent. In order to do this various other facts will have to be proved and in each case that question would depend on the facts proved."

6. Then Kapur, J. examined the facts of that case and observed:

"In the present case all that happened was that there was a first information report made to the police in which certain suspects were named; they were not arrested; investigation was started and on the date when the offending article was published no judicial proceedings had been taken or were contemplated against the persons named in the first information report. Indeed after investigation the suspects named in that report were not sent up for trial. At the date this offending publication was made there was no proceeding pending in a court of law nor was any such proceeding imminent."

7. On the first point it seems to us clear that on the facts of this case it cannot be said that any proceedings were imminent on September 20, 1967 in a Court. It is true that the first information report was lodged on September 11, 1967, but this Court has definitely held in Surendra Mohanty's case, Cri Appl. No. 107 of 1958 D/-23-1-1961 (SC) that lodging of a first information report does not by itself establish that proceedings in a court were imminent. This court further said that it would depend on the facts proved in a particular case whether the proceedings are imminent or not. There are no other facts which tend to establish the imminence of proceedings in a court. Even the accused were not arrested till September 23, 1967 and even if it be relevant there is no proof that arrest was imminent on September 20, 1967. Ordinarily until an accused is arrested it cannot be said that any proceedings in a court are imminent against that person because he may never be arrested or he may be arrested after a lapse of months or years.

8. It would be an undue restriction on the liberty of free speech to

lay down that even before any arrest has been made there should be no comments on the facts of a particular case. In some cases no doubt, especially in cases of public scandal regarding companies, it is the duty of a free press to comment on such topics so as to bring them to the attention of the public. As observed by Salmon, L. J., in *R. v. Savundranayagan and Walker*, 1968-3 All ER 439: "It is in the public interest that this should be done. Indeed, it is sometimes largely because of facts discovered and brought to light by the press that criminals are brought to justice. The private individual is adequately protected by the law of libel should defamatory statements published about him be untrue, or if any defamatory comment made about him is unfair". Salmon, L. J., further pointed out that "no one should imagine that he is safe from committal for contempt of court if, knowing or having good reason to believe that criminal proceedings are imminent, he chooses to publish matters calculated to prejudice a fair trial."

9. The learned counsel for the State urges that the crucial date is not September 20, 1967, when the statement was made, but September 25, 1967, when the newspaper published the statement. The latter date may be relevant in the case of the other appellant but as far as Gopalan is concerned it is September 20, 1967, which is the relevant date. There is no evidence that he was instrumental in getting this statement published on September 25, 1967.

10. We are accordingly of the opinion that the appellant Gopalan was wrongly convicted by the High Court. There is no evidence that any proceedings in a court were imminent.

11. Let us now examine the case of P. Govinda Pillai, the second appellant. The statement was published, as we have already said, in the daily newspaper called "Deshabhimani" on September 25, 1967. Were any proceedings in a court imminent on that date? The accused had already been arrested on September 23, 1969, in a serious cognizable case. Arrest means that the police was prima facie on the right track. The accused must have been produced before a magistrate within 24 hours of the arrest in accordance with Article 21 of the Con-

stitution, and the magistrate must have authorised further detention of the accused. In these circumstances it is difficult to say that any proceedings in a court were not imminent on that date. The fact that the police may have after investigation come to the conclusion that the accused was innocent does not make the proceedings any the less imminent. Proceedings in a court may be imminent on one day and yet not be brought the next day. For instance, the accused may in the meantime die or he may be proved innocent. To advance the day of imminence to the day when the police makes a report under S. 173, Cr. P. C. would do untold harm to those who may actually be ultimately prosecuted. Not only will it tend to harm the accused but would also tend to subvert the scheme of our criminal law and procedure. It would subvert it because it would tend to encourage public investigation of a crime and a public discussion of the character and antecedents of an accused in detention. The investigation of a cognizable case is eminently the province of the police, and if a person has information relevant to the commission of a particular crime there is nothing to prevent him from transmitting it to the police. This it seems to us would be the ordinary rule in the case of an investigation of a murder. It may be that in an investigation involving prolonged examination of account books of companies and the ramifications of a conspiracy, proceedings may not be said to be imminent as soon as the accused is arrested. Some of these cases take a long time to investigate and as observed by this court, it is difficult to lay down any inflexible rule. But as far as an investigation of a charge of murder is concerned once an accused has been arrested proceedings in court should be treated as imminent.

12. In view of this conclusion, we must hold that as far as the appellant P. Govinda Pillai is concerned proceedings in a court were imminent on September 25, 1967.

13. It has not been argued that Govinda Pillai did not know of the arrest of the accused or that he had good reasons to believe that no arrest had been effected by September 25, 1967. It is true that the statement does not mention the name of the ac-

tused but it does suggest that the person who committed the deliberate murder was acting as a result of a conspiracy and it was not a case of a sudden fight. It seems to us that the statement would tend to prejudice mankind against the accused.

14. In the result we maintain the conviction entered by the High Court against the appellant P. Govinda Pillai.

15. Accordingly the appeal of A. K. Gopalan is allowed and the appeal of P. Govinda Pillai dismissed. The fine, if already paid by A. K. Gopalan, shall be refunded.

16. MITTER, J.:— With respect I agree with the order proposed as regards Govinda Pillai but I am unable to concur in allowing the appeal of the first appellant. The facts are stated sufficiently in the judgment of my learned brother and need not be repeated. He has held and indeed there can be no doubt that any publication or comment which has a tendency to or is calculated or likely to prejudice the parties or their causes or with the due course of justice in pending proceedings would constitute a contempt of court. It is also universally accepted that even if proceedings have not actually begun but are imminent conduct of the kind referred to above would be punishable. In my view the consensus of authorities both in England and in India is that contempt of court may be committed by any one making a comment or publication of the exceptionable type if he knows or has reason to believe that proceedings in court though not actually begun are imminent. There does not appear to be any decision of this Court on the last aspect and it is therefore necessary to make a brief reference to the authorities.

17. It is agreed that there were no proceedings pending in a court when the first appellant made his statement on September 20, 1967 which was actually published in the Malayalam Daily newspaper in its issue dated September 25, 1967. In my view although no criminal proceedings were actually pending in any court on 20th September, it is not possible to hold that at that time such proceedings were not imminent or that the first appellant had no reasonable cause to believe that they were not imminent.

18. The Contempt of Courts Act, 1952 does not purport to define what actually constitutes such contempt. This was done with a purpose as attempts to interfere with the course of justice are of so many different kinds and may be committed in circumstances so various that the Legislature possibly thought it unwise to define the limits thereof. Courts in India have referred to the manifold aspects of the law of Contempt of Court and accepted the principles laid down in English decisions which go back to a date well over a century. Early in the present century in *Rex v. Parke*, 1903-2 KB 432 one Dougal was brought up before the petty Sessions of Saffron Walden charged with forgery and remanded without any evidence being taken. Articles to his disadvantage appeared in a newspaper of which the defendant was the editor. A rule was issued by the High Court to show cause why he should not be committed for contempt of Court. A point was taken that the jurisdiction would not be attracted if at the time of the publication of the article complained of there were no proceedings actually pending in any Court but the petty Sessions Court and that the jurisdiction to punish the publishers of articles of the kind before the Court was confined to cases in which at the moment of publication there was some cause actually pending in the High Court. In rejecting this contention Wills, J., observed:

"The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the Court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned.....If it be once grasped that such is the nature of the offence, what possible difference can it make whether the particular Court which is thus sought to be deprived of its independence, and its power of effecting the great end for which it is created, be at that moment in session or even actually constituted or not."

Dealing with the argument that the remedy only existed when there was a cause pending in the Court the Judge said:

".....in very nearly all the cases which have arisen there has been a cause actually begun so that the expression quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased."

In a recent judgment of the Court of Appeal in England observations have been made which run counter to the dictum in the last sentence.

19. The last extract from the judgment of Wills, J., was quoted by Lord Hewart, C.J. in *R. v. Daily Mirror*, 1927-1 KB 845 at p. 851 and by Lord Goddard, C.J. in *Regina v. Odhams Press Ltd.*, 1957-1 QB 73 at p. 81. Dealing with the question whether mens rea was necessary to constitute the offence the learned Chief Justice said:

"It is obvious that if a person does not know that proceedings have begun or are imminent, he cannot by writing or speech be said to influence the course of justice or to prejudice a litigant or accused person, but that is no answer if he publishes that which in fact is calculated to prejudice a fair trial."

In 1968-3 All ER 439 to be referred to in detail later, the Court of Appeal in England expressed similar views in no unmistakable terms.

20. We may now turn to the decisions of our High Courts. In *Tuljaram Rao v. Sir James Taylor*, ILR (1939) Mad 466 at p. 476=(AIR 1939 Mad 257 at pp. 259-260) and in the matter of "*Tribune*", Lahore, ILR 25 Lah 111 = (AIR 1943 Lah 329) opinions were expressed that a comment on proceedings which were imminent but not yet launched in Court with knowledge of the fact was as much a contempt as a comment of a case actually launched. According to the Lahore High Court it was sufficient that the proceedings were imminent to the knowledge of the person charged with contempt.

21. It was pointed out in Cri. Appl. No. 107 of 1953, D/-23-1-1961 (SC) that:

"As to when proceedings begin or when they are imminent for the purposes of the offence of contempt of Court must depend upon the circumstances of each case and it is unnecessary in this case to define the exact boundaries within which they are to be confined.

The filing of a first information report does not, by itself, establish that proceedings in a Court of law are imminent. In order to do this various other facts will have to be proved and in each case that question would depend on the facts proved."

The facts in Surendra Mohanty's case, Cri. Appl. No. 107 of 1953, D/-23-1-1961 (SC), were that there was a breach in a bund in a big reservoir between August 12 and 13, 1953 as a result of which some fields were flooded. On August 13, 1953, a first information was lodged at a police station stating that it had been cut and the cutting was suspected to have been done by one or more of the persons whose names were therein mentioned. The police thereupon started investigation and on the 24th September under the orders of the Sub-Divisional Magistrate statements of five witnesses were recorded presumably under Section 164, Criminal P. C. On October 26, 1953, a report called the charge-sheet for an offence under Section 430, I. P. C., was received by the Magistrate who took cognizance and summoned the persons accused therein and the proceedings were continued in the Court of the Magistrate. Between August 14 and October 26, 1953, two Oriya papers published comments in regard to the incident thus:

"In the year 1952, a water reservoir had been constructed at Dangarpara in the Titlagarh Sub-Division of the District of Bolangir by the Government at a cost of Rs. 33,000. This has been breached due to heavy rainfall. It is heard that 15 days before the breach of this bund, Abhut Sankh, Chintamani Subudhi and Bhagban Das and others of Lakhana on seeing the condition of the reservoir apprehended a breach and brought it to the notice of the S. D. O. and requested him to open an escape for the discharge of the surplus water. But in spite of hearing this, the S. D. O. did

not open an escape. When there was excessive accumulation of water, the Bund was unable to withstand and gave way.

It is heard that the S. D. O., in order to conceal his own fault, is accusing Mangra Najhi of Bana Bahal, Nilamani Mahakud of Kumanbahal and Satya Ganda, Banamali, Nariha and others of Dangarpara of the offences of cutting the bund and trying to create evidence by assaulting them through the police and by keeping watch (over the locality).

If actually the aforesaid persons had reported to the S. D. O. regarding the said bund and the S. D. O. neglected in taking proper steps himself, why he should not be responsible for this." This Court held that the order of conviction by the High Court could not be sustained in view of the facts that on the date when the offending article was published no judicial proceeding had been taken or were contemplated against the persons named in the first information report. According to the report the breach was not caused through any natural cause but was due to cutting by some persons who were suspected. Indeed, after investigation the suspects named in that report were sent up for trial. On the date when the offending publication was made, there was no proceeding pending in a Court of law nor was any such proceeding imminent.

22. It is difficult to hold on the facts of this case that the first appellant did not know or had no reason to believe that proceedings in Court were not imminent when he made the statement on 20th September. It is common knowledge that whenever a man loses his life through a cause other than natural, the police will invariably come to the scene, take custody of the dead body and start investigations. Indeed under Section 174, Cr. P. C., even when information is received that a person had died under circumstances raising a reasonable suspicion that some other person has committed an offence, it is the duty of the officer in charge of the police station within whose jurisdiction the death occurs to give intimation thereof to the nearest Magistrate empowered to hold inquest and to proceed to the place where the body of such deceased person is, to make an investigation and draw up a report.

23. Here a person lost his life in broad daylight not by accident but by stabbing when two groups of people clashed. One of the groups was charged by the statement of the first appellant to be guilty of deliberate conspiracy to commit murder and it was further alleged that a prominent member of that party had given instructions for this, the day prior to the violent disturbance. The first appellant was not an illiterate person who could not be reasonably expected to know that criminal proceedings were bound to be launched in respect of the affair: whether anybody would be successfully prosecuted is a different matter, but that would depend upon the evidence which would be brought before the Court. But no person with any experience of worldly affairs, much less a person of the standing of the first appellant, a member of Parliament and a leader of a political group could be ignorant of the fact that a murder in broad daylight when two groups of people clash is sure to be investigated into and made the subject of criminal proceedings. The statement of the appellant suggests that he had made some personal enquiries in the matter and had come to gather, therefrom that certain members of a particular political party had entered into a conspiracy to murder and had actually carried their plan into execution. He had also charged a leader of a rival party, who was not named, with having given instructions the previous day. There can be no doubt that the motive and the object was not only to further the cause of a particular political party but also to create an atmosphere of prejudice against members of that party and charge some of them with one of the most serious offences known to law, namely, that of conspiracy to murder followed by actual homicide.

24. In the case of 1968-3 All ER 439 (supra) the Court of Appeal in England, although of opinion that a free press had the right and duty to comment on topics of public interest so as to bring them to the attention of public like the failure of an insurance company in which the moving figure was a man with an unsavoury record who appeared to have used large sums of the company's money for his own purposes and disappeared abroad at a point of time when there was nothing

to suggest that criminal proceedings were even in contemplation, yet took a different view of the television programme depicting an interview with the appellant shortly after his return to England, when, according to the Court

"it must surely have been obvious to everyone that he was about to be arrested and tried on charges on gross fraud."

Salmon, L. J. added:

"It must not be supposed that proceedings to commit for contempt of Court can be instituted only in respect of matters published after the proceedings have actually begun. No one should imagine that he is safe from committal for contempt of Court if, knowing or having good reason to believe that criminal proceedings are imminent, he chooses to publish matters calculated to prejudice a fair trial."

How jealously Courts of law regard the preservation of the purity of the course of justice and the prevention and punishment of any attempt at pollution or perversion thereof as a solemn obligation will appear from a recent decision of the English Court of Appeal in *Attorney-General v. Butterworth*, 1962-3 All ER 326. The words of Lord Denning, M.R. are worth repeating. He said:

"I have no hesitation in declaring that the victimisation of a witness is a contempt of Court, whether done while the proceedings are pending or after they have finished. Such a contempt can be punished by the Court itself before which he has given evidence; and so that those who think of doing such things may know where they stand. I would add that, if the witness has been damnified by it, he may well have redress in a Civil Court for damages"

In my view, we should hold that a contempt of Court may be committed by a person when he knows or had good reason to believe that criminal proceedings are imminent. The test is whether the circumstances in which the alleged contemner makes the statement are such that a person of ordinary prudence would be of opinion that criminal proceedings would soon be launched. In my way of thinking the first appellant must have realised on September 20, 1967 that the investigation by the police was sure to lead

to cognizance of the offence being taken by a Magistrate and the prosecution of some persons for the offence of culpable homicide. His statement itself shows that to his knowledge the police were on the track of the guilty and had seized an unlicensed loaded gun and other weapons from the shop of a person belonging to a political party some members whereof were being accused of the crime. I would, therefore, dismiss the appeal by the first appellant also.

25. ORDER: In accordance with the opinion of the majority, the appeal of A. K. Gopalan is allowed and the appeal of P. Govinda Pillai is dismissed. The fine, if already paid by A. K. Gopalan, shall be refunded. Order accordingly.

AIR 1970 SUPREME COURT 1702 (V 57 C 361)

(From: Calcutta)*

J. C. SHAH, AG. C.J., V. RAMASWAMI AND A. N. GROVER, JJ.

The Commissioner of Income-tax, West Bengal II (in all the appeals), Appellant v. Saila Behari Lal Singha (in all the appeals), Respondent.

Civil Appeals Nos. 2276 to 2278 of 1968, D/-21-8-1969.

(A) Income-tax Act (1922), S. 66—Answer to questions referred should be final so far as High Court is concerned — They cannot be made, subject to decision in appeal pending before Supreme Court, in another reference even with the consent of the parties — 1. T. Ref. No. 158 of 1964, D/-23-2-1968 (Cal.), Reversed.

(Para 3)

(B) Income-tax Act (1922), S. 2 (6A) — Capital gains — Compensation for lands forming fixed assets compulsorily acquired are capital gains. I.T. Ref. No. 158 of 1964, D/-23-2-1968 (Cal.), Reversed.

Prima facie, receipt of compensation for land compulsorily acquired, which forms part of the fixed assets of a company is of a capital nature. AIR 1961 SC 1579, Relied on. (Para 3)

But interest which is statutorily payable on compensation is income

* (I.T. Ref. No. 158 of 1964, D/-23-2-1968—Cal.).

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and is not capital gain. AIR 1964 SC 1878, Relied on; 1. T. Ref. No. 158 of 1964, D/-23-2-1968 (Cal.), Reversed.

(Para 3)

Cases Referred: Chronological Paras (1964) AIR 1964 SC 1878 (V 51)=

53 ITR 151, Dr. Shamlal Narula v. Commr. of I-T., Punjab, J. & K., Himachal Pradesh and Patiala

3

(1961) AIR 1961 SC 1579 (V 48)=

42 ITR 302, Senairam Doongarmal v. Commr. of I-T., Assam,

3

Mr. Jagdish Swarup, Solicitor-General of India (M/s. T. S. Ramachandra, R. N. Sachthay and B. D. Sharma, Advocates, with him), for Appellant (in all the appeals); Mr. P. Burman, Sr. Advocate (M/s. R. Ghose and Sukumar Ghose, Advocates with him), for Respondent (in all the appeals).

The following Judgment of the Court was delivered by

SHAH, AG. C.J.: Shaila Behari Lal Singha—hereinafter called 'the assessee'—is a shareholder of a company styled the Ukharā Estates Zamindaries Ltd. The following table sets out the amounts of dividend received by the assessee from the company and the years in respect of which they were received:—

Year of assessment	Year of declaration of dividend	Amount of dividend.
		Rs.
1951-52	1357 B.S.	37,125
1952-53	1358 B.S.	29,250
1953-54	1359 B.S.	28,125

The assessee claimed that out of the amounts set out in the table, only Rs. 8,669 for the year 1357 B.S., Rs. 20,469 for the year 1358 B.S., and Rs. 21,822 for the year 1359 B.S., were taxable as dividend, and the remaining amounts were not taxable, since they were declared out of capital gains of the company which comprised salami or premia received by it as consideration for grant of long-term mining and other leases and as compensation for compulsory acquisition of lands for public purposes. The Income-tax Officer brought the entire amount to tax declared as dividend for each of the three years in question and grossed up the amounts under Section 16 (2) of the Income-tax Act, 1922. In appeal, the Appellate Assistant Commissioner held that the entire amount for each year was income in

the hands of the assessee, but only a part of it being dividend, within the meaning of Section 2 (6A) of the Income-tax Act, 1922, was liable to be grossed up. In second appeal, the Appellate Tribunal held that part of the amount distributed which was attributable to salami received by the company for the grant of long-term leases was not taxable as dividend, but as income of the assessee from "other sources."

2. The Tribunal then referred under Section 66 (1) of the Indian Income-tax Act, 1922, three questions to the High Court of Calcutta: the first two questions were referred at the instance of the assessee, and the third question at the instance of the Commissioner:—

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the distribution to the assessee of the amount attributable to land acquisition compensation received by the Ukhara Estate Zamindaries (P.) Ltd., after the 31st March, 1948, was in the hands of the assessee, receipt of dividend within the meaning of Section 2 (6A) of the Indian Income-tax Act, 1922?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the receipt by the assessee of the amount attributable to salamis realized by the Ukhara Estate Zamindaries (P.) Ltd., for grant of long-term leases after the 31st March, 1948, was a receipt of income in the hands of the assessee and taxable as the income of the assessee from other sources?

(3) Whether, on the facts and in the circumstances of the case, the distribution to the assessee of the amount attributable to salamis realised by the Ukhara Estate Zamindaries (P.) Ltd., for grant of long-term leases after the 31st March, 1948, was not in the hands of the assessee, receipt of dividend within the meaning of Section 2 (6A) of the Indian Income-tax Act, 1922?" The High Court recorded answers on all the questions in the negative, following their earlier judgments in Income-tax References Nos. 131 of 1961 and 3 of 1964. The High Court however observed that it was agreed between the parties that the answers in the negative on all the questions were subject to the final decision in

appeals filed against the orders made in Income-tax References Nos. 131 of 1961 and 3 of 1964 and pending in this Court.

3. In our judgment, even with the consent of the parties, the learned Judges could not dispose of the reference in the manner they have done. They had to record their answers and their reasons in support of the answers: those answers were, in so far as the High Court was concerned, final. They could not stand modified by reason of any judgment in other cases decided by this Court. Apart from the technical defect that the High Court has not recorded final answers, the order is subject to another infirmity. The High Court had to decide on the facts of each case whether any amount of salami was capital gain, and whether any part of the compensation received for compulsory acquisition of land was capital gain. Prima facie, receipt of compensation for land compulsorily acquired which forms part of the fixed assets of a company is of a capital nature: *Senairam Doongarmal v. Commr. of I.-T., Assam*, 42 ITR 302 = (AIR 1961 SC 1579), but interest which is statutorily payable on compensation is income and is not capital gain: *Dr. Shamlal Narula v. Commr. of Income-tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala*, 53 ITR 151 = (AIR 1964 SC 1878). The assumption made that the entire amount of compensation is deemed to be capital gain cannot, therefore, be sustained.

4. It is also necessary to observe that in Appeals Nos. 737 to 739 of 1968 and 13 of 1968 and 1621 of 1968 which arose out of Reference No. 131 of 1961 and other references, decided by this Court on July 25, 1969, the only question of law raised was whether distribution of dividend out of capital gains was taxable. The scope of enquiry in this group of cases in view of the form of the questions, is more extensive. In appeals Nos. 737 to 739 of 1968 we held that, having regard to the Explanation to Section 2 (6A) capital gains arising after 31st day of March, 1948 (and before the 1st day of April, 1956) were not part of accumulated profits, and if dividend be distributed to the shareholders of the company out of those capital gains, to the extent of the distribution out

of the capital gains, the dividend must be deemed exempt from liability to tax under Section 12 as dividend income liable to tax. In that case we could not consider whether the receipt from the capital gains was still income liable to tax from "other sources" (not being dividend) under Section 12 of the Indian Income-tax Act, for no such question was referred. But that question has been expressly referred in this case.

5. The order passed by the High Court is, therefore, set aside and the case is remanded to the High Court for disposal according to law. There will be no order as to costs in this Court. Costs in the High Court will be costs in the references.

Appeal allowed.

AIR 1970 SUPREME COURT 1704 (V 57 C 362)

(From Allahabad: 1969 All LJ 453)

J. M. SHELAT, C. A. VAIDIALINGAM AND I. D. DUA, JJ.

Jeewan Nath Wahal and others, Appellants v. Sheikh Mahfooz and others, Respondents.

Civil Appeal No. 1278 of 1969, D/- 8-9-1969.

Motor Vehicles Act (1939), S. 48 — Application for permit on route not opened on ground that such route is necessary in public interest — Application rejected on ground that there was no justification for a new route — Order does not fall under Section 48 and is not appealable under S. 64 (a). AIR 1963 SC 64 and C. A. No. 95 of 1965, D/-27-10-1967 (S.C.), Explained; 1969 All LJ 453, Affirmed. (Para 8)

Cases Referred; Chronological Paras

(1969) AIR 1969 SC 1130 (V 56) =

C.A. No. 1426 of 1968, D/-17-2-

1969, Obliswami Naidu v. The

Additional State Transport Appellate Tribunal, Madras

(1967) C. A. No. 95 of 1965, D/-

27-10-1967 = 1967-2 SCWR 857,

M/s. Java Ram Motor Service

v. S. Kajarathinam

(1963) AIR 1963 SC 64 (V 50) =

(1963) 3 SCR 523, Abdul

Mateen v. R. K. Pandey

Mr. C. K. Daphtary, Sr. Advocate

(M/s. Yogeshwar Prasad, S. K. Dhavon

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and Mrs. S. Bagga, Advocates with him), for Appellants; Mr. H. R. Gokhale, Sr. Advocate (M/s. J. P. Goyal, Ilyas Hussain and V. C. Parashar, Advocates with him), for Respondents Nos. 1 and 2.

The following Judgment of the Court was delivered by

SHELAT, J.: The question arising in this appeal, by certificate, may be stated thus:

When an applicant applies for a permit to run a passenger bus service on the ground that the route for which he applies, though one not yet opened, is necessary in public interest, but the Regional Transport Authority comes to the conclusion that it does not, and thereupon rejects his application, whether his order is one under S. 48 of the Motor Vehicles Act, 4 of 1939 and is, therefore, appealable under Section 64 (a) of that Act?

2. The route involved in this case was the one between Meerut and Dankaur which had no direct passenger bus service. There were, however, two routes which were being operated, namely, one from Meerut to Bulandshahr and the other from Siana to Dankaur, one crossing the other, so that if one wanted to go from Meerut to Dankaur there was no direct service, and, therefore, he would have first to travel in the bus running from Meerut to Bulandshahr, get down at a place near Gulsothi and catch the bus running from Siana to Dankaur. This was the position when the appellants, amongst others, applied to the Regional Transport Authority for permits to operate a direct service from Meerut to Dankaur. This was, therefore, not a case where the R.T.A. had already decided upon opening the new route, fixed the number of permits necessary for such a route and then invited applications from operators. Nevertheless, the R.T.A., following the procedure laid down in Section 57 of the Act, published these applications, to which objections were raised amongst others by those who were operating on the routes earlier referred to.

3. These applications came up for consideration in the meeting held before the R.T.A. on July 28, 1965, when Item 3 of the Agenda for that meeting was:

"To pronounce decision regarding recognition and classification of Meerut to Dankaur via Hapur-Gulsothi-Sikandarabad route and grant of permits thereon."

It is apparent that Item 3 involved two questions for determination of the R.T.A.; (a) whether the route proposed by the appellants and others should be opened, and (b) if so, to whom, amongst the applicants, should permit or permits, depending upon the number of permits he should decide upon, should be granted. After hearing the applicants and those who opposed them, the R.T.A. was satisfied that there was no sufficient demand for such a direct service, and, therefore, there was no justification for opening the proposed new route. Having arrived at that conclusion, the question of granting or not granting permits to individual applicants did not arise and he rejected the applications of the appellants and other applicants. Appeals having been filed before the Appellate Tribunal, the Tribunal reversed the order of the R.T.A. and granted permits to the three appellants. The respondents thereupon filed writ petitions in the High Court for quashing the order of the Tribunal contending that no appeal against the order of the R.T.A. lay under Section 64(a), and that consequently, the Tribunal had no jurisdiction to entertain such appeals and grant permits to the appellants. The learned Single Judge of the High Court, who heard the writ petitions in the first instance, dismissed them, but on appeal against his order the Division Bench of the High Court came to the conclusion that no appeal against the said order of the R.T.A. lay under S. 64(a), and accordingly, allowed the writ petitions and quashed the Tribunal's order. This appeal is directed against this order.

4. Counsel for the appellants urged that there was no provision in the Act separately providing for the R.T.A. to decide first as to whether a particular route proposed by an applicant should be opened or not. It was argued that the provisions of Chap. IV, and in particular Sections 47 and 57, show that once an application for a permit is made and is published and objections thereto are invited and the R.T.A. applies his mind to it and rejects it, no matter what his reasons for such rejection are, his order

amounts to a refusal under Section 48 and is appealable under Section 64(a). The rival contention, on the other hand, was that Section 47(3), which contains the power of the R.T.A. to first determine the number of permits necessary for a particular route (which decision, as held by this Court, is not appealable under Section 64(a)), contains also the power to decide whether a proposed route should be opened or not, and that it is only after these two points are first decided, that the question, who amongst the applicants should be granted permits, arises. It is at this latter stage that the question of granting or refusing to grant a permit arises under Section 48 and it is against an order under that section that an appeal under Section 64(a) is provided. The argument was based on the principle that a right of appeal is not something which is inherent, but is that which and to the extent it is provided for by the statute.

5. The provisions of the Act relevant to the questions raised in this appeal as also their scheme have been more than once examined by this Court. There is, therefore, no necessity to analyse them once more. In *Abdul Mateen v. R. K. Pandey*, 1963-3 SCR 523 = (AIR 1963 SC 64), the question was whether the Bihar Government acting under Section 64-A, as amended by the Bihar Amendment Act, 1950, had the power to increase the number of permits for which applications had been invited by the R.T.A. In negating the claim that the State Government had such power, this Court *inter alia* held that Section 47(3) was concerned with a "general order" limiting stage carriages on a consideration of matters specified in Section 47, and that such an order can be modified by the R. T. A. if it so decides one way or the other. But such a modification is not a matter of consideration when it is dealing with the actual grant of permit under S. 48 read with S. 57, for at that stage what the R. T. A. has to do is to choose between various applicants who may have applied under section 46. The Court held that that is not the stage when the "general order" passed under section 47(3) can be reconsidered, for, the order under section 48 is subject to section 47 including the provisions of S. 47(3).

under which the "general order" limiting the number of permits is passed. At p. 531 (of SCR) of the Report—(at p. 67 of AIR) the Court further held that the appeal contemplated under section 64 is by a person who is aggrieved by the orders specified therein and does not contemplate any appeal against "the general order" passed under section 47 (3). On this view of section 47, it was lastly held that when an appeal is taken from an order under section 48 and a revision is applied for under section 64-A of the Bihar Amendment Act, the power of the Appellate Authority, as also of the State Government as the revisional authority, is as much subject to S. 47 (3) as the power of the R. T. A. under section 48, i.e., it cannot grant a permit beyond the limit already decided upon under S. 47 (3). In *M/s. Java Ram Motor Service v. S. Rajarathnam*, C. A. No. 95 of 1965 D/- 27-10-1967 (SC) the R.T.A. had already introduced the new bus route and then had invited applications for permits. 34 applicants applied for permits. The R. T. A., however, rejected them all on the ground that there was after all no need for the new route. On these facts the question was, whether a person, whose application is rejected by the R. T. A. on the ground that there was no need for a new route, in spite of his decision previously arrived at that such a route was necessary, could appeal under S. 64 (a) against such rejection. Following the decision in *Abdul Mateen's case*, 1963-3 SCR 523 = (AIR 1963 SC 64) (supra) we held that:

"the Authority had already resolved to introduce a new bus route and invited applications for a permit under section 57 (2). It could no doubt have acted under section 47 (3) and modified its earlier decision. Instead, what it did was that while considering the question as to who amongst the 34 applicants should be granted that permit, i.e., at the stage not under section 47 (3) but under section 48 (1), it decided to refuse all applications on the ground that there was no longer any need for any such permit. In other words, though the earlier order was still intact, the authority rejected the applications on the ground that there was no need for any fresh permit. The order was clearly contrary to the previous order

passed under section 47 (3) and therefore cannot be said to be in consonance with section 47 as required by section 48 (1). The order was not one under section 47 (3) but under S. 48 (1) refusing thereby the applications including those of the appellant and the respondents and was therefore subject to an appeal under S. 64 (a)."

6. Does it make any difference to the principle laid down in these decisions whether the R. T. A. invites applications having previously decided to introduce a new route or whether an applicant proposes such a new route and applies for a permit. *Abdul Mateen's case*, 1963-3 SCR 523 = (AIR 1963 SC 64) (supra) and the case of *Java Ram Motor Service*, C. A. No. 95 of 1965 D/- 27-10-1967 (SC) (supra) were cases where the R. T. A. had first decided to introduce a new route and had then invited applications. On the other hand, in *R. Obliswami Naidu v. The Addl. State Transport Appellate Tribunal, Madras*, (reported in AIR 1969 SC 1130) no such decision had been previously taken by the R. T. A. and the appellant had applied for a permit on a new route. The question canvassed there was whether the R. T. A. had first to decide the necessity of such a new route, and then having come to such a decision proceed to examine the question whether an applicant should or should not be granted the permit. The Appellate Tribunal had held that the procedure followed by the R. T. A. was not in accordance with law as it had failed to determine the question of the need for a service for the new route applied for by the appellant before deciding his application for permit, and had contravened the provisions of section 47 (3). The appellant challenged the order by a writ petition in the High Court which was dismissed. In the appeal in this Court against that order, *Hegde, J.*, speaking for the Court, upheld the view of the Appellate Tribunal and held that though section 47 (3), if read by itself, did not throw light on the question, sections 47 and 57, when read together, made it clear that the R. T. A. had first to arrive at a decision whether there was the necessity for the new route, and then decide under section 48 whether the appellant should be granted a permit or not. This decision clearly shows that it makes no

difference between cases where applications are invited by the R. T. A. after having come to the conclusion as to the necessity for a new route, or where an applicant himself proposes a new route and applies for a permit. In both the cases, the R. T. A. has to decide, before reaching the stage of section 48 when he considers individual applications for deciding as to whom amongst the applicants the permit should be granted, whether the new route is necessary in the interest of the public.

7. The decisions referred to above, in our opinion, clearly lay down that the R. T. A. has first to make "a general order" as stated in Abdul Mateen's case, 1963-3 SCR 523 = (AIR 1963 SC 64) (supra) under section 47 (3) as to the number of permits necessary for a new route and he cannot exceed that limit while he is at the next stage when he considers under section 48 read with section 57 as to who amongst the applicants should be granted the permit or permits. Such a "general order" limiting the number of permits presupposes that he has come to a decision that the new route either proposed by him or by an applicant or applicants is necessary in public interest. Obviously, he does not have to decide the number of permits necessary for such a new route unless he first decides that the new routes should be opened. If the order as to the number of permits is a "general order" passed under S. 47 (3), in respect of which the individual applicants are not concerned with and is anterior to the stage under S. 48 when applications of the individual operators are taken into consideration, and therefore, not appealable under S. 64 (a), it must follow a fortiori that the decision as to whether the new route is necessary or not is equally a "general order" arrived at either earlier or contemporaneously with the decision as to the number of permits. If the latter order is not appealable, it cannot be that the former, i.e., the decision whether the new route is necessary or not, is not an equally "general order" with which individual applicants are not concerned, and can appeal against it under S. 64 (a).

8. On this view, it would at first sight appear as if the R. T. A. has an unlimited or unbridled power in connection with the decision as to whe-

ther a proposed route should be opened or not. That it is not so is clear from section 64-A introduced in the Act by Act 100 of 1955 which confers revisional power on the State Transport Authority, either on its own motion or on an application made to it, to call for the record of any case in which an order has been made by the R. T. A. and in which no appeal lies, and if it appears to the State Transport Authority that such an order is improper or illegal, to pass such order as it deems fit.

9. In our view the Division Bench of the High Court correctly interpreted sections 47, 48, 57 and 64, and the decisions of this Court in Abdul Mateen's case (supra) and the case of Java Ram Motor Service C. A. No. 95 of 1965 D/- 27-10-1967 (SC) (supra). The appeal, consequently, must fail and has to be dismissed. The appellants will pay to the respondents the costs of this appeal.

Appeal dismissed.

AIR 1970 SUPREME COURT 1707

(V 57 C 363)

(From Madras: ILR (1967) 1 Mad 328)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

M. V. Shanmugam and Co., Appellant v. The Commissioner of Income-tax, Madras, Respondent.

Civil Appeals Nos. 294 and 295 of 1967, D/- 22-4-1970.

Income-tax Act (1922), Ss. 3, 10 — Business of firm continued by receivers appointed by Court — Profits from business can be taxed as profits earned by "an association of persons" and not by individuals.

In a suit for dissolution of partnership the Court appointed three receivers and directed them to conduct the business. Certain regular sums were to be paid to the partners of the dissolved firm every month. The business yielded large profits in two consecutive years. The business profits were assessed as profits earned by an association of persons. On appeal

Held, that the receivers appointed by the court were merely the representatives of the real owners of the business i.e. the partners of the firm. The primary liability to pay the tax due was that of the real owners. The

fact that there were three receivers did not make them an association of receivers. (Para 5)

The receivers had joined in a common purpose and they acted jointly. When they did so they acted on behalf of the persons who were the owners of the business. The profits were earned on behalf of the persons who had a common interest created by the order of the Court and were on that account of an "association of persons". The existence of specific or defined interest in the profits did not make the earning any the less by an "association of persons". Liability to tax depends upon the earning of profits by a unit and not upon the ultimate division of the profits. All the owners of the business including the person who objected to the continuance of the business were given, month by month, some amounts from the proceeds of the business and none of them declined to receive the same. That means all of them acquiesced in the continuance of the business. On the facts proved, it must be held that in law the erstwhile partners of the firm carried on the business through their representatives. AIR 1961 SC 1261 Foll. Case law discussed.

(Paras 7, 8)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 888 (V 56) =

(1969) 73 ITR 626, C. R. Nagappa v. Commr. of Income-tax Mysore 6

(1961) AIR 1961 SC 1043 (V 48) =
(1961) 42 ITR 115, Mahomed Noorullah v. Commr. of Income Tax Madras 9

(1961) AIR 1961 SC 1261 (V 48) =
(1961) 42 ITR 172, Commr. of Income tax, Poona v. Buldana Dist. Main Cloth Importers Group 9

(1960) AIR 1960 SC 1172 (V 47) =
(1960) 39 ITR 546, Commr. of Income Tax, Bombay v. Indira Balkrishna 8

(1959) AIR 1959 Bom 298 (V 46) =
(1958) 34 ITR 187, Commr. of Income tax v. Balwantrai Jethalal Vaidya 6

(1935) 3 ITR 408 = 40 Cal WN 476, In re B. N. Elias 8

The following Judgment of the Court was delivered by

HEGDE, J.: These companion appeals by certificate under section 66A (2) of the Indian Income Tax Act, 1922

(in short 'the Act') are directed against the decision of the Madras High Court in a tax reference under section 66 (1) of the Act, relating to the assessment years 1958-59 and 1959-60.

2. Messrs. N. V. Shanmugam and Co., a firm, was carrying on business in the manufacture and sale of snuff under a deed of partnership dated April 20, 1955. Its partners were S. I. Ramiah Nadar, Murugavel Nadar and Shanmughavel Nadar. S. P. Mohan, a minor had been admitted to the benefits of the partnership, his share in the net profits being 1/6th. The deed of partnership provided that the partnership could not be dissolved before August 31, 1955. But it was open to the partners to continue the partnership or enter into a fresh partnership on fresh terms and conditions. On September 17, 1956, Ramiah Nadar filed a suit in the city Civil Court, Madras for the dissolution of the partnership with effect from August 31, 1956 and for taking of accounts. He also applied for the appointment of a receiver to take charge of the business. On September 21, 1956, the Court appointed three receivers two of whom were the partners of the firm namely Ramiah Nadar and Murugavel Nadar and the third was an Advocate by name Ram Mohan. The business of the firm had been stopped from September 1, 1956 to September 21, 1956. The Court directed the receivers "to reopen and conduct the snuff business for the purpose of winding up, with powers to realise the outstanding and discharge the dues of the firm" subject to the following among other terms.

Clause 4: The receivers can carry on the business of the partnership normally.

Clause 6: All parties to have access to the books of the firm and to the business premises.

Clause 7: All parties are entitled to get information relating to the conduct of the business from the receivers.

Clause 8: The profits if any earned from 1-9-1956 will be treated as an asset of the firm subject to be divided between the parties in the manner set out in paragraph 10 of the deed dated 20-4-1955. The receiver or receivers shall not be entitled to any share in the profits for the management.

Clause 9: The receivers will pay every month Rs. 1,500/- to plaintiff, Rs. 1,500/- to the 1st defendant, Rs. 750/- to 2nd defendant, Rupees 750/- to 3rd defendant by his guardian from November 1, 1956 (owners of the dissolved firm).

3. Sometime later the court appointed a Commissioner for taking the accounts of the firm and for arranging the sale of the business as a going concern, but no sale took place. In the assessment year 1958-59, the business yielded a profit of Rs. 93,739/-. In the assessment year 1959-60, there was a profit of Rs. 1,54,393/-. In response to a notice from the Income-tax Officer, the receivers filed "nil" returns but showed the profits earned in the business in Section D of the return. But they asserted that the income should be assessed in the hands of the beneficiaries as they are already assessee having other sources of income. The Income-tax Officer rejected that contention. He came to the conclusion that the business was carried on by an 'association of persons' and as such no question of assessing the individual partners on their share of income at the rate applicable to them would arise, as contended by the receivers. The Appellate Assistant Commissioner rejected the appeal of the assessee and confirmed the order of the Income-tax Officer; but on a further appeal, the Tribunal came to the conclusion that the profits earned should be assessed to tax in the hands of the individual partners at the rates applicable to them. At the instance of the Commissioner of Income-tax, Madras, the Tribunal submitted the following question under section 66(1) of the Act for the opinion of the High Court.

"Whether the income of the business in snuff could be assessed on the receivers as an association of persons under section 10 or under section 41 of the Act."

4. The High Court answered that question in favour of the Revenue.

5. The real point in controversy between the Revenue and the assessee is whether the profits earned in the business should be considered as profits earned by an "association of persons" or whether it should be considered as having been earned by individuals. The receivers appointed by

the court were merely the representatives of the real owners of the business i.e. the erstwhile partners of the firm. The primary liability to pay the tax due was that of the real owners. The tax may be levied and recovered from the Receivers under section 41 (1) of the Act. To borrow the expression from the Income-tax Act, 1961, they are only representative assessee. The fact that there were three receivers did not make them an association of receivers. The three receivers jointly represented the real owners. The circumstance that there were three receivers was wholly irrelevant for the purpose of the assessment. There was no question of assessing the receivers as an "association of persons". The real question is whether the persons whom the receivers represented constituted an "association of persons". Further in respect of business profits, all assessment of tax is done under S. 3 read with S. 10 of the Act. Section 3 imposes the charge and section 10 to the extent relevant for our present purpose provides that tax shall be payable by the assessee under the head "Profits and gains of business" in respect of the profits or gains of business carried on by him subject to the allowances allowed under sub-section (2) of that section. Section 41 empowers the Revenue to levy the tax that could have been levied on the person who earned the profits on one or the other of his representatives mentioned in that section and recover the same from that representative "in the like manner and to the same amount as it would be leviable upon and recoverable" from the person on whose behalf such profits are recoverable and all the provisions of the Act shall apply accordingly. Section 41 of the Act does not impose any separate charge. It only empowers the Revenue to levy and collect a tax due from a person or persons, from his or their representative. Hence there is no question of either the receivers being an "association of persons" or their being liable "under section 10 or section 41 of the Act". The liability of the receivers arose under section 41 read with section 10. The Tribunal wanted the opinion of the High Court on the question whether the profits in question should be considered to have been earned by an

"association of persons" or by individuals. We shall proceed to answer that question.

6. Mr. M. C. Chagla, learned Counsel for the assessee contended that the liability of receivers is co-extensive with that of the beneficiaries and cannot in any case be a larger or wider liability. If the assessment is made on a receiver whatever the nature of the profit, whatever the mode of computation, his liability to pay tax must be determined in accordance with S. 41 of the Act; that section is mandatory; the tax payable by him on the profits earned can only be ascertained in accordance with the special provisions laid down in that section; it is not open to the department to ignore the provisions of section 41 and levy tax on receivers in the same way as on an assessee who does not fulfil the character of a receiver. According to the Counsel when an assessment is made under section 41 of the Act, it must be done under one of the heads mentioned in Chapter III of the Act and the provisions laid down with regard to computation of the income-tax must be carried out; Section 41 will come into play after the income has been so computed. In support of this contention, he relied on the decision of the Bombay High Court in *Commr. of Income-tax, Ahmedabad v. Balwantlal Jethalal Vaidya*, (1958) 34 ITR 187 = (AIR 1959 Bom 293) which decision has been approved by this Court in *C. R. Nagappa v. Commr. of Income-Tax*, (1969) 73 ITR 626 = (AIR 1969 SC 888). Proceeding further the Counsel urged that as the assessment of the receivers should have been on the same basis as the erstwhile partners of the firm would have been assessed in respect of the profits in question. According to him, the business in question could not have been conducted by the erstwhile partners - as an "association of persons". He urged that the erstwhile partners of the firm were fighting amongst themselves; some of them wanted to carry on the business while one of them wanted to close down the same. Hence they could not have carried on the business as an "association of persons". He urged that an "association of persons" as used in section 3 of the Act means an association in which two or more persons voluntarily join in a "common purpose" or "common ac-

tion". He further urged that in a business said to be carried on by an "association of persons", there must be a unity of control and unity of management; as no such unity existed amongst the erstwhile partners of the firm, it cannot be said that the receivers represented an "association of persons".

7. We are unable to accede to the contentions of the learned Counsel for the assessee. It is not denied that the business was carried on by the receivers on behalf of erstwhile partners of the firm and that considerable profits were earned from the business. The control and the management of the business was in the hands of the receivers. That control and management was a unified one. The receivers had joined in a common purpose and they acted jointly. When they did so they acted on behalf of the persons who were the owners of the business. The receivers did not and could not have represented the individual interest of the various owners of the business. If they had done so there would have been chaos in the business. The profits to which those owners lay claim and which they were not averse to pocket, were earned on behalf of an "association of persons". The profits were earned on behalf of the persons who had a common interest created by the order of the Court and were on that account of an "association of persons". The existence of specific or defined interest in the profits did not make the earning any the less by an "association of persons". Liability to tax depends upon the earning of profits by a unit and not upon the ultimate division of the profits. The expression "association of persons" is not defined in the Act. At one stage, there was conflict of judicial opinion about the true meaning of that expression. That conflict can now be said to have been settled by some of the decisions of this Court to which we shall refer presently.

8. In *Commissioner of Income-tax Bombay v. Indira Balkrishna*, (1960) 39 ITR 546 = (AIR 1960 SC 1172) this Court accepted the observations of Sir Harold Derbyshire C.J. in *In re B. N. Elias*, (1935) 3 ITR 408 (Cal) that the word "associate" means "to join in common purpose or to join in an action". Therefore "association of persons" as used in section 3 of the

Act means an association in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one, the object of which is to produce income, profits or gains. It is true that in the instant case before the receivers were appointed, one of the erstwhile partners objected to the continuance of the partnership. But there is nothing in the record to show that he objected to the continuance of the business. All the same we shall assume that he did not want at that stage that the business should be continued. But in fact the business was continued in pursuance of the orders of the Court. All the owners of the business including the person who objected to the continuance of the business were given, month by month, some amounts from the proceeds of the business. It was not said that any of them declined to receive the same. That means all of them acquiesced in the continuance of the business. Each one of the assesses wants to share the profits earned on behalf of all of them but when it comes to the question of paying tax, they want to deny that the business was conducted on behalf of all of them. It is true that considerations of equity are irrelevant in interpreting taxing provisions but while considering the question who carried on a business, the course of conduct of the concerned parties is relevant. On the facts proved, it must be held that in law the erstwhile partners of the firm carried on the business through their representatives.

9. In *Mohamed Noorullah v. Commr. of Income Tax, Madras* (1961) 42 ITR 115 = (AIR 1961 SC 1043) this Court had to consider whether the assessment in that case was rightly made on an "association of persons". Therein, O, a Mohamedan who was carrying on the business of manufacture and sale of beedies of a particular brand, died intestate on December 17, 1942 leaving as his heirs, N, a son by his predeceased wife, L his widow and his four children by L. The widow L and one D carried on the business after the death of O. N. through his next friend, applied for leave to sue for partition in forma pauperis and pending these proceedings on March 17, 1943, two advocates

were appointed as joint receivers of all the properties of O, by consent of all the parties. The consent on behalf of the minor was given by his next friend. The widow L filed another suit for partition on May 10, 1943 but applied for the continuance of the joint receivers. N opposed the application on the ground that he wanted different persons to be appointed as receivers. By an order dated May 25, 1943, the Court ordered the continuance of the joint receivers. The receivers continued in charge of the business till November, 1946 when the business was put up for sale by auction and was purchased by N. The Income-tax Officer assessed the profits of the business for the calendar years 1943-46 in the hands of the receivers as the income of an "association of persons" consisting of the heirs of O. The Appellate Assistant Commissioner as well as the Tribunal upheld the finding of the Income-tax Officer. On a reference under S. 66 (1) of the Act, the High Court agreed with the view taken by the authorities under the Act. This Court upheld the view taken by the High Court. This decision was tried to be distinguished by Mr. Chagla on the ground that in that case all the parties had consented to the appointment of the receivers. None of the heirs of the deceased owner of the business wanted to break the unity of the business or its continuity and the business was of such a nature that it could not be carried on without such consensus; therefore, the continuance of the business by the receivers was rightly considered as continuance of business by the heirs of the deceased. According to the Counsel such was not the position in the present case. For the reasons already stated, we see no merit in that contention. We have earlier come to the conclusion that the business was continued with consent of all the owners. Hence for the purpose of this case it is not necessary to go into the question as to what would have been the position if the business had been continued without the consent of all the owners. The facts of this case directly fall within the rule laid down by this Court in *Commr. of Income-Tax, Poona v. Buldana Dist. Main Cloth Importers Group* (1961) 42 ITR 172 = (AIR 1961 SC 1261). The facts of that case were: In 1945, the Deputy

Commissioner of Buldana evolved a scheme for the distribution of cloth in his district and, with the sanction of the C. P. Government appointed a group of four persons as sole agents for the import of cloth from mills in various places in India and for its distribution to retailers. For different periods the group which imported cloth was differently constituted. H. & Co., which was a common member maintained the books relating to the business. Every time there was a change in the constituents of the group, a separate set of books was maintained and the profits from those enterprises were divided between the various persons who formed the group at the material time. The Appellate Tribunal found that the import and distribution of cloth was done on a joint basis, the purchasers were joint, so were the sales and the profits were ascertained on a joint basis and then distributed according to the capital contributed by each member of the group. This Court held that the group was an "association of persons" and could be assessed on its profits as such to income-tax and excess profits tax. It further held that it made no difference that the business was carried on because the Deputy Commissioner of the district had appointed the members constituting the group to import and distribute the cloth. Therein the members of the group did not voluntarily join the group. They were put together by the Deputy Commissioner and asked to act together which they did. Similar is the position in the present case.

10. For the reasons mentioned above, our answer to the question referred is that the profits in question were earned from a business carried on by an "association of persons".

11. In the result these appeals fail and they are dismissed with costs. One hearing fee.

Appeals dismissed.

AIR 1970 SUPREME COURT 1712

(V 57 C 364)

(From Madras: ILR (1967) 2 Mad 256)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

The Commissioner of Income-tax, Madras, Appellant v. M. V. Murugappan and others, Respondents.

Civil Appeal No. 566 of 1967, D/- 24-4-1970.

Income-tax Act (1922) (as amended by Finance Act of 1955), S. 2 (6A) (c) — "Dividend" — Liquidation of company — Current profits in the year in which company was ordered to be wound up — Amount distributed out of such profits is of the nature of capital and not of dividend in the hands of shareholders. ILR (1967) 2 Mad 256, Affirmed. (Para 8)

Cases Referred: Chronological Paras (1967) AIR 1967 SC 81 (V 54) =

(1966) 60 ITR 83, First Income-tax Officer, Salem v. Short Brothers (P.) Ltd. 5

(1964) 54 ITR 555 = 1063-1 WLR 905, Staffordshire Coal and Iron Co. Ltd. v. Brogan (Inspector of Taxes) 4

(1957) AIR 1957 Bom 4 (V 44) = (1957) 31 ITR 82, Girdhardas and Co. Ltd. v. Commr. of Income-tax, Ahmedabad 5

(1956) AIR 1956 Mad 474 (V 43) = (1956) 29 ITR 768, Appavu Chettiar v. Commr. of Income-tax, Madras 5

(1924) 1924-2 KB 52 = 93 LJ KB 709, Commr. of Inland Revenue v. George Burrell 4

(1889) 14 AC 525 = 59 LJ Ch 122, Birch v. Cropper 4

The following Judgment of the Court was delivered by

SHAH, J.: The Income-tax Appellate Tribunal submitted the following question under Section 66 (1) of the Indian Income-tax Act, 1922, to the High Court of Madras for opinion:—

"Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the sums of Rs. 81,611 and Rs. 1,49,444 were not the part of the accumulated profits of the company as on December 31, 1954 as contemplated under Section 2 (6A) (c) of the Income-tax Act of 1922?" The High Court answered the question in the affirmative. The Commis-

sioner of Income-tax asked for and obtained a certificate from the High Court only in respect of the amount of Rs. 81,611. This appeal is, therefore, restricted to the claim of the Revenue that the amount of Rupees 81,611 was not part of the "accumulated profits of the company as on October 31, 1954 as contemplated by Section 2 (6A) (c) of the Income-tax Act, 1922."

2. Ajax Products Ltd. was a public limited company incorporated in 1939. It maintained its accounts according to the calendar year. The respondents to this appeal were shareholders of the company. The company "went into liquidation on October 31, 1954". The liquidators of the company distributed on March 10, 1955 to the shareholders for each share Rs. 100 by allotment of a share in Carborundum Universal Ltd. of the same face value. Between January 1, 1954 and October 31, 1954, the company earned a profit of Rs. 1,79,704. On the profit of Rs. 1,79,704, the company was assessed to pay Rs. 98,093 as tax, leaving a balance of Rs. 81,611 which formed part of the amount distributed. The Income-tax Officer brought the value of the shares received by the shareholders to tax, on the footing that it represented "accumulated profits". In appeal the Appellate Assistant Commissioner held that under the law as it then stood, the amount of Rs. 81,611 was not accumulated profits and when distributed, it was capital in the hands of the shareholders. This order was confirmed by the Tribunal. The High Court agreed with the view of the Tribunal that under the definition of the expression "dividend" in Section 2 (6A) (c) in force in the year of assessment 1955-56, distribution of the current profits in the year in which the company was ordered to be wound up was not dividend and was on that account not liable to be taxed as dividend.

3. Under the Indian Companies Act, 1913, no dividend could be paid otherwise than out of profits of the year or undistributed profits of previous years. A company as a going concern may distribute by way of dividend to the shareholders profits of the year or accumulated profits of the previous years. But a share in the assets of the company distributed in the course of winding up is of the nature

of capital and not of dividend, and it cannot be apportioned into capital and accumulated profits.

4. In *Birch v. Cropper*, (1889) 14 AC 525, Lord Macnaughten observed:

"I think it rather leads to confusion to speak of the assets which are the subject of this application as "surplus assets" as if they were an accretion or addition to the capital of the company capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company—part and parcel of the joint stock or common fund—which at the date of the winding up represented the capital of the company."

This view was affirmed in a later judgment in *Commissioner of Inland Revenue v. George Burrell*, 1924-2 KB 52, where Pollock, M.R., observed:

".....it is a misapprehension, after the liquidator has assumed his duties to continue the distinction between surplus profits and capital."

This decision was recently affirmed by the House of Lords in *Staffordshire Coal and Iron Co. Ltd. v. Brogan* (Inspector of Taxes), 1964-54 ITR 555. The House of Lords held that there was no ground for making an exception to the general rule that the surplus assets of a company, after providing for all liabilities, were divisible among its members as capital. Accordingly, the receipt by a constituent company of its appropriate proportions of the distributed surplus was a receipt of a capital nature. Lord Evershed observed at p. 565:

"It cannot now be in doubt that surplus assets in the hands of the liquidator of a limited liability company—whether limited by share capital or by guarantee—are in his hands capital. Such a conclusion was laid down, by the Court of Appeal in 1924-2 KB 52 (see especially per Atkin L.J.), and it has never since been questioned."

5. The Indian Income-tax Act, 1922, when originally enacted, contained no definition of "dividend": the expression "dividend" had, therefore, the same meaning as it had in the Indian Companies Act, 1913, and the amount distributed among the shareholders by the liquidator out of the assets of the company after meeting the liabilities was regarded as a capital receipt in the hands of the share-

holders. In 1939 the Indian Legislature incorporated by Section 2 of the Indian Income-tax (Amendment) Act 7 of 1939 an inclusive definition of the expression "dividend". Clause (c) of that definition read:

".....any distribution made to the shareholders of a company out of accumulated profits of the company on the liquidation of the company:

Provided that only the accumulated profits so distributed which arose during the six previous years of the company preceding the date of liquidation shall be so included."

But the profits of the year in the course of which the company was ordered to be wound up not being accumulated profits were not part of the dividend: Appavu Chettiar v. Commr. of Income-tax, Madras, 1956-29 ITR 768 = (AIR 1956 Mad 474); Girdhardas & Co. Ltd. v. Commr. of Income-tax, Ahmedabad, 1957-31 ITR 82 = (AIR 1957 Bom 4); and also the observations of this Court in First Income-tax Officer, Salem v. Short Brothers (P.) Ltd., 1966-60 ITR 83 at pp. 88 and 89 = (AIR 1967 SC 81 at pp. 84 and 85).

6. Clause (c) of Section 2 (6A) was amended by the Finance Act of 1955 and the proviso to cl. (c) was deleted. The only effect of deleting the proviso was to remove the limitation providing that distribution of profits of the six previous years preceding the date of liquidation only was dividend.

7. By the Finance Act of 1956, cl. (c) was replaced by the following clause:—

"Any distribution made to the shareholders of a company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not;"

This amendment came into operation as from April 1, 1956.

8. We are in this case concerned with the distribution of Rs. 100 by allotment of a share in the Carborundum Universal Ltd. made on March 10, 1955. The question whether the distribution was dividend had to be determined in the light of the Income-tax Act as amended by the Finance Act of 1955. The amount of Rs. 81,611 distributed by the liquidator on March 10, 1955, represented the current profits and not profits earned

before January 1, 1954. The amount distributed as dividend out of the current profits could not, in the state of the law in force in the year of assessment 1955-56, be deemed dividend in the hands of the shareholders.

9. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1714 (V 57 C 365)

(From: Calcutta)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Satya Charan Dutta, Appellant v. Urmila Sundari Dassi and others, Respondents.

Civil Appeal No. 1356 of 1966, D/- 9-9-1969.

Hindu Succession Act (1956), S. 8, Sch. Class II Entry II — Widow succeeding to property of her deceased husband — Death of widow intestate after Act came into force — Heirs of her deceased husband succeed — Brother and sister of her deceased husband succeed jointly having equal shares — The use of arabic numerals is not decisive of the point whether or not the heirs specified in entry II of class II succeed simultaneously and equally. (Para 5)

Mr. D. N. Mukherjee, Advocate, for Appellant; M/s. M. C. Bhāndare, Par-tap Singh and K. Rajendra Chaudhuri, Advocates, for Respondent No. 1.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by certificate from a judgment of the Calcutta High Court.

2. The facts may be briefly stated. One Ratnamala Dassi who was governed by the Bengal School of Hindu Law as modified by the Hindu Succession Act, 1956, hereinafter called the Act, died intestate in January 1964 leaving no issue or lineal descendants. Her husband Monmotha Nath Dutt had pre-deceased her. The said Ratnamala Dassi left her surviving the appellant and respondents 2 and 3, the brothers of her husband and respondent 1,

* (A. F. O. D. No. 85 of 1965, D/- 3-12-1965—(Cal.))

EN/EN/E565/69/RGD/P

Urmila Sundari Dassi her husband's sister. In 1964 respondent No. 1 instituted a suit for a declaration that as an heiress of Ratnamala Dassi she had 1/4 share in the movable and immovable property left by her and that she be allotted her share by partition of those properties. The appellant entered appearance and took up the plea in his written statement that under the Act he and respondents 2 and 3 being the brothers of the husband of the deceased Ratnamala Dassi were the heirs in preference to respondent 1 who was the sister of the deceased's husband. The suit was tried on the original side by a learned Single Judge of the Calcutta High Court who granted a preliminary decree on December 23, 1964 in favour of respondent 1 holding that she had 1/4 share in the estate left by Ratnamala Dassi. The appellant preferred an appeal to a Division Bench which was dismissed.

3. The sole point which has to be considered is whether, according to the order of succession as laid down in Class II of the Schedule to section 3 of the Act, brother would succeed in preference to the sister or whether the brother and sister would succeed jointly having equal shares? According to section 15 (1) when a female Hindu dies intestate her property devolves according to the Rules set out in Section 16. Section 15 divides the groups of heirs of a female dying intestate into five categories described as Entries (a) to (e). We are concerned, in the present case, with Entry (b) which is "secondly, upon the heirs of the husband". Section 16 provides that the order of succession among heirs referred to in Sec. 15 shall be and the distribution of the intestate's property among those heirs shall take place according to the following rules:

Rule 1. "Among the heirs specified in sub-section (1) of Section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2.....

Rule 3. The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) of Section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's

or the husband's, as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death."

As the property in the present case was of the husband of Ratnamala Dassi, we have to turn to Sec. 8 to find out who would have been his heirs. Section 8 reads:

Section 8. "The property of a male Hindu dying intestate shall devolve according to the provisions of this chapter—

(a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;

(b) secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased." The Schedule mentioned in Section 8 to the extent it is material is reproduced below:—

CLASS I

"Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son.

CLASS II

I. Father.

II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.

III.

IV.

V.

VI.

VII.

VIII.

IX.

Explanation.—....."

Section 9 lays down that among the heirs specified in the Schedule those in Class I shall take simultaneously and to the exclusion of all other heirs and those in the first entry in Class II shall be preferred to those in the second entry and so on. Section 11 is to the effect that the property of an intestate shall be divided in any one

entry in Class II of the Schedule so that they share equally.

4. Before the High Court the contention raised on behalf of the appellant was that "brother" being prefixed by arabic numeral (3) came before "sister" which word had the numeral (4) before it and that the object of using the numerals within a particular group was to prescribe the order of preference. It was also argued that the use of the arabic numerals in groups II, III and IV of Class II must have some meaning; otherwise the Legislature would have used such numerals in respect of the heirs not only in Class II but in Class I as well. The learned Judges of the Division Bench felt that the use of the arabic numerals appeared to be redundant but "the combined effect of this section read with the others seems to be that the Legislature intended that the heirs named after numerals II, III and IV composed three entries only."

5. We are unable to accede to the argument that the use of arabic numerals is decisive of the point whether or not the heirs specified in Entry II of Class II succeed simultaneously and equally. It is inconceivable that a matter of such importance should have been left to the employment of numerals alone. If the intention of the Legislature was that each class of relatives shown against the arabic numerals constituted an entry express and specific provisions to that effect would have been made in the substantive sections of the Act. Indeed, Section 11 says quite clearly that the property of an intestate shall be divided between the heirs specified in any one entry in Class II of the Schedule so that they share equally. That language would not be consistent with the view that the heirs shown against the arabic numerals constitute an entry within the meaning of Section 11. The Act was meant to lay down a comprehensive and uniform system of inheritance and its scheme is to prescribe a set of rules for succession to the property of male and female Hindus dying intestate. Sections 8 to 13 contain the general rules relating to succession to the property of a male Hindu including the matter of ascertainment of shares. Sections 15 and 16 contain the general rules affecting succession to the property of a female Hindu. The rules relating to preferential heirs are given

in Section 10. If the intention was to give preference among the heirs in Class II according to arabic numerals treating the same as a separate entry some provision would undoubtedly have been made in Section 11 for that purpose. As noticed before, it is that section which deals with the distribution of property among heirs in Class II of the Schedule. Indeed Section 11 would be wholly unnecessary if each one of the heirs mentioned in each entry of Class II were to take preference to the next one in the same entry. It is also significant that in Class I male and female heirs have been treated as equal. There is no reason why any distinction should have been made among the heirs in Class II on the ground of the heir being male or female. For instance, in Entry II in Class II, a brother would have preference over the sister and in his presence the latter would succeed if the submission on behalf of the appellant is to be accepted. No reason or justification has been suggested for making such a distinction. Similarly, on the appellant's argument the son's daughter's son should have preference over the son's daughter's daughter. That again would run counter to the whole scheme of the Act that male and female heirs should get equal treatment. It must be remembered that the Act incorporated one of the principal reforms which had become a pressing necessity owing to the changed social and economic conditions in Hindu society that in succession there should be equal distribution between male and female heirs.

6. It is true that the draftsmen, while employing the arabic numerals in Entries II to IV of Class II only, are likely to have something in mind but on whole and in view of the reasons which have been given above no particular significance can be given to the use of the arabic numerals. Generally speaking, numbers or numerals are employed in a statute for the sake of convenient and easy reference but their use cannot override the statutory provisions. Nor is it possible in the absence of any indication in the sections or in the Schedule itself to attribute such a radical departure from the general scheme of classification of heirs, as has been suggested, namely, that in case of three entries only in Class II the Legislature intended to

create an order of preference and lay down the same by the use of arabic numerals.

7. There is no merit in this appeal which fails and it is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1717
(V 57 C 366)

(From Patna: AIR 1957 Patna 408)

M. HIDAYATULLAH, C. J., J. M. SHELAT AND C. A. VAIDIA-LINGAM, JJ.

Kedarnath Lal (dead) by his legal representatives and another (in all the appeals), Appellants v. Sheonarain and others, Respondents.

Civil Appeals Nos. 1091 to 1130 of 1964, D/-5-9-1969.

(A) Transfer of Property Act (1882), S. 60 — Mortgage — Release of part of mortgaged property by mortgagee — Conditional or absolute — Motive for release, payment of dues to mortgagee promised by mortgagor — But payment not made a condition of release — Release held absolute and unconditional.

It is open to the promisee to waive the performance of any part of the contract or to release any property from the operation of a mortgage or charge. If he wishes his rights to continue in the event of some conditions simultaneously imposed on the promisor, he must see that the release is made dependent on the performance by the promisor of his part of the agreement. (Para 11)

The mortgagee Co-operative Society released a portion of the mortgaged property by a registered deed in order to enable the mortgagor member to repay Rs. 500 forming part of the debt due by the said member to the Co-operative Society:

Held, that, though the motive for the release was the payment of Rs. 500 to the mortgagee Society, the release was not conditional on payment of Rs. 500 promised by the member mortgagor. The release was absolute and unconditional and became operative even though Rs. 500 were not paid to the Society. (Para 11)

(B) Transfer of Property Act (1882), S. 52, Expln. — Pendency of proceedings when commences and how long

continues — Mortgage in favour of Co-operative Society — Petition by Society for mortgage award (equivalent of mortgage decree) on 5-4-1934 — Court making a mistake and treating it as a proceeding for a money award and passing such award on 16-8-1934 — Later on, Court correcting its order, passing final mortgage decree and permitting Society to purchase mortgaged property in execution — Society obtaining possession on 20-7-1937 — Held, that litigation in respect of mortgage remained pending from 5-4-1934 to 20-7-1937 and any transfer of mortgaged property in suit during that period (on 13-8-1934) was hit by doctrine of lis pendens — Money award on 16-8-1934 could not be said to be beginning of lis pendens. AIR 1957 Pat 408, Reversed.

(Paras 13, 14, 15)

(C) Transfer of Property Act (1882), S. 52 — Transfer pendente lite — Attachment before judgment of property ineffective against applicability of doctrine of lis pendens — AIR 1957 Pat 408, Reversed.

If the property was acquired pendente lite, the acquirer is bound by the decree ultimately obtained in the proceedings pending at the time of acquisition. This result is not avoided by reason of the earlier attachment. Attachment of property is only effective in preventing alienation but it is not intended to create any title to the property. On the other hand, Section 52 places a complete embargo on the transfer of immovable property, right to which is directly and specifically in question in a pending litigation. Therefore, the attachment is ineffective against the doctrine. 1897-24 Ind App 170 (PC), Rel. on; AIR 1957 Pat 408, Reversed.

(Para 16)

(D) Transfer of Property Act (1882), S. 52 — Court sales — Principle of lis pendens applies.

It is true that Section 52, strictly speaking, does not apply to involuntary alienations such as Court sales but it is well established that the principle of lis pendens applies to such alienations. AIR 1967 SC 1440, Rel. on.

(Para 17)

(E) Transfer of Property Act (1882), S. 52 — Doctrine of lis pendens applies irrespective of strength or weakness of the case on one side or other — There is, however, one condition that proceedings must be bona fide—

If proceedings are bona fide, applicability of Section 52 was not avoided. AIR 1948 PC 147, Rel. on; AIR 1957 Pat 408, Reversed. (Para 18)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 1440 (V 54)=
1967-2 SCR 18, Samarendra
Nath Sinha v. Krishna Kumar
Nag 17
(1948) AIR 1948 PC 147 (V 35)=
75 Ind App 165, Gauri Dutta
Maharaj v. Sukur Mohd. 18
(1897) 24 Ind App 170 = ILR 25
Cal 179 (PC), Motilal v. Karrab-
ul-Din 16, 17
(1887) 15 Ind App 97=ILR 15 Cal
756, Radhamadhub Holder v.
Manohar 17
(1885) 2 Ind App 171 = ILR 12
Cal 414 (PC), Nilkant v. Suresh
Chandra 17

Mr. C. B. Agarwala, Sr. Advocate (Mr. D. Goburdhun, Advocate with him), for Appellants (in all the appeals); M/s. U. P. Singh and K. C. Dua, Advocates, for Nos. 3 and 4 (in C.A. No. 1091 of 1964), No. 3 (in C.A. No. 1092 of 1964), No. 4 (in C.A. No. 1093 of 1964), No. 7 (in C.A. No. 1094 of 1964), No. 3 (in C.A. No. 1096 of 1964), Nos. 4 and 5 (in C.A. No. 1097 of 1964) and No. 4 (in C.As. Nos. 1099, 1100 and 1101 of 1964), for Respondents.

The Judgment of the Court was delivered by:

HIDAYATULLAH, C. J.—These are 13 appeals by certificate against the common judgment in second appeal, April 17, 1957, of the High Court of Patna. The appellants are the original plaintiffs. The appellants had filed 12 title suits for ejectment in the Court of the Second Munsif at Buxar. Eleven suits were dismissed. It was held that the plaintiffs had no title to suit lands. One suit was compromised and decreed in terms of the compromise. Two other suits—one by Kedar Nath (one of the plaintiffs in the 12 title suits) and the other by one Udholal—were filed for rent for 1335-1337 Fasli in respect of some lands comprised in Survey No. 3385 of Mouza Buxar against the tenant Ram Chhabi Lal. The two rent suits were heard together. Kedar Nath was held to be the landlord and not Udholal. The suit of the former was decreed and that of the latter dismiss-

ed. On appeals filed by Udholal the decision was reversed. Appeals by Kedar Nath to the High Court were dismissed on the ground that in the title suits from which eleven appeals were filed it was held by the High Court affirming the decision of the Courts below that Kedar Nath had no title. Since the success of the last two appeals depended on whether Kedar Nath had title or not it is not necessary to refer to them at this stage. We shall deal with the other eleven appeals first.

2. In these appeals, plaintiffs and defendants 1 to 3 are common. Plaintiffs are purchasers from the mortgagees of the suit lands who had purchased the suit lands in an auction-sale in execution of the mortgage decree. Defendants 1 to 3 were the former owners of these suit lands and the other defendants were either purchasers at auction-sales in execution of money decrees against the owners or transferees from the auction-purchasers.

3. The suits concern plots formed out of two Survey Nos. 3384 and 3385. It is thus that the other two suits get connected with the title suits because in those suits the rent of certain plots from Survey No. 3385 was involved. The history of the plots is as follows:—

4. One Laxmi Narain was the previous owner of these two Survey Nos. On his death his daughter's sons Ram Narain Ram, Sheonarain Ram and Gopal Ram inherited these Survey Nos. along with other properties. The first two sons were defendants 1 to 2 in the suits and defendant 3 is the son of Sheonarain Ram. In 1930 the other two brothers sued Gopal Ram for a partition. Preliminary decree was passed on April 15, 1931 and the final decree on September 10, 1932. Half share in the property went to Gopal Ram and other half jointly to the other two brothers. The suit Survey Nos. came to the share of Ram Narain Ram and Sheonarain Ram.

5. On April 27, 1931, Ram Narain Ram executed a mortgage of a half share in 27 plots made in the two Survey Nos. and some other property with Buxar Trading Co-operative Society. On 20-4-1933, the Society released Ram Narain Ram's share in the 27 plots from the mortgage by a regis-

tered release deed. On September 20, 1932 Sheonarain Ram filed a suit for partition against Ram Narain Ram. The preliminary decree was passed in May 1933, that is to say, after the release by the Society. The two brothers divided the two Survey Nos. half and half between them. No final decree in this partition suit seems to have been passed.

6. Devendra Nath (one of the defendants) obtained settlement of 3 k 13 d of land out of Survey No. 3384 from Sheonarain Ram on June 10, 1933 and in execution of a money decree against Ram Narain Ram and Sheonarain Ram purchased on August 13, 1934 the remaining portion of Survey No. 3384 and Survey No. 3385. He obtained possession on February 27, 1935. He had obtained attachment of the two plots before judgment, on April 23, 1934. Devendra Nath disposed of 3 k 13 d by settling them on his wife and she was one of the defendants in the suits. Devendra Nath's title depends on whether the release by the Society was valid and binding on the Society or not. If the release was valid and binding on the Society, the Society could not obtain a decree in respect of these two Survey Nos. and bring them to sale. This is one of the points for consideration in these appeals. The High Court and the Court below have decided unanimously that the release was not binding on the Society and Devendra Nath obtained no title.

7. On April 26, 1934, that is to say, before Devendra Nath's purchase but after attachment by him, the Society applied to the Registrar, Co-operative Societies, for a mortgage award. In that application the surety of Ram Narain Ram was also joined. On August 16, 1934, a money award was given against Ram Narain Ram and his surety. On September 20, 1934, the money award was cancelled and a preliminary mortgage award was passed. Admittedly the mortgage award had the force of a mortgage decree. The final mortgage award was made on May 28, 1935. The award ordered sale of all mortgage properties including the half share of Ram Narain Ram in Survey Nos. 3384 and 3385. No mention was made of the earlier release of the Survey Nos. by the Society by a registered deed. In execution of the decree the Society purchased the

two Survey Nos. on February 7, 1936 and obtained possession on July 20, 1937.

8. One Dwarikanath had a money decree against the Society and he attached the two disputed Survey Nos. and brought them to sale. The Buxar Central Co-operative Bank purchased the two Survey Nos. in auction-sale on February 8, 1940, obtaining possession on July 5, 1941. On March 26, 1943 the Society and the Bank went into liquidation. The right, title and interest of the Society and the Bank was sold by the common Liquidator to Kedar Nath including the 27 plots made in the two Survey Nos. Kedar Nath's purchase was on March 20, 1943 but he took the sale benami in the name of Dhanesar Pandey, who was plaintiff No. 2 in the title suits while Kedarnath was plaintiff No. 1. The title of the plaintiffs Kedar Nath and Dhanesar Pandey is based on this purchase. After the release of the two Survey Nos. by the Society, Ram Narain Ram and Sheonarain Ram, and after his purchase, Devendra Nath, made settlement of the plots to various persons. They are the remaining defendants in the suits and respondents in the various appeals before us. The High Court has given a chart of these persons and the dates of pattas but as nothing turns upon these details it is not necessary to mention them here.

9. The plaintiffs (Kedar Nath and Dhanesar Pandey) in these title suits asked for declaration of title and possession. Their case was that the release was void and inoperative and not binding on the Society. Therefore, the mortgage award and the auction-sale were binding on Ram Narain Ram and all those who derive title from him. Their next contention is that, in any event, the transfers to the defendants were effected during the pendency of the mortgage award proceedings and were affected by the doctrine of *lis pendens*. These two grounds were not accepted by the High Court and the Courts below and it is these two grounds which were urged before us in these appeals. The other side seeks to avoid the effect of *lis pendens* by pleading that the mortgage award was claimed *mala fide* against the suit plots after their release and, in any event, there was attachment of these

plots before the petition for the mortgage award was made.

10. Before we deal with these two points it may be mentioned at once that neither ground of appeal applies to the transfers by Sheonarain who was not a mortgagor and who was not affected by the release deed made by the Society. Mr. C. B. Aggarwal frankly conceded that the transfer by him could not be assailed and must stand. He, therefore, did not press Civil Appeals Nos. 1091, 1092, 1093 and 1094 of 1964. These appeals are accordingly dismissed with costs.

11. We may first consider whether the release was binding on the Society or not. When Ram Narain Ram mortgaged the property to raise a loan from the Society of which he was a member, half share in the plots belonged to him because these plots had fallen in the preliminary decree to the share of his brother Sheonarain Ram and himself. That preliminary decree was passed on April 15, 1931. The Society had fixed a ceiling on the amount which could be borrowed, at Rs. 3,000. The mortgage deed recited that the amount borrowed was Rs. 3,000 with interest at 12 1/2 per cent. Actually Rs. 1,890 were given as a loan. The release deed, releasing the suit plots was executed in pursuance of a resolution of the Society (Res. No. 4 dated April 4, 1933). The release stated thus:

".....relinquished and released the properties, specified below, from the debt due by the said Ram Narain Ram, to the said Society, entered in the said mortgage bond, in favour of Ram Narain Ram....."

The said property shall not be made liable for any debt of the said Society nor shall any incumbrance be recovered from the said property. The said property shall come in possession of Ram Narain Ram. The said Ram Narain Ram shall have right to sell the property or to keep the same in whatever ways he likes. The said Society neither has nor shall have any objection thereto."

Why the release was granted by the Society was stated in the following words:

"... A petition was filed on behalf of the said Ram Narain Ram in the meeting of the members in the presence of all the members of the

society for releasing some land from the said mortgage in order to repay the debt of Rs. 500 forming part of the debt due by the said Ram Narain Ram to the said co-operative society which was put up before all the members and accepted by them. . . ."

It appears that Ram Narain Ram did not pay the amount of Rs. 500 to the Society and the Society considered itself free to include these two plots, notwithstanding the release, in their application for an award decree. In our opinion the release was binding on the Society. The argument in opposition to the binding nature of the release is that it was conditional on payment of Rs. 500. This is not true. No doubt the motive for the release was the payment of Rs. 500 to the Society promised by Ram Narain Ram, but the payment was not made a condition of the release. There was no attempt to realise this amount from Ram Narain Ram. Therefore, the release being absolute and unconditional and by a registered deed must be treated as binding. It is open to the promisee to waive the performance of any part of the contract or to release any property from the operation of a mortgage or charge. If he wishes his rights to continue in the event of some condition simultaneously imposed on the promisor, he must see that the release is made dependent on the performance by the promisor of his part of the agreement. Here the Society merely released the two plots without making the payment a condition precedent, and the release operated.

12. That, however, is not the end of the matter. The Society filed on April 5, 1934 a petition for a mortgage award before the Assistant Registrar, Co-operative Societies. The petition is headed 'Petition for mortgage decree'. The petition mentioned that the mortgage was made on April 27, 1931 and that the amount secured was Rs. 3000 with interest at 12 1/2 per cent per annum. The petition then described the property mortgaged and it included plots Nos. 3385 and 3384. The amount due on December 31, 1933 was said to be Rs. 2440/3. The relief asked for was:

"We the punches therefore pray that a decree may be passed by your honour against the said member and he may be directed under the decree

to pay the debt, principal and interest, amounting, to Rs. 2440/3/- within 3 months, that in case of non-payment this order may be passed that the entire amount may be realised by auction sale of the mortgaged property and that if the mortgaged property would not be sufficient for the satisfaction of the entire amount of the decree the punches of the committee be allowed to pray for passing a personal decree against the said member."

13. When the Registrar made his order he overlooked that a mortgage award had to be passed. On August 16, 1934 he ordered that an award jointly with sureties be issued. However, on September 2, 1934, he corrected his earlier order thus:

"S. 1.6 read along with section 1.5. By mistake of the 2nd Assistant simple award was issued instead of mortgage award. Issue mortgage award and ask the C. B. to return the simple award which will be cancelled here.

S. Syed Ozair. D.F.A.
Addl. A.R. 2-9-34."

After this mortgage award which had the force of a preliminary decree, the Society on December 16, 1934 resolved that a final mortgage decree be obtained from the Assistant Registrar, and a final decree was obtained and the property brought to sale on February 7, 1936 and purchased by the Society itself with the permission of the court executing the decree. Possession was obtained on July 20, 1937. Therefore, litigation in respect of this mortgage remained pending from April 5, 1934 to July 20, 1937. Under Explanation to section 52 of the Transfer of Property Act the whole of this period denoted pendency of the proceeding for purposes of application of the doctrine of *lis pendens*.

14. All the leases made by Devendranath were after the proceedings commenced. Devendranath purchased the right, title and interest of Ram Narain Ram on August 13, 1934. His acquisition was *prima facie* hit by the doctrine of *lis pendens*. Three arguments were advanced before us to meet this situation and we shall now deal with them *seriatim*.

15. The first argument is that there could be no *lis pendens* till August 16, when the money award was issued

because a money suit or proceeding cannot lead to the application of the doctrine of *lis pendens*. As a proposition of law the argument is sound but it is wrongly grounded on fact. The proceeding was to get a mortgage award, the equivalent of a mortgage decree. The Court made a mistake and treated it as a proceeding for a money decree. When the court corrected its order, the mortgage award related back to the petition as made and the whole of the proceeding must be treated as covered by the doctrine. We cannot, therefore, accede to the suggestion that the doctrine did not apply; at any rate, on this suggested ground.

16. The second ground of attack is that before the proceedings commenced before the Registrar these fields had been attached and therefore, the doctrine of *lis pendens* again cannot apply. We are unable to accept this argument either. If the property was acquired *pendente lite*, the acquirer is bound by the decree ultimately obtained in the proceedings pending at the time of acquisition. This result is not avoided by reason of the earlier attachment. Attachment of property is only effective in preventing alienation but it is not intended to create any title to the property. On the other hand, section 52 places a complete embargo on the transfer of immovable property right to which is directly and specifically in question in a pending litigation. Therefore the attachment was ineffective against the doctrine. Authority for this clear position is hardly necessary but if one is desired it will be found in *Moti Lal v. Karrab-ul-Din*, (1897) 24 Ind App 170 (PC).

17. Lastly it was contended that the sale was by court auction and the doctrine of *lis pendens* would not apply to such a sale. This point was considered in *Samarendra Nath Sinha v. Krishna Kumar Nag*, 1967-2 SCR 18 = (AIR 1967 SC 1440), by one of us (Shelat J.) and it was observed as follows:

"... The purchaser *pendente lite* under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him. This principle is well

illustrated in *Radhamadhub Holder v. Monohar*, (1887) 15 Ind App 97 where the facts were almost similar to those in the instant case. It is true that section 52, strictly speaking, does not apply to involuntary alienations such as court sales but it is well established that the principle of *lis pendens* applies to such alienations. (See *Nilkant v. Suresh Chandra*, (1885) 12 Ind App 171 and (1897) 24 Ind App 170 (PC)). This ground also has no validity.

18. Lastly it was argued that if the fields were released from the operation of the mortgage they could not be made the subject of a mortgage decree, and whatever was done in the mortgage proceedings was not of any consequence. To this there are two answers. Firstly, the respondent before the Registrar (*Ram Narain Ram*) made no objection to the inclusion of the plots in the petition for a mortgage award. Secondly, the doctrine of *lis pendens* applies irrespective of the strength or weakness of the case on one side or other. See *Gouri Dutt Maharaj v. Sukur Mohammed*, 75 Ind App 165 = (AIR 1948 PC 147). There is, however, one condition that the proceedings must be *bona fide*. Here no doubt the Society knew that the plots had been released from the mortgage, but it was also clear that the release was to enable *Ram Narain Ram* to dispose of some of the plots and pay Rs. 500 to the Society. This amount was never paid and the Society must have *bona fide* felt that the plots still remained encumbered. In fact the attitude of *Ram Narain Ram* in not claiming that these plots be removed from the mortgage award shows that he too felt that this was the true position. In *Gouri Dutt Maharaj's* case, 75 Ind App 165 = (AIR 1948 PC 147), referred to by us, it was said that if the proceedings were *bona fide*, the applicability of section 52 was not avoided.

19. For the above reasons we are clear that the purchase by *Kedarnath* was protected by the doctrine of *lis pendens*, the prior transfer to the defendants notwithstanding. In this view of the matter the judgment of the High Court cannot be sustained. The appeals will, therefore, be allowed. The judgment and decree of the High Court will be set aside and the suits of the appellant will be decreed with

costs throughout. In this Court the cost will be one set.

Appeals allowed.

AIR 1970 SUPREME COURT 1722
(V 57 C 367)

(From: Andhra Pradesh)

J. C. SHAH AND K. S. HEGDE, JJ.

Goli Eswariah, Appellant v. Commissioner of Gift Tax, Andhra Pradesh, Respondent.

Civil Appeal No. 695 of 1968, D/- 5-5-1970.

(A) Hindu Law — Joint family property — Self acquisition — Doctrine of throwing self acquired property into common hotchpot — Nature of.

The separate property of a Hindu coparcener ceases to be so and acquires the characteristic of a joint family or ancestral property not by any physical mixing with his joint family or ancestral property but by his own volition and intention by his waiving and surrendering his separate rights in it as separate property. The act is a unilateral act. No longer he declares his intention the property assumes the character of joint family property. The doctrine is peculiar to *Mitakshara* School of Hindu law. When a coparcener throws his separate property into the common stock he makes no gift under T. P. Act. There is no donor or donee and no question of acceptance of property thrown into the common stock arises. AIR 1961 SC 1268, Rel. on. (Para 6)

(B) Gift Tax Act (1958), S. 2 (xxiv) — "Transfer of property" — Joint Hindu Family property — Act of throwing self acquired property by a coparcener into common hotchpot — Not a transfer — Decision of Andhra Pradesh High Court Reversed. AIR 1965 Andh Pra 95 and AIR 1970 Andh Pra 126 and (1970) 75 ITR 529 (All), Overruled.

The declaration by which the assessee has impressed the character of joint Hindu family property on the self acquired properties owned by him does not amount to a "transfer" so as to attract the provisions of the Act. Decision of Andhra Pradesh High Court Reversed; AIR 1965 Andh Pra 95 and AIR 1970 Andh Pra 126 and (1970) 75 ITR 529 (All), Overruled;

FN/FN/C368/70/CWM/P.

(1970) 76 ITR 315 (Mad) (FB) and Tax Case No. 10 of 1966 (Mad) and (1969) 74 ITR 167 (Guj) (FB) and AIR 1968 Ker 190 and (1967) 65 ITR 19 (Mys), Approved. (Para 13)

The act of throwing self acquired property by a coparcener into common hotchpot is an unilateral act. Cl. (d) of S. 2 (xxiv) which contemplates a "transaction entered into" by one person with another cannot apply to a unilateral act. It is true that for the purpose of the Act a Hindu undivided Family can be considered as a 'person'. But the coparcener by his act does not enter into any transaction with his family. 78 CLR 199 (Aus) Rel. on. (Para 10)

The act cannot also be considered as a 'disposition' under the main part of S. 2 (xxiv). It is clear from the context in which the word "disposition" is used that it refers to a bilateral or a multi-lateral act. It does not refer to a unilateral act of throwing self acquired property into common hotchpot. (Para 12)

(C) Words and Phrases — Word 'disposition' — Meaning — It is not a term of law and it has no precise meaning — Its meaning has to be gathered from the context in which it is used. (Para 12)

Cases Referred: Chronological Paras

(1970) 75 ITR 529=(1970) 1 ITJ 86 (All), Commr. of Gift Tax v. Jagdish Saran 5

(1970) AIR 1970 Andh Pra 126 (V 57) = (1968) 70 ITR 812, G. V. Krishna Rao v. First Addl. Gift-tax Officer, Gun- 5

(1969) 74 ITR 167 = (1969) 29 ITJ 316 (Guj) (FB), Dr. A. R. Shukla v. Commr. of Gift Tax, Gujarat 5

(1968) AIR 1968 Ker 190 (V 55)= (1968) 67 ITR 612, P. K. Subramania Iyer v. Commr. of Gift-tax, Kerala 5

(1967) 65 ITR 19. = 10 Law Rep 397 (Mys), Smt. Laxmibai Narayana Rao Nerlekar v. Commissioner of Gift-tax 5

(1966) Tax Cas No. 10 of 1966 (Mad), VR. S. RM. Ramaswami Chettiar v. Commr. of Gift Tax, Madras 5

(1965) AIR 1965 SC 1494 (V 52) = (1965) 56 ITR 62, Commr. of Income tax, Madras v. M. K. Stremann 12

(1965) AIR 1965 Andh Pra 95 (V 52)=(1965) 56 ITR 353, Commissioner of Gift Tax v. C. Satyanarayanamurthy 2, 4

(1964) Tax Cas No. 272 of 1964 = 76 ITR 315 (Mad) (FB), Commissioner of Gift Tax, Madras v. P. Rangasami Naidu 5

(1962) AIR 1962 Mad 26 (V 49)= (1961) 41 ITR 297, M. K. Stremann v. Commr. of Income-tax, Madras 12

(1961) AIR 1961 SC 1268 (V 48) = (1961) 3 SCR 779, Mallesappa Bandeppa Desai v. Desai Mal- 6

78 CLR 199 (Aus.), Grimwade v. Federal Commr. of Taxation 11

The following judgment of the Court was delivered by

HEGDE, J.: This appeal by certificate arises from the judgment of the Andhra Pradesh High Court rendered in its advisory jurisdiction on a case stated by the Income-tax Appellate Tribunal, Hyderabad Bench under section 26 (1) of the Gift-tax Act, 1958 (to be hereinafter referred to as the 'Act'). The question referred for the opinion of the High Court was:

"Whether the declaration by which the assessee has impressed the character of joint Hindu family property on the self-acquired properties owned by him amounts to a transfer so as to attract the provisions of the Gift-tax Act."

2. The High Court following its earlier decision in Commr. of Gift-tax v. C. Satyanarayanamurthy (1965) 56 ITR 353 = (AIR 1965 Andh Pra 95); answered that question in the affirmative.

3. The material facts as could be gathered from the statement of the case submitted to the High Court are as follows:

4. The assessee is the karta of his joint family. The assessment year with which we are concerned in this case is 1959-60, for which the "previous year" is the year commencing on 23-10-1957 and ending on 10-11-1958. The assessee owned movable and immovable properties, which were his self acquisitions. By a deed dated December 9, 1957, he threw into the common stock his houses bearing Nos. 6658-59 and 2731 situate at Imambavidi, Secunderabad and a cash deposit of Rs. 1,50,000/- in the firm of M/s.

Goli Eswariah, Paper Merchants, Secunderabad. In the books of account of the firm, necessary entries were made transferring the amount to the account of the family. The Gift-tax Officer treated that portion of the value of the properties so blended in which the assessee ceased to have a right on partition of the family as having been gifted by him to the family. He rejected the contention of the assessee that his act of throwing his self acquired properties into the common stock did not amount to a gift under the Act. In appeal, the Appellate Assistant Commissioner took the view that since the deed in question was not registered, there was no transfer of the immovable properties to the family and as such there was no gift of the two houses mentioned earlier but with regard to the sum of Rs. 1,50,000/-, he considered it as a gift and accordingly held that 3/4th of it was liable to be taxed under the provisions of the Act. Thereafter the matter was taken up in appeal to the tribunal. The tribunal by its order dated November 17, 1961 held that the act by which the assessee threw his self acquired properties to the family hotchpot did not amount to a transfer and hence it need not have been effected by a registered document. It further held that where the coparcener threw his self acquired properties into the hotchpot of the joint family, there was no element of transfer within the meaning of section 2, cl. (xxiv) sub-cl. (d) of the Act. At the instance of the Commissioner, Gift-tax, Andhra Pradesh, the tribunal stated a case for the opinion of the High Court and submitted the aforementioned question for its opinion. The High Court did not examine the question of law arising for decision afresh as it was bound by the earlier decision of that High Court in (1965)-56 ITR 353 = (AIR 1965 Andh Pra 95) (supra) wherein that court had held that where a Hindu by a declaration has impressed on his self acquired property the character of joint family property, the same would amount to a transfer of property within the terms of section 2 (xxiv) (d) and as such is a gift as envisaged in S. 2 (xii) and section 4 (a) of the Act. The view taken in that case was that an act similar to the one we are called upon

to consider in this case would amount to a "transaction" entered into by any person with intent thereby to diminish directly or indirectly the value of his own property and to increase the value of the property of any other person."

5. On the question of law that we are required to decide in this case, there is a sharp cleavage of judicial opinion. The Andhra Pradesh High Court in the case referred to earlier as well as in G. V. Krishna Rao v. First Addl. Gift-tax Officer, Guntur, (1968) 70 ITR 812 = (AIR 1970 Andh Pra 126) and the Allahabad High Court in Commr. of Gift-tax v. Jagdish Saran, (1970) 75 ITR 529 (All) have taken the view that when a coparcener in a Hindu Undivided Family governed by Mitakshra School throws his self acquired properties into common stock, the same amounts to a 'gift' under the Act. On the other hand, a Full Bench of the Madras High Court in Commr. of Gift-tax, Madras v. P. Rangasami Naidu, Tax Cas No. 272 of 1964 (Mad) (FB) and VR. S. RM. Ramaswami Chettiar v. Commr. of Gift-tax, Madras, Tax Cas No. 10 of 1966 (Mad), a Full Bench of the Gujarat High Court in Dr. A. R. Shukla v. Commr. of Gift-tax, Gujarat (1969) 74 ITR 167 (FB); a division bench of the Kerala High Court in P. K. Subramania Iyer v. Commr. of Gift-tax, Kerala, (1968) 67 ITR 612 = (AIR 1968 Ker 190) and a division bench of the Mysore High Court in Smt. Laxmibai Narayana Rao Nerlekar v. Commr. of Gift-tax, (1967) 65 ITR 19 (Mys) have taken a contrary view.

6. To pronounce on the question of law presented for our decision, we must first examine what is the true scope of the doctrine of throwing into the 'common stock' or 'common hotchpot'. It must be remembered that a Hindu family is not a creature of a contract. As observed by this Court in Mallesappa Bandeppa Desai v. Desai Mallappa, (1961) 3 SCR 779 = (AIR 1961 SC 1268) that the doctrine of throwing into common stock inevitably postulates that the owner of a separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property. The existence of a coparcenary is absolutely necessary before a coparcener can throw into

the common stock his self acquired properties. The separate property of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by him into the common stock with the intention of abandoning his separate claim therein. The separate property of a Hindu ceases to be a separate property and acquires the characteristic of a joint family or ancestral property not by any physical mixing with his joint family or his ancestral property but by his own volition and intention by his waiving and surrendering his separate rights in it as separate property. The act by which the coparcener throws his separate property to the common stock is a unilateral act. There is no question of either the family rejecting or accepting it. By his individual volition he renounces his individual right in that property and treats it as a property of the family. No longer he declares his intention to treat his self acquired property as that of the joint family property, the property assumes the character of joint family property. The doctrine of throwing into the common stock is a doctrine peculiar to the Mitakshara School of Hindu law. When a coparcener throws his separate property into the common stock, he makes no gift under Chapter VII of the Transfer of Property Act. In such a case there is no donor or donee. Further no question of acceptance of the property thrown into the common stock arises.

7. Bearing in mind the true nature of the doctrine of throwing into the common hotchpot, we shall now proceed to examine the relevant provisions of the Act to ascertain whether the act of the assessee can be considered as a gift under the Act.

8. Section 3 is the charging section. It provides that subject to the other provisions contained in the Act, there shall be charged for every assessment year commencing on and from the 1st day of April, 1958, a tax known as gift tax in respect of the gifts, if any, made by a person during the previous year (other than gifts made before the 1st day of April 1957) at the rate or rates specified in the Schedule. Gift is defined in section 2 (xii) as follows:

"gift" means the transfer by one person to another of any existing

movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer of any property deemed to be a gift under Section 4".

9. In this case we are not dealing with a deemed gift. Therefore we need not consider the scope of section 4. Before an act can be considered as a gift as defined, there must be a transfer of property by one person to another. 'Person' is defined as including a Hindu Undivided Family in section 2 (xviii). Section 2 (xxii) says that 'property' includes any interest in property, movable and immovable. Section 2 (xxiv) defines "transfer of property" thus:

"Transfer of property" means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing includes—

(a) the creation of a trust in property;

(b) the grant or creation of any lease, mortgage, charge, easement, licence, power, partnership or interest in property;

(c) the exercise of a power of appointment of property vested in any person, not the owner of the property, to determine its disposition in favour of any person other than the donee of the power; and

(d) any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own property and to increase the value of the property of any other person."

10. The High Court relied on section 2 (xxiv) (d) in answering the question referred to it in favour of the Revenue. It came to the conclusion that the act of the assessee in throwing his self-acquired properties into the common stock amounted to "a transaction entered into by him with intent thereby to diminish directly or indirectly the value of his own property and to increase the value of the property of any other person". It is true that the assessee by throwing his self-acquired property into the common stock gave up his exclusive right in that property and in its place he was content to own that property jointly with the other members of his fami-

ly. We do not think that it is necessary in this case to consider whether the act of the assessee can be said to have "diminished directly or indirectly the value of his own property and increased the value of the property" of his joint family because in our opinion that act cannot be considered as a "transaction entered into". Clause (d) of section 2 (xxiv) contemplates a "transaction entered into" by one person with another. It cannot apply to a unilateral act. It must be an act to which two or more persons are parties. It is true that for the purpose of the Act, a Hindu Undivided Family can be considered as a "person". But the assessee did not enter into any transaction with his family. Therefore we are unable to agree with the High Court that the act of the assessee fell within the scope of section 2 (xxiv) (d) of the Act.

11. Section 2 (xxiv) (d) is similar to Paragraph (f) of section 4 of the Australian Gift Duty Assessment Act, 1941-42. Interpreting that section in *Grimwade v. Federal Commr. of Taxation* 78 CLR 199 (Aus) the High Court of Australia observed that the transaction by a person referred to therein must be a transaction with some other person and that it cannot be a unilateral act.

12. Mr. B. Sen, learned Counsel for the department contended that the said act should be considered as a 'disposition' under the main part of section 2 (xxiv). The word 'disposition' is not a term of law. Further it has no precise meaning. Its meaning has to be gathered from the context in which it is used. In the context in which that term is used in section 2 (xxiv), it cannot mean to 'dispose of'. Otherwise even if a man abandons or destroys his property, it would become a 'gift' under the Act. That could not have been the intention of the legislature. In section 2 (xxiv), the word 'disposition' is used along with words "conveyance, assignment, settlement, delivery, payment or other alienation of property." Hence it is clear from the context that the word 'disposition' therein refers to a bilateral or a multi-lateral act. It does not refer to a unilateral act. In this connection reference may be usefully made to the decision of this Court in *Commr. of Income-tax, Madras v. M. K. Stremann*, (1965) 56 ITR 62=(AIR

1965 SC 1494). Therein the assessee first threw his private properties into the common stock and afterwards there was a partition amongst the members of the family which included his two minor sons and a minor daughter, represented by their mother. The question arose whether the partition in question amounted to a transfer of assets by the assessee to the three minor children so as to attract the provisions of section 16 (3) (a) (iv) of the Indian Income-tax, Act, 1922. In that case, the Revenue did not contend in this Court that the act of the assessee throwing into common stock his self acquired properties amounted to transfer of assets by the assessee to his three minor children. On the other hand, it contended that the partition that took place subsequently amounted to a transfer of assets of the assessee to his minor children. This Court overruled that contention. Therein the contention of the Revenue appeared to have proceeded on the basis that the antecedent act of the assessee viz. throwing his self-acquired properties to the common stock may not amount to a transfer of his assets to his minor children but the partition that followed amounted to such a transfer. In that very case the Revenue appears to have contended before the High Court that the act of the assessee in throwing his self acquired properties into common stock amounted to a transfer of his assets to his minor children. The High Court observed that when the separate property of a coparcener ceases to be his separate and becomes impressed with the character of coparcenary property, there is no transfer of that property from the coparcener to the coparcenary; it becomes joint family property because the coparcener who owned it up-till then as his separate property, has by the exercise of his volition, impressed it with the character of joint family or coparcenary property, to be held by him thereafter along with other members of the joint family; it is by his unilateral action that the property became joint family property; the transaction by which a property ceased to be the property of a coparcener and became impressed with the character of coparcenary property, does not itself amount to a transfer, no transfer need precede the change and no transfer ensues either—See M. K.

Stremann v. Commr. of Income-tax, Madras, 1961-41 ITR 297 = (AIR 1962 Mad 26). We are in agreement with those findings.

13. For the reasons mentioned above, we allow this appeal, set aside the judgment of the High Court and answer the question referred to the High Court thus:

The declaration by which the assessee has impressed the character of joint Hindu family property on the self-acquired properties owned by him did not amount to a transfer so as to attract the provisions of that Act. The Revenue shall pay the costs of the appellant in this appeal.

Appeal allowed.

**AIR 1970 SUPREME COURT 1727
(V 57 C 368)**

(From: Allahabad)*

J. C. SHAH AND A. N. GROVER, JJ.

Smt. Munni Devi and another, Appellants v. Gokal Chand and another, Respondents.

Civil Appeal No. 899 of 1966, D/-12-9-1969.

Houses and Rents — Uttar Pradesh (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 16 — Existence of vacancy to allot premises to another person — Order by Rent Control and Eviction Officer — Order open to challenge in Civil Court — (Civil P. C. (1908), S. 9 — Suit expressly barred).

The Legislature has invested the District Magistrate with power under Sections 7 and 7-A on the existence of a vacancy to allot the premises to another person, but the Legislature has not made the determination of the preliminary state of facts by the District Magistrate conclusive. By reaching an erroneous decision, he cannot clothe himself with jurisdiction which he does not possess. It is only when the order is with jurisdiction that the order is not liable to be challenged in a Civil Court by virtue of Section 16 of the Act. (Para 6)

Where the landlord applied for an order in ejectment against the tenant on the plea that he had committed

default in paying rent and the Rent Control and Eviction Officer holds that the tenant had vacated the premises and that a sub-tenant was in illegal occupation and issues a notice under Section 7-A (3), the order is not final and is liable to be challenged in Civil Court. (1888) 21 QBD 313 and AIR 1952 SC 319, Applied; AIR 1959 SC 492, Rel. on. (Para 6)

Cases Referred: Chronological Paras

(1959) AIR 1959 SC 492 (V 46) =

1959 Supp (1) SCR 733, Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi 7

(1952) AIR 1952 SC 319 (V 39) =

1952 SCR 696, Ebrahim Abobakar v. Custodian-General of Evacuee Property 5

(1888) 21 QBD 313 = 36 WR 776,

Reg. v. Commr. of Income-tax 5

M/s. Yogeshwar Prasad and Hardev Singh, Advocates, for Appellants; Mr. S. N. Anand, Advocate, for Respondents.

The Judgment of the Court was delivered by

SHAH, J.—Gokal Chand—first respondent in this appeal—was a tenant of shop No. 34/2, Dispensary Road, Dehra Dun, which belongs to Munni Devi—the first appellant in this appeal. Munni Devi applied to the Rent Control and Eviction Officer, Dehra Dun, for an order in ejectment on the plea that Gokal Chand had committed default in paying rent. The R. C. & E. Officer passed an order observing that the tenant did not lead any evidence to show that he had not vacated the shop and it was clear on the evidence that the tenant was not in occupation of the shop and had let it out to one Alladia. He accordingly declared that the shop was vacant.

2. The Rent Control and Eviction Officer allotted the shop to Kishorilal. Kishorilal then applied to the Rent Control and Eviction Officer that the shop allotted to him was in the illegal occupation of Rawal Chand, son of Gokal Chand. On May 22, 1957, the Rent Control and Eviction Officer declared that Gokal Chand, the previous tenant, had vacated the shop and that Rawal Chand was in illegal occupation of the shop. He accordingly issued a notice under Section 7A (3) of the Act.

3. Gokal Chand then filed a civil suit in the Court of the Munsif, Dehra Dun, for a declaration that he was an

*(Second Appeal No. 4136 of 1964 D/-14-5-1965—All.)

allottee and a tenant of the shop and that he was in possession in that capacity. To that suit were impleaded Munni Devi and Kishorilal as party-defendants. The trial Court held that Gokal Chand had at no time vacated the shop, nor was his tenancy terminated. He accordingly made an order declaring that Gokal Chand was an allottee and a tenant of the shop and was entitled to remain in occupation of the same. An appeal against that order to the District Court was dismissed. A second appeal to the High Court was also unsuccessful.

4. In this appeal with special leave, counsel for Munni Devi and Kishorilal urges that the order of the Civil Court was without jurisdiction. Section 3 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947, imposes certain restrictions on eviction of tenants. By Section 7 (1) (a) it is provided:

"Every landlord shall, within 7 days after an accommodation becomes vacant by his ceasing to occupy it or by the tenant vacating it or otherwise ceasing to occupy it or by termination of a tenancy or by release from requisition or in any other manner whatsoever, give notice of the vacancy in writing to the District Magistrate."

Sub-sections (2) and (3) of Section 7 provide:

"(2) The District Magistrate may by general or special order require a landlord to let or not to let to any person any accommodation which is or has fallen vacant or is about to fall vacant.

(3) No tenant shall sub-let any portion of the accommodation in his tenancy except with the permission in writing of the landlord and of the District Magistrate previously obtained."

Section 7A which was added by Act 24 of 1952 provides, in so far as it is material:

"(1) Where in pursuance of an order of the District Magistrate under sub-section (2) of Section 7, the vacancy of any accommodation is required to be reported and is not reported, or where an order requiring any accommodation to be let or not to be let has been duly passed under sub-section (2) of Section 7 and the District Magistrate believes or has reason to believe that any person has in contravention of the

said order, occupied the accommodation or any part thereof, he may call upon the person in occupation to show cause, within a time to be fixed by him, why he should not be evicted therefrom:

Provided:

x x x x x x

"(2) If such person fails to appear in reply to the notice served under sub-section (1) or, if he appears but fails to satisfy the District Magistrate that the order under sub-section (2) of Section 7 was not duly passed and that he is entitled to remain in occupation of the accommodation, the District Magistrate may, without prejudice to any other action which may be taken against him under this Act or any other law for the time being in force, direct him to vacate the premises within a period to be specified."

Section 16 of the Act provides:

"No order made under this Act by the State Government or the District Magistrate shall be called in question in any Court."

5. Counsel for the appellants urged that the suit filed by Gokal Chand was not maintainable, for the Act sets up a complete machinery for determining, after enquiry whether any premises governed by the Act have fallen vacant, and for making an order calling upon the person or persons in wrongful occupation to vacate and deliver possession of the premises, and that by express enactment in Sec. 16, the order of the District Magistrate is declared final. We are unable to agree with that contention. Lord Esher, M. R., in *Reg. v. Commr. of Income-tax, 1888-21 QBD 313*, observed:

"When an inferior Court or Tribunal or body which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that Tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such Tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which

may exist. The Legislature may entrust the Tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction and on finding that it does exist, to proceed further to do something more. When the Legislature are establishing such a Tribunal or body with limited jurisdiction, they also have to consider whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is erroneous application of the formula to say that the Tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts including the existence of the preliminary facts on which the further exercise of their jurisdiction depends, and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

This rule was approved by this Court in *Ebrahim Aboobakar v. Custodian-General of Evacuee Property*, 1952 SCR 696 = (AIR 1952 SC 319).

6. Munni Devi applied for an order in ejectment against Gokal Chand on the plea that he had committed default in paying rent. The Rent Control and Eviction Officer held that Gokal Chand had vacated the premises and had inducted a sub-tenant. The Legislature has invested the District Magistrate with power on the existence of a vacancy to allot the premises to another person, but the Legislature has not made the determination of the preliminary state of facts by the District Magistrate conclusive. The jurisdiction to pass an order in ejectment only arises if there is a vacancy. The right of a tenant in possession is a valuable right and there is nothing in Section 7 or Section 7A which confers jurisdiction upon the District Magistrate to conclusively determine the facts on the existence of which his jurisdiction arises. Undoubtedly he has jurisdiction to make orders under Sections 7 and 7A of the Act, if there be a vacancy. But whether there is a vacancy is a jurisdictional fact which could not be decided by him finally. By reaching an erroneous decision, he cannot clothe him-

self with jurisdiction which he does not possess. It is only when the order is with jurisdiction that the order is not liable to be challenged in a Civil Court by virtue of Section 16 of the Act.

7. In *Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi*, 1959 Supp (1) SCR 733. = (AIR 1959 SC 492), the respondent had obtained on rent the "accommodation" in dispute from the appellant. The appellant submitted an application under Section 3A of the U. P. (Temporary) Control of Rent and Eviction Act, 1947, to the House Allotment Officer (on whom the power of the District Magistrate was conferred) for increase in rent. That officer passed an order increasing the rent payable by the tenant on the ground that there was a new construction. The appellant then instituted a suit under Section 5 (4) of the Act for the enhancement of 'reasonable annual rent'. The respondent contended inter alia, that there was no new construction of "accommodation" after June 30, 1946, and that, therefore, the suit was not maintainable. The trial Court found that there was a new "accommodation" and the Court could determine its rent under Section 5 (4). In revision, the High Court held that though the construction was new, the "accommodation" in the occupation of the respondent was not new, and, therefore, Section 3A of the Act was inapplicable. In appeal, this Court held that a wrong decision made by the House Allotment Officer who exercised the power of the District Magistrate under Section 3A of the Act or an order made by him in excess of his power under that section could be rectified by a suit under Section 5 (4) of the Act.

8. In the present case the Civil Court has come to the conclusion that Gokal Chand had never vacated the shop and no vacancy had occurred. By wrongly deciding that Gokal Chand had vacated the shop, the District Magistrate had no power to pass orders directing forcible ejectment, and allotting the shop to another person.

9. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1730
(V 57 C 369)

(From Madras: AIR 1964 Mad 320)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Punithavalli Ammal, Appellant v.
Minor Ramalingam and another, Res-
pondents.

Civil Appeal No. 139 of 1967, D/-
4-3-1970.

(A) Hindu Succession Act (1956),
S. 14 (1) — Property of a female
Hindu to be her absolute property—
Adoption by Hindu widow — Full
ownership conferred on widow under
S. 14 (1) not defeated — AIR 1964
Mad 320, Reversed.

The full ownership conferred on a
Hindu female under Section 14 (1) is
not defeasible by the adoption made
by her to her deceased husband after
the Act came into force. (Para 7)

The rights conferred on a Hindu
female under S. 14 (1) of the Act are
not restricted or limited by any rule
of Hindu law. That provision makes
a clear departure from the Hindu law
texts or rules. According to Hindu
law texts as interpreted by Courts,
on adoption by a Hindu widow, the
adopted son acquired all the rights of
an aurasa son and those rights related
back to the date of the death of the
adoptive father. Those texts or rules
cannot be used for circumventing the
plain intentment of the provision. AIR
1960 Bom 463, Approved; AIR 1964
Mad 320, Reversed. (Paras 6, 7)

(B) Hindu Succession Act (1956),
S. 4 (1) — Overriding effect of Act—
Full ownership conferred on Hindu
female by S. 14 not defeated by sub-
sequent adoption by her — AIR 1964
Mad 320, Reversed. (Para 6)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 365 (V 55) —

1968-1 SCR 476, Sukh Ram v.
Gauri Shankar

(1962) AIR 1962 SC 59 (V 49) —

1962-2 SCR 813, Krishnamurthi
v. Dhruwaraj

(1962) AIR 1962 SC 1493 (V 49) —

(1962) Supp (3) SCR 418, Munna-
lal v. Rajkumar

(1960) AIR 1960 Bom 463 (V 47) —

61 Bom LR 1316, Yamunabai v.
Ram Maharaj Shreedhar Maha-
raj

(1954) AIR 1954 SC 379 (V 41) —
1955-1 SCR 1, Srinivas Krishna-
rao Kango v. Narayan Devji
Kango

The following Judgment of the Court
was delivered by

HEGDE, J.: The question for deci-
sion in this appeal by certificate is
whether the full ownership conferred
on a Hindu female under Sec. 14 (1)
of the Hindu Succession Act (to be
hereinafter referred to as 'the Act') is
defeasible by the adoption made by
her to her deceased husband after the
Act came into force.

2. The facts relevant for the pur-
pose of deciding that question of law
may now be stated. One Somasundara
Udayar of Poongavur village in Tan-
javoor District died prior to 1937
leaving behind him his widow Sella-
thachi and two daughters Kuppalmai
and Punithavalli Ammal. The prop-
erties left behind by the deceased
were inherited by his widow and they
were in her possession when the Act
came into force on June 17, 1956. By
virtue of Section 14 (1) of the Act,
Sellathachi became the full owner of
the properties inherited by her from
her husband. On July 13, 1956, she
adopted the plaintiff-1st respondent in
this appeal. Thereafter on June 19,
1957 she settled 9 acres 16 cents of
land and half share in a house inher-
ited by her from her husband on her
daughter Punithavalli Ammal, the ap-
pellant in this appeal. The validity
of this settlement deed was challenged
by means of a suit by the adopted son
even during the lifetime of Sella-
thachi. The settlor who was implead-
ed as the 1st defendant to the action
died soon after the institution of the
suit. Various contentions were raised
in defence but it is unnecessary to go
into them. The trial Court dismissed
the suit on the ground that in view
of Section 14 (1) Sellathachi was the
full owner of the properties inherited
by her from her husband and hence
the adopted son cannot impugn the
alienation made by her. This decision
was upheld in appeal but in second
appeal, a Division Bench of the High
Court of Madras reversed that decision
holding that the adoption of the plain-
tiff must be deemed to relate back to
the date of the death of Somasundara
Udayar and, therefore, Sellathachi was
incompetent to make the impugned

alienation. The correctness of this finding is in issue in this appeal.

3. According to Hindu law texts as interpreted by Courts, on adoption by a Hindu widow, the adopted son acquires all the rights of an aurasa son and those rights relate back to the date of the death of the adoptive father—see *Srinivas Krishnarao Kango v. Narayan Devji Kango*, 1955-1 SCR 1 = (AIR 1954 SC 379). Hence, the estate held by a widow was a defeasible estate. The same is the case with a person possessing title defeasible on adoption; not only his title but also the title of all persons claiming under him will be extinguished on adoption — see *Krishnamurthi v. Dhruwaraj*, 1962-2 SCR 813 = (AIR 1962 SC 59). In fact, under the Benaras School of Mitakshara rule where a male coparcener is not entitled to alienate even for value, his undivided interest in the coparcenary property without the consent of the other coparceners, the alienation effected by a sole surviving male coparcener can be successfully challenged by a person adopted subsequent to the alienation. The fiction of relation back has been given full effect by Courts and consequences spelled out as if the fiction is a fact. The adopted son is deemed for all practical purposes, subject to some minor exceptions to have born as an aurasa son on the date his adoptive father died. Admittedly but for the relevant provisions in the Act the settlement in favour of the appellant could have afforded no basis for resisting the claim of the adopted son. Therefore, we have to see whether the provisions of the Act have effected any change in the law as regards the fiction referred to. Section 4 (1) of the Act provides:

"Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any

of the provisions contained in this Act."

4. It is undisputed that the fiction of relation back in the case of adoption under Hindu law is based on Hindu law texts or rule or at any rate it is based on interpretation of Hindu law. Therefore, that rule ceased to have effect from the date the Act came into force with respect to any matter for which provision is made under the Act. Hence, we have to see whether the matter dealt with under Section 14 (1) impinges on the rule of adoption relating back to the date of death of the adoptive father.

5. Adoption is a mode of affiliation which confers a right of inheritance under Hindu law. Under that law a widow in the absence of any preferential heir succeeded to the estate of her deceased husband but she took only an estate known as widow's estate. After her death the property devolved on the nearest reversioner of her husband. Section 14 (1) of the Act made an important departure in that respect. That section provides:

"Any property possessed by a female Hindu whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner."

6. The explanation to the section is not necessary for our present purpose. It was conceded at the Bar that Sellathachi was in possession of the property in dispute on the date the Act came into force. By virtue of the aforesaid provision, she became the full owner of the property on that date. From a plain reading of section 14 (1), it is clear that the estate taken by a Hindu female under that provision is an absolute one and is not defeasible under any circumstance. The ambit of that estate cannot be cut by any text, rule or interpretation of Hindu law. The presumption of continuity of law is only a rule of interpretation. That presumption is inoperative if the language of the concerned statutory provision is plain and unambiguous. The fiction mentioned earlier is abrogated to the extent it conflicts with the rights conferred on a Hindu female under section 14 (1) of the Act. In *Sukhram v. Gauri Shankar*, (1968) 1 SCR 476 = (AIR 1968 SC 365) this Court held that though a male member of a Hindu family governed by the Benaras

School of Hindu law is subject to restrictions qua alienation of his interest in the joint family property but a widow acquiring an interest in that property by virtue of Hindu Succession Act is not subject to any such restrictions. This Court held in *Munna Lal v. Rajkumar*, 1962 Supp (3) SCR 418 = (AIR 1962 SC 1493) that by virtue of section 4 of the Act the legislature abrogated the rules of Hindu law on all matters in respect of which there is an express provision in the Act. In our opinion the rights conferred on a Hindu female under section 14 (1) of the Act are not restricted or limited by any rule of Hindu law. The section plainly says that the property possessed by a Hindu female on the date the Act came into force whether acquired before or after the commencement of the Act shall be held by her as full owner thereof. That provision makes a clear departure from the Hindu law texts or rules. Those texts or rules cannot be used for circumventing the plain intentment of the provision.

7. In our judgment the learned judges of the Madras High Court were not right in limiting the scope of section 14 (1) by taking the aid of the fiction mentioned earlier. That in our opinion is wholly impermissible. On the point under consideration the decision of the Bombay High Court in *Yamunabai v. Ram Maharaj Shreedhar Maharaj*, (AIR 1960 Bom 463), lays down the law correctly.

8. In the result we allow this appeal and set aside the decree and judgment of the High Court and restore that of the trial court but in the circumstances of the case we make no order as to costs. The first respondent will pay the Court-fee payable by the appellant in the appeal.

Appeal allowed.

AIR 1970 SUPREME COURT 1732
(V 57 C 370)

(From Calcutta: (1967) 2 ITJ 102)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

The Commissioner of Income-tax,
Calcutta, Appellant v. Sm. Kokila
Debi and others, Respondents.

Civil Appeals Nos. 220 to 230 of
1967, D/- 20-4-1970.

FN/GN/B878/70/RGD/B

Income-tax Act (1922), S. 41 (1) — Only thing to be seen is whether income was received by trustees on behalf of any person — Held on facts, proviso to S. 41 (1) had no application.

Where by a deed of settlement the settlor created a trust in respect of certain property in favour of a deity, declaring that 2/3rd of the rents realised from the property were to be utilised towards seva of the deity and 1/3rd to be retained in the hands of the trustees to meet the collection charges, taxes and other incidental expenses.

Held that the sole beneficiary under the deed was the deity and the 1st proviso to section 41 (1) was not applicable; that the case clearly fell within section 41 (1). The mere fact that in the deed the trustees were referred to as beneficiaries did not make them beneficiaries, when on reading the deed it was clear that the sole beneficiary was the deity.

If the deity was considered as a 'person' then the case did not come within the 1st proviso to section 41 (1) and it had to be dealt with under section 41 (1).. (Para 10)

The following Judgment of the Court was delivered by

HEGDE, J.: These appeals were brought on the strength of the certificates granted by the High Court of Calcutta against its judgment in references under section 66 (1) of the Indian Income-tax Act, 1922 (hereinafter called the Act).

2. The questions referred to the High Court are:

"(1) Whether on the facts and in the circumstances of the case and on a proper construction of three deeds executed on the 3rd November, 1944, the 25th September 1947 and the 17th March, 1951, referred to in the order, the Tribunal was right in holding that there was only one beneficiary viz. Sri Sri Iswar Gopal Jew, under the trust?

(2) If the answer to the question (1) be in the negative, then whether the income of the Trust was to be assessed at the maximum rate by virtue of the first proviso to section 41 (1) of the Income-tax Act, 1922?"

3. The High Court answered the first question in the affirmative and in view of that answer, it did not find

it necessary to answer the second question.

4. The facts found by the tribunal, as could be gathered from the statement of the case submitted by it are as follows:

5. Shri Badriprasad Agarwalla, a Hindu governed by Mitakshara School of Hindu law, had three wives, (1) Sukti Devi, (2) Krishna Devi and (3) Kokila Devi. From the second wife, Krishna Devi, he had a son named Fulchand born in March 1929. After the death of the second wife, Badri Prasad Agarwalla took Kokila Devi as his third wife. From her he had six sons, the eldest of whom is Nirmal Kumar born in 1942. On November 3, 1944, he executed a deed of trust by which he transferred to the trustees two of his self-acquired properties situate at 41/16-A, Russa Road and 21, Paika Para Row for the benefit of the deity Sri Sri Ishwar Gopal Jew whom he had consecrated at his ancestral house at 1/2, Krishnaram Bose Street, Calcutta. The intended purposes of the said trust were set out in the deed itself. Under that deed Kokila Devi was appointed as a trustee. It was provided in that deed that each of the sons of Badri Prasad on attaining majority would automatically become a trustee of that trust. It may be mentioned here that in accordance with this provision, Fulchand became a trustee on attaining majority in March, 1947 and Nirmal Kumar, the eldest son of Kokila Devi also became a trustee in the year 1960. Under the said deed, Kokila Devi was appointed as the sole Shebait of the idol until the sons of Badri Prasad became majors. But as soon as they became majors they were to be joint Shebait of the idol along with Kokila Devi. 2/3rd of the rent realised from the trust properties was to be utilised towards seva of the deity and the balance 1/3rd was to be retained in the hands of the trustees to meet the collection charges, taxes and other incidental expenses relating to the said properties.

6. On September 25, 1947, Badri Prasad executed another deed to which he, Kokila Devi and Fulchand were parties. The deed was admittedly a supplement to the earlier deed dated November 3, 1944.

7. On March 17, 1951, Badri Prasad executed a third deed. To that

deed Badri Prasad, Kokila Devi and Fulchand were parties. This deed was also expressly made as a supplement to the deed of November 3, 1944. The avowed object in executing this deed was to clarify the status, rights and liabilities of the trustees and the shebait in office for the benefit of and in the interest of the deity and to avoid future litigation. Under this deed, it is mentioned that the properties covered by the first two deeds were given in absolute dedication to the deity established by the settlor at 1/2, Krishnaram Bose Road, Calcutta and the trustees and shebait held their offices as such for carrying on daily and periodical sevas and worship of the deity and they were to hold the properties for and on behalf of the deity. Therein provision was made for the management of the property, for conducting the sevas and pujas of the deity and for maintenance of proper and necessary accounts.

8. The Income-tax Officer assessed the income from all the properties in the hands of the trustees at the maximum rate in accordance with the provision contained in the 1st proviso to section 41 (1) of the Act. In appeal, the Appellate Assistant Commissioner confirmed the order of the Income-tax Officer but on a further appeal taken to the Income Tax Appellate Tribunal, the Tribunal held that the sole beneficiary under the three deeds was the deity Sri Sri Ishwar Gopal Jew. Hence the 1st proviso to section 41 (1) is not applicable to the facts of the case and the trustees should be assessed in the status of an individual in respect of the income received by them on behalf of the deity. The relevant portions of section 41 (1) and the 1st proviso thereto read:

"In the case of income, profits or gains chargeable under this Act..... any trustee or trustees appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise.... are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such... trustee or trustees in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable and all the provisions of this Act shall apply accordingly:

Provided that where such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate, but, where, such persons have no other personal income, chargeable under this Act and none of them is an artificial juridical person, as if such income, profits or gains or such part thereof were the total income of an association of persons

9. As seen earlier, the finding of the Appellate Tribunal is that the trustees had no beneficial interest in the income of the properties included in the trust deeds and that the sole beneficiary under those deeds is the deity. The question whether a deity can be considered as a 'person' within the meaning of section 2 (9) of the Act had not been canvassed before the High Court or the tribunals below nor was that question raised before us. Therefore we shall not go into that question. For the purpose of this case we shall proceed on the basis that it is 'a person' within the meaning of section 2 (9) of the Act. Now coming to the deeds, all that the learned Counsel for the revenue was able to show us is that in one of the trust deeds, the trustees were referred to as beneficiaries but on a reading of the entire deed, it is clear that reference to them as beneficiaries is a misnomer and that they are not entitled to any benefit under any of those deeds. Therefore the finding of the tribunal that the sole beneficiary under those deeds is the deity is not open to challenge. If that is so, the case clearly falls within the main section 41 (1) and that the 1st proviso to that section is inapplicable to the facts of the case. On the facts found by the tribunal, it cannot be said that the income or profits in question are 'not specifically receivable by the trustees on behalf of anyone person'.

10. The fact that for certain purposes, a trusteeship is considered as 'property' and that the trustees have an interest in the trust is irrelevant for our present purpose. In considering the scope of S. 41 (1), the only thing that we have to see is whether the income in question was received

by the trustees on behalf of any person. If the deity is considered as a 'person' then quite clearly the case does not come within the 1st proviso to section 41 (1) and that it has to be dealt with under section 41 (1).

11. For the reasons mentioned above, these appeals fail and they are dismissed. The respondents are ex parte in this Court. Hence there will be no order as to costs in these appeals.

Appeals dismissed.

AIR 1970 SUPREME COURT 1734 (V 57 C 371)

(From Punjab: (1967) 64 ITR 121)
J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Commissioner of Income-tax, Punjab, Appellant v. Kulu Valley Transport Co. (P) Ltd., Respondent.

Civil Appeals Nos. 859 and 860 of 1966, D/- 30-4-1970.

(A) Income-tax Act (1922), Ss. 24 (2), and 22 — Voluntary loss return filed beyond period specified in general notice under section 22 (1) but before assessment — Losses can be carried forward — (Per majority; Shah, J. Contra).

Per majority; Shah, J., Contra: The losses returned by the assessee before the assessment are required to be determined by the I.T.O. AIR 1959 SC 1154, Foll. (Para 19)

It can well be said that section 22 (3) is merely a proviso to section 22 (1). Thus a return submitted at any time before the assessment is made is a valid return. A return whether it is a return of income, profits or gains or of loss must be considered as having been made within the time prescribed if it is made within the time specified in section 22 (3). If section 22 (3) is complied with section 22 (1) also must be held to have been complied with. If compliance has been made with the latter provision the requirements of section 22 (2A) would stand satisfied. (Para 19)

Thus losses returned by the assessee require in law to be determined and carried forward after being set off under section 24 (2) even when it is a voluntary return filed beyond the

period specified in the general notice under section 22 (1) but before the assessment. (1963) 49 ITR 846 (Bom), Approved. (Para 19)

An argument that a great deal of inconvenience will result if a voluntary return can be entertained at any time in accordance with section 22 (3) when loss is involved and in order to give the assessee the benefit of the carry forward of the loss a number of assessments would have to be reopened cannot be acceded to. Moreover voluntary return cannot be filed beyond period specified in S. 34 (3). (Para 20)

(B) Interpretation of Statutes — Fiscal statute — Two views possible — View favourable to assessee must be accepted. (Para 20)

Cases Referred: Chronological Paras (1964) 1964-52 ITR 609 (Punj),

Tulsi Das Jaswant Lal Kuthiala v. Income-tax Officer, A Ward, Ambala 12

(1963) 1963-49 ITR 846 (Bom), Radhakrishna Rungta v. Seventh Income-tax Officer 6, 12, 21

(1959) AIR 1959 SC 1154 (V 46) = (1959) 36 ITR 569, Commr. of Income-tax, Bombay City II v. Ranchhoddas Karsondas 6, 9, 13, 18, 19

(1958) AIR 1958 Cal 195 (V 45) = (1958) 33 ITR 630, Commr. of Income-tax v. Govindalal Dutta 13, 18

(1958) AIR 1958 Mad 40 (V 45) = (1957) 32 ITR 458, P. S. Rama Iyer v. Commr. of Income-tax 9

(1954) AIR 1954 Bom 543 (V 41) = (1954) 26 ITR 105, Ranchodas Karsondas v. Commr. of Income-tax, Bombay City 18

(1953) AIR 1953 SC 111 (V 40) = (1952) 23 ITR 82, Anglo French Textile Co. Ltd. v. Commr. of Income-tax, Madras 9, 10

(1951) 1951-20 ITR 432 (Cal), Commr. of Agricultural Income-tax v. Sultan Ali 9

(1950) AIR 1950 Mad 647 (V 37) = (1950) 18 ITR 906, Anglo French Textile Co. Ltd. v. Commr. of Income-tax, Madras No. 4 9

The following Judgments of the Court were delivered by

SHAH, J.—The Kulu Valley Transport Co. (P.) Ltd.—hereinafter called 'the Company'—did not file returns of income in respect of the assessment

years 1953-54 and 1954-55 within the period specified in the general notice under Section 22 (1) of the Income-tax Act, 1922. In January 1956, the Company filed voluntary returns disclosing loss of income in the course of its business amounting to Rs. 1,51,520 and Rs. 48,977, respectively, for the two years in question. The Income-tax Officer refused to determine the loss observing:

"This is a loss case and the return has been filed after the statutory time. The Company is, therefore, not entitled to the benefit of carry-forward of loss in the subsequent assessments. The case is, therefore, filed."

2. Against the order of the Income-tax Officer, appeals were preferred to the Appellate Assistant Commissioner. That officer rejected the Company's request for extension for filing the returns, and dismissed the appeals, observing:

"The return made under Sec. 22 (2A) can only be taken to be a return under sub-section (1) of Section 22 for the purpose of this Act, if it is made within the statutory time prescribed in sub-section (2A) of Section 22."

3. The Income-tax Appellate Tribunal in second appeal held that the expression "all the provisions of this Act shall apply as if it were a return under sub-section (1)" in sub-section (2A) only applies to a valid return, i.e., return which is filed within the time-limit prescribed under sub-section (1). The Tribunal rejected the contention that a voluntary return disclosing loss of income submitted after the expiry of the period for filing a return under sub-section (1) may be deemed to be a return under sub-section (3), and the loss disclosed therein must be determined under sub-section (2) of Section 24 to qualify the assessee to carry it in the following year.

4. At the instance of the assessee the Tribunal referred the following question to the High Court of Punjab:

"Whether the losses of Rs. 1,51,520 and of Rs. 48,977 returned by the assessee in Jan. 1956 for the assessment years 1953-54 and 1954-55, respectively, require in law to be determined and carried forward under Section 24 (2) of the Income-tax Act?" The High Court answered the question in the affirmative. The Commissioner of Income-tax has appealed to this

Court with certificate granted by the High Court.

5. Sub-section (2A) of Section 22 which was added to Section 22 by Section 14 of Act 25 of 1953 with effect from April 1, 1952, provides:

"If any person who has not been served with a notice under sub-section (2) has sustained a loss of profits or gains in any year under the head 'Profits and gains of business, profession, or vocation', and such loss of any part thereof would ordinarily have been carried forward under sub-section (2) of Section 24, he shall, if he is to be entitled to the benefit of the carry-forward of loss in any subsequent assessment, furnish within the time specified in the general notice given under sub-section (1) or within such further time as the Income-tax Officer in any case may allow, all the particulars required under the prescribed form of return of total income . . . in the same manner as he would have furnished a return under sub-section (1) had his income exceeded the maximum amount not liable to income-tax in his case, and all the provisions of this Act shall apply as if it were a return under sub-section (1)." On the plain words used by the Parliament, sub-section (2A) applies only where the return is filed within the time specified in the general notice under sub-section (1) or within such further time as the Income-tax Officer may allow. A return not filed within the time prescribed by sub-section (1) or time extended by the Income-tax Officer does not comply with the requirement of sub-section (2A), and the assessee cannot claim that the loss be determined and carried forward.

6. The High Court, however, held that a voluntary return filed after the expiry of the period specified in sub-section (1) but before the assessment is made must still be entertained as a return filed under sub-section (3), even if it returns a loss of income under the head "Profits and gains of business, profession or vocation". In the view of the High Court, sub-section (3) of Section 22 applies to all returns, whether disclosing profit or loss, and whether made voluntarily or pursuant to a notice under sub-section (2), and on that account even if the return is filed beyond the period prescribed by Section 22 (1), and discloses a loss, the Income-tax Officer was bound to

determine the loss so that it may be carried forward in the following year. In reaching that conclusion the High Court purported to rely upon Commr. of Income-tax, Bombay City II v. Ranchhodas Karsandas, 1959-36 ITR 569 = (AIR 1959 SC 1154) and Radhakrishna Rungta v. Seventh Income-tax Officer, 1963-49 ITR 846 (Bom).

7. The view expressed by the High Court cannot, in my judgment, be sustained. The assessee who has sustained loss of income under the head "Profits and gains of business, profession or vocation" and who has not been served with a notice under sub-section (2) may qualify for carrying forward the loss in any subsequent year of assessment must furnish within the time specified in the general notice under sub-section (1) or such time as may be extended by the Income-tax Officer a return in the prescribed form disclosing that loss. Under a return filed not in compliance with a notice under sub-section (2) disclosing loss and filed beyond the time specified in the general notice or extended time, the assessee cannot claim to carry forward the loss. The view expressed by the High Court renders sub-section (2A) otiose.

8. It is implicit in the conclusion reached by the High Court that the right to carry forward loss which is expressly restricted by sub-section (2A) may still be exercised under sub-section (3).

9. In determining whether the view expressed by the High Court is permissible, it is necessary to refer to the decisions of the Courts under Section 22 before it was amended by Act 25 of 1953. It was held in interpreting S. 22 before it was amended that a return filed beyond the period specified in the general notice, if filed before the assessment is made, must, if it disclosed profit exceeding the maximum exempt from tax, be dealt with according to the provisions of the Act. There was a conflict of decisions on the question whether a return could be filed voluntarily disclosing income below the limit of exemption. In P. S. Rama Iyer v. Commr. of Income-tax, 1957-32 ITR 456 = (AIR 1958 Mad 40), it was held that a return disclosing profit below the maximum exempt from tax was a valid return: the Calcutta High Court in Commr. of Agricultural Income-tax

v. Sultan Ali, 1951-20 ITR 432 (Cal), expressed a contrary view. This Court in Ranchhoddas Karsandas' case 1959-36 ITR 569 = (AIR 1959 SC 1154), agreeing with the Bombay High Court, held that a return disclosing income below the taxable limit submitted voluntarily in answer to the general notice under Section 22 (1) of the Income-tax Act is a good return: it is a return such as the assessee considers represents his true income, and that a return in answer to the general notice under Section 22 (1) or in answer to a notice under S. 22 (2) of the Income-tax Act may by virtue of S. 22 (3) be filed at any time before assessment. A return voluntarily made before the assessment cannot be ignored by the Income-tax Officer. In Ranchhoddas Karsandas's case, 1959-36 ITR 569 = (AIR 1959 SC 1154), the assessee had returned without a notice under Section 22 (2) income which was less than the maximum exempt from tax. But the case did not deal with a return in which loss was disclosed by the assessee. In Anglo-French Textile Co., Ltd. v. Commr. of Income-tax, Madras, No. 4, 1950-18 ITR 906 = (AIR 1950 Mad 647), the assessee Company had submitted a 'nil return' pursuant to a notice under Section 22 (2). The Income-tax Officer computed the income of the Company under Section 23 (1) of the Income-tax Act, 1922 as 'nil'. Proceedings were later started under Section 34 of the Income-tax Act to assess the income which the Income-tax Officer believed to have escaped assessment. The assessee then claimed that the loss of profits sustained by it in the previous year should be determined in the proceeding under Section 34 and such loss should be allowed to be carried forward and set off against the income which may be determined for the year for which the notice under Section 34 was issued. The High Court of Madras decided the case on a point which is not relevant here. The case was carried to this Court in appeal. In Anglo-French Textile Co. Ltd. v. Commr. of Income-tax, Madras, 1952-23 ITR 82 = (AIR 1953 SC 111), this Court held that where no return was filed by an assessee at any stage of the case disclosing any income, profits or gains at all and proceedings were later started under Section 34, the assessee could not claim in the

course of those proceedings that a certain loss of a previous year should be determined and recorded. The Court observed at pp. 85 and 86 (of ITR) = (at pp. 112, 113 of AIR):

"There is no provision in the Act which entitles the assessee to have a loss recorded or computed, unless something is to be done with the loss. Thus, under Section 24 (1), a loss can be set off against an income, profit or gain and under sub-section (2) the balance of a loss can be carried forward to a following year on the conditions set out there. Except for this, there is nothing else that can be called in aid.

But under sub-section (2) the loss can be carried forward when "the loss cannot be wholly set off under sub-section (1)" and in that event only the "portion not so set off" can be carried forward. We are, therefore, thrown back on sub-section (1).

Sub-section (1) provides that where an assessee sustains a loss of profits or gains in any year under any of the heads mentioned in Section 6, he shall be entitled to have the amount of the loss "set off against his income, profits or gains under any other head in that year". Therefore, before any question of set-off can arise, there must be (1) a loss under one or more of the heads mentioned in Section 6, and (2) an income, profit or gain under some other head. It follows that when there is no income under any head at all, there is nothing against which the loss can be set off in that year and unless that can be done, sub-section (2) does not come into play."

The Court held that loss of income will not be determined, unless the assessee has more heads of income than one, and the loss under one head is to be set off against income under any other head in that year of account. It was implicit in the judgment, that the taxing authorities will not determine loss under the head "profits and gains of business, profession or vocation" when the assessee has no other source of income.

10. The Parliament apparently realised the hardship involved in preventing a person who has only one source (such source being profession, business or vocation) of income from carrying forward the loss to the subsequent

years of assessment and incorporated by Act 25 of 1953, with effect from April 1, 1952, sub-section (2A) and enabled the assessee to carry forward the loss when he made a return within the time specified in sub-section (1), even if there was no other source of income. The Parliament by the same Act amended sub-section (2) of S. 24 and added the words "so much of the loss as is not so set off or the whole loss where the assessee had no other head of income" after the words "cannot be wholly set off under sub-section (1)". This was intended to supersede a part of the decision of this Court in *Anglo-French Textile Co Ltd's case*, 1952-23 ITR 82 = (AIR 1953 SC 111).

11. Sub-sections (1), (2), (2A) and (3) of Section 22 must be interpreted in this back-ground. Undeniably, sub-section (3) confers upon the assessee a right to submit a return at any time before the assessment is made. Such a return must be voluntary or pursuant to a notice under sub-section (2). The return may disclose income or loss if however the return was made before the Act was amended by the incorporation of sub-section (2A) in Section 22, and it disclosed loss only, according to the decision of this Court loss will not be determined if there be a single source of income. If it be a return filed not pursuant to a notice under sub-section (2) of Section 22, and discloses a loss of income under the head "profits and gains of business", the loss will be determined and carried forward only if it is made within the period specified in sub-section (1) or the period extended by the Income-tax Officer. The clause "if he is to be entitled to the benefit of the carry-forward of loss" in sub-section (2A) clearly means that the right to carry forward loss suffered under the head of income computable under Section 10 may only be exercised if the voluntary return is filed within the period specified in sub-section (1). Sub-section (3) cannot, in my judgment, be read as implying that notwithstanding the restrictions placed by sub-section (2A) a return disclosing loss of income computable under Section 10 will not only be entertained but the loss determined and declared under S. 24 (3) so as to enable the assessee to carry it forward. If a return of loss may be filed at any time in pursuance of a

general notice under sub-section (1), sub-section (2A) will serve no purpose whatever. The limitation placed upon the right to file a return of loss is clearly intended to avoid practical difficulties in the administration of the Act. If the interpretation placed by the High Court be accepted, a taxpayer may avoid making returns pursuant to notice under sub-section (1), and when sought to be assessed in subsequent years, he may claim to bring before the authorities transactions relating to many previous years which he has not disclosed.

12. The view which I am taking was suggested in *Tulsi Das Jaswant Lal Kuthiala v. Income-tax Officer, A Ward, Ambala*, 1964-52 ITR 609 (Pun), and also in *Radhakrishna Rungta's case*, 1963-49 ITR 846 (Bom) at p. 855.

13. It is true as held by this Court in *Ranchhoddas Karsondas's case*, 1959-36 ITR 569 = (AIR 1959 SC 1154), that a return disclosing income below the taxable limit or disclosing loss cannot be rejected by the Income-tax Officer as not being a return of income. The view to the contrary in *Commr. of Income-tax v. Govindalal Dutta*, 1958-33 ITR 630 = (AIR 1958 Cal 195) is erroneous. But that does not mean that the assessee may after filing a voluntary return of loss of income under the head "profits and gains of business" after the period specified in Section 22 (1) claim that the loss be determined and carried forward.

14. In the present case no notice under sub-section (2) was issued to the Company, and the Company made a voluntary return. The return was strictly governed by the terms of sub-section (2A) of Section 22 and upon such a return the Company could not claim that loss of income be determined and carried forward.

15. I would, therefore, answer the question in the negative.

GROVER, J.: (for himself and Hegde, J.).—15A. These appeals arise from a judgment of the Punjab High Court answering the following question which had been referred to it by the Income-tax Appellate Tribunal in the affirmative and in favour of the assessee:

"Whether the losses of Rs. 1,51,520 and of Rs. 48,977 returned by the assessee in January 1956 for the assessment years 1953-54 and 1954-55, res-

pectively, require in law to be determined and carried forward under Section 24 (2) of the Income-tax Act?"

The assessee Kulu Valley Transport Co. (P.) Ltd. is a private company incorporated under the Indian Companies Act, 1913, having its registered office at Pathankot. In January 1956, the Company voluntarily filed returns under Section 22 (3) of the Income-tax Act, 1922, hereinafter called 'the Act', showing losses of Rs. 1,51,520 and Rs. 48,977 for the assessment years 1953-54 and 1954-55, respectively. No notice had been served on the Company under Section 22 (2) of the Act. The Income-tax Officer held that since the returns had been filed after the statutory period, the Company was not entitled to carry forward the losses for both the years in the subsequent assessments. Before the Appellate Assistant Commissioner two main points were urged. The first was that the delay in the submission of the returns should have been condoned and secondly, the returns should have been treated as having been made under Section 22 (3) in which case also they would be valid returns under Section 22 (2A) by reading sub-sections (3) and (1) of Section 22 together. The Appellate Assistant Commissioner did not find any sufficient or reasonable cause for condoning the delay. On the second point he decided against the Company. The Tribunal agreed with the view of the Appellate Assistant Commissioner and on the main point held that the Company was not entitled to the benefit of carrying forward the losses as it had not filed the returns in accordance with Section 22 (2A) of the Act.

16. Section 24 (2) contains substantive provisions relating to carrying forward of the loss. It provides that where any assessee sustains a loss or profit or gain in any year being a previous year in any business, profession or vocation and the loss cannot be wholly set off under sub-section (1) (of Section 24) so much of the loss as is not so set off or the whole loss where the assessee had no other head of income shall be carried forward to the following year. Sub-section (2A) of Section 22 was inserted by the Income-tax (Amendment) Act, 1953, with effect from April 1, 1952. Sub-section (2A) of Section 22 reads:

"If any person who has not been served with a notice under sub-section (2) has sustained a loss of profits or gains in any year under the head "profits and gains of business, profession or vocation", and such loss or any part thereof would ordinarily have been carried forward under sub-section (2) of Section 24, he shall, if he is to be entitled to the benefit of the carry-forward of loss in any subsequent assessment, furnish within the time specified in the general notice given under sub-section (1) or within such further time as the Income-tax Officer in any case may allow, all the particulars required under the prescribed form of return of total income and total world income in the same manner as he would have furnished a return under sub-section (1) had his income exceeded the maximum amount not liable to income-tax in his case, and all the provisions of this Act shall apply as if it were a return under sub-section (1)."

According to Section 22 (1) the Income-tax Officer was to give public notice on or before the first day of May in each year by publication in the prescribed manner requiring every person whose total income during the previous year exceeded the maximum amount which was not chargeable to income-tax to furnish within such period not being less than 60 days as might be specified in the notice a return of his total income and total world income during that year. The Income-tax Officer could in his discretion extend the date for the delivery of the return. Under Section 22 (2) if the Income-tax Officer was of the opinion that income of any person was of such amount as to render him liable to income-tax he could serve a notice on him requiring him to furnish within such period not being less than 30 days a return showing his total income and total world income during the previous year. The date for delivery of the return could again be extended in the discretion of the Income-tax Officer. Section 22 (3) provided that if any person had not furnished a return within the time allowed by or under sub-section (1) or sub-section (2) or having furnished a return under either of those sub-sections, discovered any amount or wrong statement therein, he could furnish a return or a re-

vised return at any time before the assessment was made. Thus, the scheme of Section 22 is that a public or general notice is to be given every year by the Income-tax Officer or he could even give an individual or special notice. But if a person has not furnished a return within the time allowed by or under the first two sub-sections of S. 22 he could still furnish a return at any time before the assessment is made. It is well settled by now that a return can always be filed at any time before the assessment is made. The Income-tax Officer has to make the assessment on that return and he could not choose to ignore it. The question that immediately arises is whether in case of a voluntary return in which loss has been shown and determined, the Income-tax Officer can decline to give the benefit under Section 24 (2) of carrying forward the loss on the ground that the assessee did not comply with the provisions of Section 22 (2A) of the Act. In other words, when there is an express provision in that sub-section which must be availed of if the assessee is to be entitled to the benefit of carrying forward of loss in any subsequent assessment can he take advantage of the provisions of Section 22 (3) and claim that since he has filed a voluntary return before any assessment has been made and if it be determined that he has suffered a loss, he is entitled to carry forward that loss.

17. The argument on behalf of the assessee is that Section 24 (2) confers the right to carry forward the loss to the following year provided the conditions contained in the sub-section are satisfied. There is no further requirement that has to be fulfilled so far as the substantive law is concerned. Section 22 (2A) is merely a procedural provision and it also provides that once a return has been furnished in accordance therewith, all the provisions of the Act become applicable as if it were a return under sub-section (1). That would attract Section 22 (3) and, therefore, a voluntary return can be filed even after the period mentioned in sub-section (2A) has expired so long as the assessment has not taken place. It is pointed out that supposing a return is filed showing income X but the Income-tax Officer in the as-

essment proceedings holds that there has been a loss and the assessee was mistaken in showing a profit, the assessee in such circumstances can certainly claim the benefit of Section 24 (2). If that is possible, there is no reason or justification for holding that he could claim the benefit of Section 24 (2) by filing a voluntary return in the given illustration he would be deprived of that benefit if he filed a return voluntarily showing a loss except in compliance with S. 22 (2A). On the other hand, the contention on behalf of the revenue is that Section 22, before its amendment in the year 1953, did not make any provision for the filing of a loss return voluntarily. Under Section 22 (1), returns which were invited were only of taxable income. No return which in the opinion of the person making it was a loss return was intended to be filed under Section 22 (1). It was only under Section 22 (2) that the return that was required to be filed was in pursuance of the individual notice given by the Income-tax Officer. Since by this notice a return in the prescribed form had to be filed by a person to whom the notice was issued whether it was of profit or loss, a loss return could, therefore, be filed only in pursuance of a notice served under Section 22 (2) but not voluntarily. It is by virtue of the provisions contained in Section 22 (2A) that a loss return can be filed where a person has not been served under sub-section (2) in order to get the benefit of the carrying forward of the loss under Section 24 (2). This is indeed expressly provided by sub-section (2A) of Section 22.

18. It would appear that the position before the amendment in 1953 with regard to the filing of a voluntary return of loss was not clear. Although apparently under the provisions of Section 22 there was no bar to the filing of such a return in the same way as the return showing profit could be filed under Section 22 (3), there was conflict of judicial opinion on the point. The Calcutta High Court had held in 1951-20 ITR 432 (Cal) and 1958-33 ITR 630 = (AIR 1958 Cal 195), that voluntary returns showing a loss could not be regarded as returns at all and the Income-tax Officer was not required to make any assessment on them. The Bombay High Court, however, had taken a different view in

Ranchhoddas Karsondas v. Commr. of Income-tax, Bombay City, 1954-26 ITR 105 = (AIR 1954 Bom 543). In that case the return which had been filed voluntarily was below the taxable limit. According to the Bombay High Court such a return could be validly filed under Section 22 (3) and the Income-tax Officer could not ignore it so long as the return had been filed before any assessment had been made. In 1959-36 ITR 569 = (AIR 1959 SC 1154), which was an appeal against that decision, this Court while upholding the Bombay view, observed:

"It is a little difficult to understand how the existence of a return can be ignored, once it has been filed. A return showing income below the taxable limit can be made even in answer to a notice under Section 22 (2). The notice under Section 22 (1) requires in a general way what a notice under Section 22 (2) requires of an individual. If a return of income below the taxable limit is a good return in answer to a notice under Section 22 (2), there is no reason to think that a return of a similar kind in answer to a public notice is no return at all."

The amendment in 1953 seems to have been made to clarify the law about the filing of a return showing a loss voluntarily. It was declared that such a return could be validly made. The time which was specified for filing the return was on the same lines as in sub-section (1) of Section 22 and all the provisions of the Act were to apply as if it was a return under sub-section (1).

19. Now the question which was submitted for the opinion of the High Court, in the present case, consisted of two parts, viz., (1) whether the loss returned by the assessee for the assessment years in question was required in law to be determined by the Income-tax Officer and (2) whether those losses could be carried forward after being set off under Section 24 (2) of the Act. The first part of the question stood concluded by the decision of this Court in Ranchhoddas Karsondas' case, 1959-36 ITR 569 = (AIR 1959 SC 1154). The Income-tax Officer could not have ignored the return and had to determine those losses. Section 24 (2) confers the benefit of losses being set off and carried forward and there is no provision in Section 22

under which losses have to be determined for the purpose of Section 24 (2). The question which immediately arises is whether Section 22 (2A) places any limitation on that right. This sub-section which has been reproduced before simply says that in order to get the benefit of Section 24 (2) the assessee must submit his loss return within the time specified by Section 22 (1). That provision must be read with Section 22 (3) for the purpose of determining the time within which a return has to be submitted. It can well be said that Section 22 (3) is merely a proviso to Section 22 (1). Thus, a return submitted at any time before the assessment is made is a valid return. In considering whether a return made is within time sub-section (1) of Section 22 must be read along with sub-section (3) of that section. A return whether it is a return of income, profits or gains or of loss must be considered as having been made within the time prescribed if it is made within the time specified in Section 22 (3). In other words, if Section 22 (3) is complied with Section 22 (1) also must be held to have been complied with. If compliance has been made with the latter provision, the requirements of Section 22 (2A) would stand satisfied.

20. On behalf of the revenue it is pointed out that a great deal of inconvenience will result if a voluntary return can be entertained at any time in accordance with Section 22 (3) when loss is involved and in order to give the assessee the benefit of the carry-forward of the loss, a number of assessments would have to be reopened. It is difficult to accede to such an argument merely on the ground of inconvenience. Moreover, it is common ground that a voluntary return cannot be filed beyond the period specified in Section 34 (3) of the Act. It cannot be overlooked that even if two views are possible, the view which is favourable to the assessee must be accepted while construing the provisions of a taxing statute.

21. In the judgment under appeal reliance was placed on a decision of the Bombay High Court in 1963-49 ITR 846 (Bom) and in our opinion the view taken therein is sound and must be upheld.

The appeals fail and are dismissed with costs. One hearing fee.

ORDER: In accordance with the decision of the majority, these appeals fail and are dismissed with costs; one hearing fee.

Appeals dismissed.

**AIR 1970 SUPREME COURT 1742
(V 57 C 372)**

**M. HIDAYATULLAH C. J. AND
SHAH, V. RAMASWAMI AND
K. S. HEGDE AND A. N. GROVER, JJ.**

M/s. Rattan Lal and Co and another etc., Petitioners v. The Assessing Authority, Patiala and another, etc., Respondents; Pradip Kumar and another, (In W. P. No 165 of 1968), Interveners.

Writ Petns. Nos. 133, 165, 169 to 172, 185, 218, 219, 227, 228, 230, 239, 252, 253, 248 and 249 of 1968, D/- 29-10-1968.

(A) Sales Tax—Punjab General Sales Tax Act (46 of 1948) (as amended by Act 7 of 1967) Ss. 5 (3), 11 — Provisions as amended no longer offend section 15 of Central Sales Tax Act.

The provisions of the Punjab General Sales Tax Act (as amended by Act 7 of 1967) are clear and sufficient to make the amended Act accord with section 15, Central Sales Tax Act, 1956. The Act as amended does not suffer from any of the defects from which the unamended Act had suffered. AIR 1967 SC 1616 Ref.

(Paras 3, 9)

The stage of tax is after the amendment stated in section 5 (3) (i) and (ii). In the case of sales tax, the stage of tax is the sale of such goods by the last dealer liable to pay the tax and in the case of purchase tax the stage is purchase by the last dealer liable to pay tax. It is also provided that the turnover of any dealer for any period shall not include his turnover during that period of any sale or purchase of declared goods at any other stage than the stage so mentioned. Dealer knows what he has done with his goods or is going to do with them. If he knows that he is not the last dealer having parted with the goods to another dealer or he knows that he is going to use the goods or sell them to consumers, he knows when he is not liable to tax and when he is.

CN/DN/F517/68/VBB/A

Therefore, he will not include the transaction in his taxable turnover in the first case but include it in the second. Goods in the hands of a dealer are not taxed. They are only taxed on the last purchase or sale. This information is always possessed by a dealer and by providing that he need not include in his turnover any transaction except when he is the last dealer, the position is now clear.

(Paras 6, 7)

The retrospectivity of the Act does not make any difference. (Para 9)

What has been said in regard to the provisions of the Punjab Amendment Act applies *mutatis mutandis* to Haryana Amendment Act also.

(Para 15)

(B) Constitution of India, Art. 14 — Punjab General Sales Tax Act (46 of 1948) (as amended by Act 7 of 1967) Ss. 2 (d) and 11AA proviso — Opportunity given to dealer to ask for reassessment or to submit to old assessment — Art. 14 not violated as opportunity is open to every dealer.

(Para 10)

(C) Constitution of India, Art. 245 — Delegated legislation — Central Sales Tax Act (1956), S. 15 — Punjab General Sales Tax Act (46 of 1948) (as amended by Act 7 of 1967) — Provisions not invalid on ground of unguided delegation to administrative authority in matter of taxation — Haryana Amendment is also not invalid on that ground.

The Central Act itself gives power to the legislature to choose a rate of tax at not more than 3 per cent of the taxable turnover. The tax levied by the Punjab Act is well within that limit and therefore the legislature has chosen the maximum and has left it free to the authorities to impose the tax within that maximum, regard being had to the requirements of revenue and the expenditure necessary for the State. There is therefore no unguided delegation to the administrative authority. (Para 11)

The Haryana Amendment is also not invalid on that ground.

(Para 15)

(D) Punjab Reorganization Act (1966), S. 88 — Reorganisation of Punjab State on 1-11-1966 — Competence of legislature of new State to

amend Act with retrospective effect from date anterior to 1-11-1966 — (Constitution of India, Pre., Art. 3 and Art. 245) — (Punjab General Sales Tax Act (46 of 1948)) — (Punjab General Sales Tax (Haryana Amendment and Validation) Act (1967)).

After the reorganisation of the old Punjab State into Punjab and Haryana States, the Punjab General Sales Tax Act, 1948 applied as an independent Act to each of the areas and is subject to the legislative competence of the legislature in that area. The Act has been amended in 1967 in each of the new States in relation to the area of that State with retrospective effect and it is inconceivable that this could not be within the competence. The scheme of the States Reorganization Acts (including the Punjab Reorganization Act) makes the laws applicable to the new areas until superseded, amended or altered by the appropriate legislature in the new States. This is what the legislature has done in 1967 and there is nothing that can be said against such amendment. (Para 12)

(E) Sales Tax — Punjab General Sales Tax Act (46 of 1948) (as amended by Punjab Sales Tax (Haryana Amendment and Validation) Act, 1967) — Amended Act does not offend section 15 of Central Sales Tax Act or equality clause of the Constitution.

(Para 13)

(F) Constitution of India, Art. 304 — Punjab General Sales Tax (Haryana Amendment and Validation) Act, 1967 — Allegation of discrimination between imported and local goods — Amendment does not violate Art. 304.

Imposition of differential rates of tax by the same State on goods manufactured or produced in the State and similar goods imported in the State is prohibited by Art. 304 (a). But where the taxing State is not imposing rates of tax on imported goods different from rates of tax on goods manufactured or produced in the State, Art. 304 has no application. AIR 1969 SC 147, Foll. (Para 14)

The tax under the Haryana Amendment of 1967 is at the same rate and therefore the tax cannot be said to be higher in the case of imported goods. It may be that when the rate is applied the resulting tax is somewhat

higher but that does not offend against the equality contemplated by Art. 304. That is the consequence of ad valorem tax being levied at a particular rate. So long as the rate is the same Article 304 is satisfied. Even in the case of local manufacturers if their cost of production varies, the net tax collected will be more or less in some cases but that does not create any inequality because inequality is not the result of the tax but results from the cost of production of the goods or the cost of their importation. (Para 15)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 147 (V 56) =
Civil Appeal No. 763 of 1967,
D/- 18-4-1968, State of Madras
v. N. K. Natraja Mudaliar 14
(1967) AIR 1967 SC 1616 (V 54) =
(1967) 3 SCR 577, Bhawani
Cotton Mills Ltd. v. State of
Punjab 3
(1957) AIR 1957 SC 657 (V 44) =
1957 SCR 837, A. V. Fernandez
v. State of Kerala 3

In W. P. No. 133 of 1968: Mr. S. V. Gupte, Sr. Advocate (M/s. S. K. Mehta and K. L. Mehta Advocates of M/s. K. L. Mehta and Co. with him), for Petitioners; In W. P. No. 165 of 1968: Mr. C. D. Garg, Advocate and M/s. S. K. Mehta and K. L. Mehta, Advocates of M/s. K. L. Mehta and Co., for Petitioners; In W. P. Nos. 169 and 170 of 1968: Mr. Hardev Singh, Advocate, for Petitioners; In W. P. Nos. 171, 172, 218, 219, 227, 228, 230, 239, 248, 249, 252 and 253 of 1968: Mr. V. C. Mahajan, Advocate and M/s. S. J. Mehta and K. L. Mehta Advocates of M/s. K. L. Mehta and Co., for Petitioners; In W. P. No. 185 of 1968: Mr. M. C. Chagla, Sr. Advocate (M/s. A. N. Sinha and B. P. Jha Advocates with him), for Petitioners; In W. P. Nos. 133 and 165 of 1968: Mr. Niren De, Solicitor-General of India, (M/s. O. P. Malhotra and R. B. Sachthey, Advocates with him), for Respondents; In W. P. Nos. 218, 219, 227 and 228 of 1968: Mr. Anand Saroop, Advocate General for the State of Haryana (Mr. R. N. Sachthey, Advocate with him), for Respondents. In W. P. Nos. 169 to 172 of 1968: M/s. O. P. Malhotra and R. N. Sachthey, Advocates, for Respondents; In W. P. Nos. 185, 230, 248, 249, 252 and 253 of 1968: M/s. R. N. Sachthey, Advocate, for Respondents; In W. P. No. 165 of 1968:

Mr. B. Datta, Advocate and Mr. P. C. Bhartari, Advocate for M/s. J. B. Dadachanji and Co., for Interveners.

The following Judgment of the Court (consisting of M. Hidayatullah C. J. and J. C. Shah, V. Ramaswami, K. S. Hegde and A. N. Grover JJ.) was delivered by

HIDAYATULLAH, C. J.: These are 17 petitions challenging the validity of the Punjab General Sales Tax (Amendment and Validation) Act, 1967 (Act No. 7 of 1967) by the Punjab Legislature and the Punjab Sales Tax (Haryana Amendment and Validation) Act, 1967. Thirteen of these petitions challenge the Punjab Amendment Act and four challenge the Haryana Amendment Act.

2. The petitioners are firms or companies dealing in cotton or oil seeds. Their business is to purchase ginned and unginned cotton for manufacturing yarn and selling the said cotton also to registered and unregistered dealers both inside and outside the State. The petitioners of the second category purchase oil-seeds for use in manufacture of edible oils. The surplus oil-seeds are sold to other dealers, registered or unregistered, inside and outside the State of Punjab. Both these commodities are essential commodities to which the Central Sales Tax Act applies. Certain provisions of these Amending Acts are challenged on the ground that they offend section 15 of the Central Act and are also unconstitutional being in violation of Articles 14 and 19.

3. The Punjab General Sales Tax Act was passed in 1948. It was amended from time to time. The Act as it stood on April 1, 1960, was challenged in *Bhawani Cotton Mills Ltd. v. State of Punjab*, 1967-3 SCR 577 = (AIR 1967 SC 1616). On April 10, 1967 this Court by majority struck down certain portions of the Act on the ground that they were in conflict with the provisions of S. 15 of the Central Act. On November 1, 1966 the former State of Punjab bifurcated and the States of Punjab and Haryana came into existence. On December 29, 1967, the Punjab Legislature enacted Act 7 of 1967 amending the original Act, and the following day the President's Act intitled the Punjab General Sales Tax (Haryana Amendment and Validation)

Act, 1967 (Act No. 14 of 1967) was passed for Haryana. Both the Acts were preceded by Ordinances which they replaced. It is not necessary to refer to the Ordinances.

4. Section 15 of the Central Sales Tax Act, 1956 (54 of 1956) provided as follows:

"15. Restrictions and conditions in regard to tax on sale or purchase of declared goods within a State.

Every sales-tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely:

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed three per cent. of the sale or purchase price thereof, and such tax shall not be levied at more than one stage;

(b) where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter-State trade or commerce, the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be provided in any law in force in that State."

The section provides that in respect of declared goods the tax (sales or purchase) shall not exceed the prescribed limit and shall not be levied at more than one stage and shall be refunded to persons from whom it is collected if the goods are sold in the course of inter-State trade or commerce. The original Punjab General Sales Tax Act, 1948 was challenged before this Court in *Bhawani Cotton Mills Ltd. case*. The Act in defining the taxable turnover in section 5 (2) allowed certain deductions and one such deduction in cl. (vi) was:

"... turnover during that period on the purchase of goods which are sold not later than six months after the close of the year, to a registered dealer, or in the course of inter-State trade or commerce, or in the course of export out of the territory of India: Provided that in the case of such a sale to a registered dealer, a declaration, in the prescribed form and duly filled and signed by the registered dealer to whom the goods are sold, is

furnished by the dealer claiming deduction."

The original section, as it stood on April 1, 1960, read as follows:

"5. Rate of tax.

(1) Subject to the provisions of this Act, there shall be levied on the taxable turnover every year of a dealer a tax at such rates not exceeding four naye paise in a rupee as the State Government may by notification direct:

Provided

Provided further that the rate of tax shall not exceed two naye paise in a rupee in respect of any declared goods as defined in clause (c) of section 2 of the Central Sales Tax Act, 1956, and such tax shall not be levied on the purchase or sale of such goods at more than one stage:

Provided

(2) In this Act the expression "taxable turnover" means that part of a dealer's gross turnover during any period which remains after deducting therefrom—

(a) his turnover during that period on—

(i)

(ii) sales to a registered dealer of goods declared by him in a prescribed form.

x x x x x x

(vi) the purchase of goods which are sold not later than six months after the close of the year, to a registered dealer or in the course of inter-State trade or commerce, or in the course of export out of the territory of India:

Provided that in the case of such a sale to a registered dealer, a declaration, in the prescribed form and duly filled and signed by the registered dealer to whom the goods are sold, is furnished by the dealer claiming deduction.

x x x x

It was contended in that case that sections 2 (ff), 5 (1) second proviso and 5 (2) (a) (vi) were in conflict with section 15 of the Central Act. Bhawani Mills were dealers registered under the Punjab General Sales Tax Act, 1948 and for the assessment years 1960-61, 1961-62 and 1962-63 the Mills denied their liability to the Central Sales Tax on the purchase of cotton in the accounting years.

5. The scheme of the Act then in force put the tax on purchase of cotton

(which was a declared commodity) at the rate of 2 naye paise in a rupee. By the second proviso to section 5 (1) it was further provided that such tax shall not be levied on the purchase or sale of such goods at more than one stage. The word 'dealer' at that time was defined as follows:

"Dealer means any person including a Department of Government who in the normal course of trade sells or purchases any goods that are actually delivered for the purpose of consumption in the State of Punjab, irrespective of the fact that the main place of business of such person is outside the said State and where the main place of business of any such person is not in the said State, 'dealer' includes the local manager or agent of such person in Punjab in respect of such business." The provisions for taxing purchases of cotton were challenged on the ground that there was a possibility of the tax being levied at more than one stage, the provisions of the second proviso notwithstanding. The argument was summarized by our brother Vaidialingam thus:

"In this case, according to the appellant, it has to send quarterly returns, even during the accounting year and, as per section 10 (4) of the Act, it has to pay also tax, in accordance with the returns submitted by it for every quarter. In the returns that are being sent, the dealer will have to include all purchases of cotton, effected by him during the quarter for which the return is sent. There is no indication, either in the Act or in the rules or the forms prescribed, as to whether the persons from whom the appellant purchased cotton, have paid tax or not. Section 15 of the Central Act is not restricted only to registered dealers. There will also be nothing to guide the appellant to know as to whether the goods, purchased by it, have been sold to it by its vendor within the period mentioned in cl. (vi) of section 5 (2) (a) of the Act. Under those circumstances, there is always a possibility, or even a certainty, of more persons than one having paid tax or being made liable to pay tax in respect of the same goods at different stages. That is quite opposed to the provisions of section 15 (a) of the Central Act. Even otherwise, it is pointed out that if a person has purchased cotton and sells it after the

period provided for in S. 5 (2) (a) (vi), that party is liable to pay sales tax and would have also paid the same. Another purchaser from the said party will also be liable to pay tax, on the same commodity if he sells the goods, after the period mentioned in cl. (vi).

That is, two persons are made liable for payment of tax, in respect of the same commodity. In other words the purchases of the same item of declared goods, by the persons indicated above, are made liable for tax, whereas under the Central Act, there can be only one levy and collection of tax at one stage, either on sale or on purchase."

Learned counsel in that case showed by way of contrast how the Madras, Mysore, Andhra Pradesh and U. P. had avoided such a consequence. In answer, it was pointed out by the State that since the tax was levied, whether on sale or purchase, at the very first transaction, the stage was fixed and that the dealer could always claim exemption under section 5 (2) (a) (vi) or a refund under section 12 of the Act. This Court in its majority judgment did not consider that the second proviso to section 5 (1) by its mere declaration prevented the levy of tax at more than one stage. The difficulty, however, remained that the Act itself did not indicate the stage at which the tax was to be levied and because under section 15 (1) of the Central Act there could be no liability for payment of tax unless this stage was so stated in the Act or the rules thereunder. It was pointed out that a dealer would have to show in his return all purchases of cotton and pay the tax with his return. There was nothing which would have enabled the dealer to know whether the tax had already been paid by another dealer and to exclude from his return those transactions. The dealer could not take a chance as heavy penalties were provided. This was particularly so where the goods passed through an unregistered dealer's hands at an intermediate stage. In dealing with the latter part of the reasons this Court gave an example which may be quoted here:

"... if a dealer, 'A' sells the declared goods to 'B', six months after the close of the year (B being a registered dealer). A becomes liable to purchase tax. But, if B sells the identical decl-

ared goods, again, after the period mentioned in sub-cl. (vi), he will also be liable to pay purchase tax. That means, in respect of the same item of declared goods, more than one person is made liable to pay tax and the tax is also levied at more than one stage. That is not permissible under S. 15 (a) of the Central Act. If goods are resold to a non-registered dealer, within the period, sub-cl. (vi) will not help the original purchaser. We may also point out, at this stage, that sub-cl. (vi) of section 5 (2) (a), negatives the assumption that the normal rule, under the Act, in respect of declared goods, is to levy the tax on the first purchaser."

This Court then referred to section 12 where there is a provision for refund which taken with rules 48-58 allowed for refund to be claimed, and found the provisions insufficient to get over the difficulty. This Court observed:

"Even in the matter of obtaining refunds, there can be no controversy, that the appellant will have to place, before the officer concerned, particulars of transactions connected with the commodity in question and also the basis on which it claims the relief. It will be absolutely difficult, if not impossible, for persons like the appellant, to collect materials in this behalf, because, there is no provision contained either in the Act or the rules, on the basis of which it will be entitled to be supplied with all the material information, relevant for sustaining a request for refund. If the Central Act makes it mandatory that the tax can be collected only at one stage, in our opinion, it is not enough for the State to say that a person, who is not liable to pay tax, must nevertheless, pay it in the first instance, and then claim refund, at a later stage. We may state that the question as to how far a party can ask for refund, without the order of assessment being set aside, by appropriate proceedings, is highly doubtful; because at the time when the actual order of assessment is passed, in certain cases, it may not be possible for a party to say whether he is entitled to exemption, or not, under sub-cl. (vi) of section 5 (2) of the Act. If a person is not liable for payment of tax at all, at any time, the collection of a tax

from him, with a possible contingency, of refund at a later stage, will not make the original levy valid; because, if particular sales or purchases are exempt from taxation altogether, they can never be taken into account, at any stage, for the purpose of calculating or arriving at the taxable turnover and for levying tax."

Relying upon the observations in *A. V. Fernandez v. State of Kerala*, 1957 SCR 837 = (AIR. 1957 SC 657) this Court concluded:

"... the provisions contained in a statute with respect to exemptions of tax or refund or rebate, on the one hand, must be distinguished from the total non-liability or non-imposition of tax, on the other. These observations also, in our opinion, effectively provide an answer to the stand taken by the State, in this case that section 12 of the Act provides an adequate relief, by way of refund, even if tax is collected at an earlier stage."

The Amending Acts which are now challenged set about removing these difficulties. These amendments are again challenged on the same lines. It is convenient to take the two Amending Acts separately. First we shall take up for consideration the Punjab amendments. Here, we are concerned only with a few of the amendments made by the Amending Act 7 of 1967. Section 5 was amended retrospectively from different dates. In sub-section (1), in the second proviso, the words "as defined in cl. (c) of S. 2 of the Central Sales Tax Act, 1956, and such tax shall not be levied on the purchase or sale of such goods at more than one stage" are now omitted. After the second proviso another proviso is introduced. In sub-s. (1A), the words "in respect of such goods other than declared goods" are substituted retrospectively from 16th December, 1965 for the words "in respect of such goods." After sub-s. (2) a new sub-section (3) is introduced from October 1, 1958. We may now set out the 5th section as it emerges from the amendment before we deal with the objections:

"Section 5. Rate of tax—(1) Subject to the provisions of this Act, there shall be levied on the taxable turnover of a dealer a tax at such rates not exceeding six naye paise in a rupee as the State Government may by notification direct.

(2) In this Act the expression 'taxable turnover' means that part of a dealer's gross turnover during any period which remains after deducting therefrom—

(a) his turnover during that period on—

(i) x x x

(vi) the purchase of goods which are sold not later than six months after the close of the year, to a registered dealer, or in the course of inter-State trade or commerce, or in the course of export out of the territory of India;

Provided that in the case of such a sale to a registered dealer, a declaration, in the prescribed form and duly filled and signed by the registered dealer to whom the goods are sold, is furnished by the dealer claiming deduction.

(3) Notwithstanding anything contained in this Act,—

(a) in respect of declared goods, tax shall be levied at one stage and that stage shall be—

(i) in the case of goods liable to sales tax, the stage of sale of such goods by the last dealer liable to pay tax under this Act;

(ii) in the case of goods liable to purchase tax, the stage of purchase of such goods by the last dealer liable to pay tax under this Act;

(b) the taxable turnover of any dealer for any period shall not include his turnover during that period on any sale or purchase of declared goods at any stage other than the stage referred to in sub-clause (i), or as the case may be, sub-clause (ii) of clause (a)."

In addition, a new section, S. 11AA was added to the following effect:

"11AA. Review of certain assessments, etc. of tax on declared goods:

(1) Notwithstanding anything contained in this Act, the Assessing Authority shall (whether or not an application is made to him in this behalf), review all assessments and reassessments made before the commencement of the Punjab General Sales Tax (Amendment and Validation) Act, 1967, in respect of declared goods and make such order varying or revising the order previously made as may be necessary for bringing the order previously made into conformity with the provisions of this Act as amended by

the Punjab General Sales Tax (Amendment and Validation) Act, 1967:

Provided that no proceeding for review shall be initiated without giving the dealer concerned a notice in writing of not less than thirty days.

(2) Any dealer on whom a notice is served under sub-section (1) may within thirty days from the date of receipt of such notice intimate in writing the assessing authority of his intention to abide by the assessment or reassessment sought to be reviewed and if he does so, the assessing authority shall not review such assessment or reassessment under this section.

(3) No order shall be made under this section against any dealer without giving such dealer a reasonable opportunity of being heard.

(4) Notwithstanding anything contained in any judgment, decree or order of any court or other authority to the contrary but subject to the provisions of the foregoing sub-sections any assessment, re-assessment, levy or collection of any tax in respect of declared goods made or purporting to have been made, and any action or thing taken or done or purporting to have done in relation to such assessment, re-assessment, levy or collection, under the provisions of this Act before the commencement of the Punjab General Sales Tax (Amendment and Validation) Act, 1967, shall be as valid and effective as if such assessment, re-assessment, levy or collection or action or thing had been made, taken or done under this Act as amended by the Punjab General Sales Tax (Amendment and Validation) Act, 1967."

The argument is that the position has not altered at all even after the amendments and the liability to taxation at different stages remains still and the Act continues to be in conflict with the Central Act on the same reasons on which Bhawani Mills case proceeded. It is argued that the amendments have been made retrospective but no machinery is provided to enable the dealer to discover that the goods had been taxed before and the single stage at which the tax is to be levied is still not clearly discernible. This is the main argument but there are many supplementary arguments which we shall notice later.

For the present we confine our attention to the main point.

6. The stage of tax is now stated in S. 5 (3) (i) and (ii). In the case of sales-tax, the stage of tax is the sale of such goods by the last dealer liable to pay the tax and in the case of purchase tax the stage is purchase by the last dealer liable to pay tax. It is also provided that the turnover of any dealer for any period shall not include his turnover during that period of any sale or purchase of declared goods at any other stage than the stage so mentioned.

7. It will be seen that the matter is now in the hands of the dealer. He has to find out for himself whether he is liable to pay the tax or not. A dealer knows what he has done with his goods or is going to do with them. If he knows that he is not the last dealer having parted with the goods to another dealer or he knows that he is going to use the goods or sell them to consumers, he knows when he is not liable to tax and when he is. Therefore, he will not include the transaction in his taxable turnover in the first case but include it in the second. Goods in the hands of a dealer are not taxed. They are only taxed on the last purchase or sale. This information is always possessed by a dealer and by providing that he need not include in his turnover any transaction except when he is the last dealer, the position is now clear.

8. It is contended that even so the dealer may not know that he is the last dealer and may make some mistake. The law does not take into account the actions of persons who are negligent or mistaken but only of persons who act correctly, according to law. If the dealer is clear about his own position he is now quite able to see whether he is the last purchaser liable to pay the tax or the last seller liable to pay the tax. The Act by specifying the stage as the last purchase or sale by a dealer liable to pay the tax makes the stage quite clear and by giving an option to him not to include such transactions in his return saves him from the liability to pay the tax till he is the dealer liable to pay the tax. In our opinion, therefore, the present provisions of the Act are quite clear and are quite sufficient to make the amended Act accord with the Central Act. The arguments noted in the

earlier case of this Court do not therefore arise.

9. It will thus be seen that the present Act does not suffer from any of the defects from which the unamended Act had suffered. It is, however, contended that the Act has been made retrospective but no machinery is provided to discover if the declared goods were assessed to tax more than once. As we have already pointed out, the matter is within the ken of the dealer himself and it is for him to decide whether he would not claim the benefit of S. 11AA and ask for a refund or in future transactions delete the sales from his taxable turnover when he is not the last dealer liable to pay the tax. Therefore the retrospectivity of the Act does not make any difference. It is not contended before us that it was not within the competence of the Punjab Legislature to pass such an Act retrospectively. The defect pointed out is the self-same defect which was noticed in Bhawani Mills case. But that defect no longer exists.

10. It is argued further that there is a discrimination between the two kinds of manufacturers. In the definition of 'dealer' in Section 2 (d) and in the proviso to Sec. 11-AA, it is submitted, it arises because of the opportunity given to a dealer to ask for reassessment or to submit to the old assessment. This is open to every dealer and the intention is to give an opportunity to the dealer himself leaving it to his own will whether to ask for a refund or not. This hardly can be said to create a discrimination.

11. Lastly, it is contended that there is a delegated legislation in that the maximum has been provided without indication of the circumstances under which the tax is to be levied. This, it is said, creates unguided delegation to administrative authority, the function of the Legislature. It is to be noticed that the Central Act itself gives power to the Legislature to choose a rate of tax at not more than 3 per cent of the taxable turnover. The tax levied is well within that limit and therefore the Legislature has chosen the maximum and has left it free to the authorities to impose the tax within that maximum regard being had to the requirements of revenue and the expenditure necessary for the State.

12. We may now deal with some arguments which are common to both sets of cases before considering the case of the Haryana amendment. It is argued that the reorganization of the State took place on November 1, 1966 and the amendment in some of its parts seeks to amend the original Act from a date anterior to this date. In other words, the Legislature of one of the States seeks to amend a law passed by the composite State. This argument entirely misunderstands the position of the original Act after the reorganization. That Act applied now as an independent Act to each of the areas and is subject to the legislative competence of the Legislature in that area. The Act has been amended in the new States in relation to the area of that State and it is inconceivable that this could not be within the competence. If the argument were accepted, then the Act would remain unamendable unless the composite State came into existence once more. The scheme of the States Reorganization Act makes the laws applicable to the new areas until superseded, amended or altered by the appropriate Legislature in the new States. This is what the Legislature has done and there is nothing that can be said against such amendment.

13. In regard to Haryana cases also the same arguments are urged. It is contended that the amended Act there also offends Section 15 for the reasons which we have given. Neither the amendment of S. 55 in this area nor the introduction of Section 11-AA for refund offends against Section 15 of the Central Act or the equality clause of the Constitution. It is said that pending cases will always be reconsidered whether or not an application in that behalf is made but in the case of disposed-of cases it depends upon the party to intimate in writing that he has no objection to the assessment or reassessment already made. If any objection can be taken, it will be by those whose cases are pending and not by those whose cases have been closed. The option to submit to the assessment is open to every one alike and there is no discrimination if a party wants that his case need not be reconsidered. He has only to state that in writing and that would be the end of the matter. If he wants his case to be reconsidered, then he can

go before the Tribunal and get his case reconsidered.

14. It is also urged in this connection that there is a discrimination between the imported goods and local goods. It is said that the discrimination is also between the first purchase in the case of imported goods and last sale in the case of local goods. Since the imported goods might be more expensive by reason of freight, etc. or intermediary sales having taken place, it is said, that the burden of tax will be heavier and therefore this will offend against the equality clause and Art 304 of the Constitution. In our opinion this argument is without any substance. The rate of tax is same in every case. In *State of Madras v. N. K. Nataraja Mudaliar*, Civil Appeal No. 763 of 1967, D/-18-4-1968 (reported in AIR 1969 SC 147), this Court stated that the essence of Arts. 301 and 303 is to enable the State by a law "to impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in the State are subject, so however, as not to discriminate between goods so imported and goods so manufactured or produced." It was pointed out by this Court that "imposition of differential rates of tax by the same State on goods manufactured or produced in the State and similar goods imported in the State is prohibited by that clause. But where the taxing State is not imposing rates of tax on imported goods different from rates of tax on goods manufactured or produced (sic) (in the State?). Article 304 has no application."

15. Here also the tax is at the same rate and therefore the tax cannot be said to be higher in the case of imported goods. It may be that when the rate is applied the resulting tax is somewhat higher but that does not offend against the equality contemplated by Art. 304. That is the consequence of ad valorem tax, being levied at a particular rate. So long as the rate is the same, Art. 304 is satisfied. Even in the case of local manufacturers, if their cost of production varies, the net tax collected will be more or less in some cases but that does not create any inequality because inequality is not the result of the tax but results from the cost of production of the goods or

the cost of their importation. This ground, therefore, has also no substance. We do not think it necessary to set down here the provisions of the Haryana Amendment Act because they follow the scheme of the Punjab Amendment Act in substance and what we have said in regard to the Punjab Amending Act applies mutatis mutandis to Haryana Amendment Act also.

16. In the result these petitions have no substance. They are dismissed with costs. One set of hearing fee. Petitions dismissed.

AIR 1970 SUPREME COURT 1750 (V 57 C 373)

(From Calcutta: AIR 1967 Cal 560)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

M/s. Shri Gopal Paper Mills Co. Ltd., Appellant v. Commissioner of Income Tax, Central, Calcutta, Respondent.

Civil Appeal No. 1669 of 1966, D/-21-4-1970.

Finance Act (1956), Part II, D Second Proviso (1) (a) and (b)—Shareholders becoming owners of bonus shares on 30-12-1954 — Assessment year 1956-57 — Accounting year ending on 31-12-1955 — Shares actually issued on 1-1-1955 — Effect — (Companies Act (1956), Section 84 — AIR 1967 Cal 560, Reversed.

On 30-12-1954 at a general meeting the assessee company passed a resolution that the accumulated undivided profits of the Company standing to the credit of the general reserve as on 30th June 1954 be capitalised and distributed amongst the holders of the ordinary shares in the Company on the footing that they had become entitled thereto as capital and that the said capital be applied on behalf of such ordinary share-holders in payment in full for the ordinary shares in the Company. The company had full power under the Articles of Association to do so.

Held that the ordinary share-holders became owners of the bonus shares as from the date of the resolution. It was not necessary for the issue of the shares that a share certificate was given. The fact that the shares were actually issued on 1-1-1955 was not material. Hence there was no justifi-

fication on the part of the department in reducing the rebate firstly under Part II, Section D, Second Proviso (1) (a) and secondly under (b) in the assessment year 1956-57 the accounting year ending on 31-12-1955. (1874) 9 Ch. A. 554, Not followed; (1876) 4 Ch. D. 140 & (1892) 66 LT 704, Rel. on; AIR 1967 Cal 560, Reversed.

(Paras 6, 7, 8, 10)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 250 (V 51) =

1964-3 SCR 698, Sri Gopal Jalan and Co. v. Calcutta Stock Exchange Association Ltd. 10

(1911) 1911-1 Ch. 73, Mosely v. Koffyfontein Mines Ltd. 10

(1899) 80 LT 347 = 15 TLR 281, Spitzel v. Chinese Corporation 10

(1892) 66 LT 704, Dalton Time Lock Co. v. Dalton 10

(1885) 29 Ch D 421 = 52 LT 933, In re Florence Land and Public Works Co. 10

(1876) 4 Ch. D 140 = 36 LT 124, In re Heaton's Steel and Iron Co. 9

(1874) 9 Ch A 554 = 43 LJ Ch 772, In re Imperial Rubber Co. Bush's Case 8, 9

The following Judgment of the Court was delivered by

HEGDE, J.: This appeal is by a certificate under section 66A (2) of the Indian Income Tax Act, 1922 (which will hereinafter be called 'the Act') issued by the High Court of Calcutta. It arises out of the judgment and order of that High Court dated February 3, 1965 in a reference under section 66 (1) of the Act. In the reference mentioned earlier, two questions of law were referred to the High Court for its opinion. They are:

"(1) Whether on the facts and in the circumstances of the case the bonus shares of the face value of Rupees 50,07,500/- should be included in the paid up capital of the assessee within the meaning of that term in pursuance of sub-section (1) of the explanation to paragraph (D) of Part II of the Finance Act, 1956 for the relevant assessment year?

(2) Whether on the facts and in the circumstances of the case the bonus shares in question can be said to have been issued within the meaning of the second proviso to paragraph (D) of Part II of the Finance Act, 1956 to the shareholders by the assessee

during the accounting year ended 31st December, 1955 relevant for the assessment year 1956-57?"

2. The facts relevant for the purpose of deciding this appeal may now be stated: The appellant is a company incorporated under the Indian Companies Act. It carries on business of manufacture of paper. On December 30, 1954, it passed the following resolution unanimously at a General Meeting held on that date:

(a) That a sum of Rs. 50,07,500/- (Rupees fifty lakhs seven thousand and five hundred) being part of the undivided profits of the Company standing to the credit of General Reserve as on 30th June, 1954, be capitalised and distributed amongst the holders of the ordinary shares in the Company on the footing that they became entitled thereto as capital and that the said capital be applied on behalf of such Ordinary Shareholders in payment in full for 5,00,750 Ordinary shares of Rs. 10/- each, in the Company and that such 5,00,750 New ordinary shares of Rs. 10/- each, credited as fully paid up shall rank in all respects *pari passu* with the existing ordinary shares, save and except that the holders thereof will not participate in any dividend in respect of any period ending on or before 31st December 1954 and that the same shall be treated for all purposes as an increase of the nominal amount of the capital of the Company held by each of such ordinary shareholders and not as income.

(b) That pursuant to the above resolution and in satisfaction of the interest of the said Ordinary Shareholders in the capitalised sum, the Directors be and they are hereby directed to issue, allot and distribute the said 5,00,750 New Ordinary Shares of Rs. 10/- each, credited as fully paid up amongst the persons whose names are registered as such in the books of the Company as on 1st day of January 1955, in proportion of one such new ordinary share for each ordinary share already held by them on that date, provided that no allotment of shares issued as aforesaid shall be made to non-resident shareholders till approval of the Reserve Bank of India is obtained for the same.

(c) That the Draft of the Agreement providing for the allotment of said

New Ordinary shares in satisfaction of the said capital bonus and submitted to this meeting and signed in the margin by the Chairman, by way of identification, be and the same is hereby approved and that the Director be authorised to affix the Company's seal to duplicate endorsement of such Agreement as and when the same shall have been signed on behalf of the members holding Ordinary shares in the company on 1st January, 1955, by some person to be appointed by the Directors in that behalf, which the Directors be and are hereby authorised to do."

3. There is no dispute as regards the validity of that resolution. It was passed in accordance with the Articles of Association of the Company. For the assessment year 1966-67, (1956-57) the relevant accounting period ending on December 31, 1955, the Income-tax Officer had determined by his order dated September 29, 1958, the total income of the company at Rs. 42,73,176/-. In computing the Corporation Tax due in respect of the said income, the Income-tax Officer reduced the rebate to which the appellant-company was entitled on two counts: firstly in accordance with sub-cl. (a) of cl. (1) to second proviso to S. D. of Pt. II of the Finance Act, 1956, he reduced the rebate at the rate of 2 annas a rupee on Rs. 50,07,500/- which according to him represented the face value of the bonus shares issued by the appellant company to its shareholders during the previous year with a view to increasing its paid up capital. Secondly he excluded these bonus shares from the paid up capital of the company as on 1st January, 1955 for the purpose of determining the excess dividends over 6 per cent of the paid up capital on which the rebate was to be reduced at the rate of 2 annas in a rupee according to sub-cl. (b) of cl. (1) of the second proviso to S. D. of Pt. II of the Finance Act, 1956. The reduction of the rebate on the first count was Rs. 6,25,937/50 P. and on the second count it was Rs. 1,48,127/31 P. The company appealed to the Appellate Assistant Commissioner and claimed that the bonus shares were in fact issued in the year preceding the previous year relevant to the assessment year 1956-57, therefore, did not come within the mischief of sub-cl. (a) of

cl. (1) of the second proviso to S. D. of Pt. II. It also contended that the bonus shares were part of the paid up capital of the company as on January 1, 1955 and, therefore, its case came within the scope of sub-cl. (b) of the second proviso to S. D. of Pt. II of the Finance Act, 1956. The Appellate Assistant Commissioner rejected the first contention of the company but accepted the second contention. According to him, as the bonus shares were to be credited as fully paid up amongst persons whose names were registered as such in the books of the company as on January 1, 1955, the issue could not possibly take place before that date. But at the same time he took the view that the shareholders have been put into possession of the bonus shares on January 1, 1955 and that the shares were actually issued on January 1, 1955. Hence he held that from that date the ordinary shareholders became the owners of the bonus shares. He, therefore, included the face value of the bonus shares in the paid up capital of the company as on the 1st day of the accounting year for the purpose of sub-cl. (b) of cl. (1) of the 2nd proviso to S. D. of Part II of the Finance Act, 1956. Both the company as well as the department appealed against the order of the Appellate Assistant Commissioner to the extent it went against them. The Tribunal rejected the contention of the assessee and accepted that of the department. Thereafter at the instance of the assessee, it stated a case to the High Court. The High Court answered both the questions referred to it in favour of the department.

4. The Finance Act, 1956 prescribed the rate of super tax in Part II Paragraph 'D'. That part reads:

"D. In the case of every company—	Rate
On the whole of total income	Six annas and nine pies in the rupee.

Provided that—

(i) a rebate at the rate of five annas per rupee of the total income shall be allowed in the case of any company which—

(a) in respect of its profits liable to tax under the Income-tax Act for the year ending on the 31st day of March, 1957, has made the prescribed arrange-

ments for the declaration and payment within the territory of India, of the dividends payable out of such profits and for the deduction of super-tax from dividends in accordance with the provisions of sub-section (3D) of section 18 of that Act, and

(b) is a public company with total income not exceeding Rs. 25,000/- to which the provisions of Section 23A cannot be made applicable;

(ii) a rebate at the rate of four annas per rupee of the total income shall be allowed in the case of any company which satisfies condition (a) but not condition (b) of the preceding clause; and

(iii) a rebate at the rate of three annas and six pies per rupee on so much of the total income as consists of dividends from a subsidiary Indian company, and a rebate at the rate of one anna per rupee on any other income included in the total income shall be allowed in the case of any company not entitled to a rebate under either of the preceding clauses:

Provided further that—

(i) if the amount of the rebate under clause (i) or clause (ii), as the case may be, of the preceding proviso shall be reduced by the sum, if any, equal to the amount or the aggregate of the amounts, as the case may be, computed as hereunder:

(a) on the amount representing the face value of any bonus shares or the amount of any bonus issued to its shareholders during the previous year with a view to increasing the paid-up capital, except to the extent to which such bonus shares or bonus have been issued out of premiums received in cash on the issue of its shares; and

(b) in addition, in the case of a company referred to in cl. (ii) of the preceding proviso which has distributed to its shareholders during the previous year dividends in excess of six per cent. of its paid-up capital, not being dividends payable at a fixed rate—

on that part of the said dividends which exceeds 6 per cent. but does not exceed 10 per cent. of the paid up

capital

on that part of the said dividends which exceeds 10 per cent. of the paid up capital; at the rate of three annas per rupee

(ii) where the sum arrived at in accordance with sub-clause (b) or both the sub-clauses of clause (i) of this proviso exceeds the amount of the rebate arrived at in accordance with clause (i) or clause (ii), as the case may be, of the preceding proviso only so much of the amounts—

(a) issued as bonus shares or as bonus; and

(b) distributed as dividends,

as is sufficient, in that order in accordance with the rates specified in cl. (i) of this proviso, to reduce the rebate to nil, shall be deemed to have been taken into account for the purpose:

Provided further that the super-tax payable by a company the total income of which exceeds Rs. 25,000 shall not exceed the aggregate of—

(a) the super-tax which would have been payable by the company if its total income had been Rs. 25,000, and

(b) half the amount by which its total income exceeds Rs. 25,000.

Explanation.—For the purposes of paragraph D of this Part—

(i) the expression 'paid-up capital' means the paid-up capital (other than capital entitled to a dividend at a fixed rate) of the company as on the first day of the previous year relevant to the assessment for the year ending on the 31st day of March, 1957, increased by any premiums received in cash by the company on the issue of its shares, standing to the credit of the share premium account as on the first day of the previous year aforesaid;

(ii) the expression 'dividend' shall be deemed to include any distribution included in the expression 'dividend' as defined in clause (6A) of Section 2 of the Income-tax Act;

(iii) where any portion of the profits and gains of the company is not included in its total income by reason of such portion being exempt from tax under any provision of the Income-tax Act, the amount of the 'paid-up capital' of the company, the amount distributed as dividends (not being dividends payable at a fixed rate), the

amount representing the face value of any bonus shares and the amount of any bonus issued to the shareholders, shall each be deemed to be such proportion thereof as the total income of the company for the previous year bears to its total profits and gains for that year other than capital gains or capital receipts reduced by such allowances as may be admissible under the Income-tax Act which have not been taken into account by the company in its profit and loss account for that year."

5. In the Finance Act, 1957, also a similar scheme of according rebate and reduction thereof in conditions set out in 1956 Act was adopted.

6. The first question that arises for decision is as to when the bonus shares became the property of the shareholders? Is it on the date of the resolution of the general meeting of the company, namely, December 30, 1954 or on any later date? It may be remembered that for the allotment of the bonus shares, there was no question of calling for applications under the Articles of Association of the company. It was not open to the ordinary shareholders to refuse to accept those shares when allotted. The company had full powers to convert its accumulated undivided profits into bonus shares. The resolution passed at the general meeting specifically says that those accumulated undivided profits of the company standing to the credit of the general reserve as on June 30, 1954 "be capitalised and distributed amongst the holders of the ordinary shares in the company on the footing that they had become entitled thereto as capital and that the said capital be applied on behalf of such ordinary shareholders in payment in full for 5,00,750 ordinary shares of Rs. 10 each, in the company and that such 5,00,750 new ordinary shares of Rs. 10 each, credited as fully paid up shall rank in all respects *pari passu* with the existing ordinary shares....."

7. From this part of the resolution it is clear that the ordinary shareholders became owners of the bonus shares to which they were entitled to under the resolution as from the date of the resolution. The expression "be capitalised and distributed" in the resolution means "is hereby capitalised and distributed." In fact, the

whole tenor of the resolution shows that the distribution of the bonus shares became effective as from 30th December, 1954. If the ordinary shareholders became the owners of the bonus shares on and after January 1, 1955 or on some later date, the statement in the resolution "save and except that the holders thereof will not participate in any dividend in respect of any period ending on or before 31st December, 1954" becomes meaningless. The authorities under the Act and the High Court have placed undue emphasis on cl. (b) and (c) of the resolution. Those clauses lay down the procedure to be adopted in the matter of carrying into effect the decision of the general meeting embodied in cl. (a). They do not in any manner cut down the ambit of that resolution.

8. The High Court as well as the Tribunal were under the erroneous impression that a share cannot be held to have been issued to a person until a share certificate is given to him. This misconception appears to have resulted from the decision in *Bush's case*, (1874) 9 Ch App 554. In *Buckley v. On the Companies Acts*, 13th Edn., p. 129, the law on the point is stated thus:

"It was supposed to have been decided in *Bush's case*, (1874) 9 Ch App 554 that by the "issue" of shares was meant the issue of the certificates for the shares. But this is a misapprehension. The expression "issue" with regard to shares may bear various meanings according to the context. It is not necessarily either the allotment of the share or the issue of the certificate that constitutes the issue of the share. The question may be whether the shareholder has or has not been put completely in possession of his share, and this may be so, although some formal act may not have been completed. Thus, shares may have been issued which have been allotted, but for which no certificates have ever been issued, and on the other hand, shares as to which a resolution to allot has been made may not have been issued.

Shares for which the memorandum of association has been subscribed are "issued" when the company is registered."

9. In *re Heaton's Steel and Iron Co.*, (1876) 4 Ch D 140, the Court of Appeal held that the issue of certifi-

cates is not necessary to the issue of shares within Section 25 of the English Companies Act, 1867. In that case, Brett J. observed:

"that in Bush's case, (1874) 9 Ch A 554 (supra), the issue of certificates was merely taken as evidence of the time when the shares were issued, but this must not be taken to mean that shares are not issued until the certificates are issued."

James, L. J., observed:

"I think it is desirable to say, as the appellant appears to have been misled by the marginal note to Bush's case, (1874) 9 Ch A 554, that the notion that shares are only issued when the certificates are issued is a blunder which could hardly be attributed to us."

10. In *Dalton Time Lock Co. v. Dalton*, (1892) 66 LT 704, the Appeal Court observed that the share for which the defendant had subscribed in the memorandum of association, must be held to have been issued to him upon the registration of the company and hence he must be held liable to pay the share money. We are unable to agree with the contention of the Revenue that merely because in clause (b) of the resolution of the general meeting, the directors of the company were directed to issue bonus shares, the property in the bonus shares had not passed to the ordinary shareholders on December 30, 1954. The words 'allot' and 'distribute' found in cl. (b) of the resolution do not carry the matter further. Their meaning should be gathered from the context in which they were used. Clauses (b) and (c) of the resolution must be read harmoniously with cl. (a). The word "allotment" has not been defined in the Companies Act. The meaning of the word "allot" or "allotment" will have to be gathered from the context in which those words are used. This Court considered the meaning of the word "allotment" in *Sri Gopal Jalan and Co. v. Calcutta Stock Exchange Association Ltd.*, 1964-3 SCR 698 = (AIR 1964 SC 250). Therein it referred to a large number of English decisions which have considered the meaning of that word. In that decision this Court referred to the observations of Chitty J. in *In re Florence Land and Public Works Co.*, (1885) 29 Ch D 421:

"To my mind there is no magic whatever in the term "allotment" as

used in these circumstances. It is said that the allotment is an appropriation of a specific number of shares. It is an appropriation, not of specific shares, but of a certain number of shares."

In *Gopal Jalan's case*, 1964-3 SCR 698 = (AIR 1964 SC 250) (supra), Sarkar J. (as he then was) quoted with approval the following passage from Farwell L.J. in *Mosely v. Koffyfontain Mines Ltd.*, (1911) 1 Ch 73 at p. 84:

"As regards the construction of these particular articles, it is plain that the words "creation", "issue" and "allotment" are used with the three different meanings familiar to business people as well as to lawyers. There are three steps with regard to new capital; first, it is created; till it is created the capital does not exist at all. When it is created, it may remain unissued for years, as indeed it was here; the market did not allow of a favourable opportunity of placing it. When it is issued it may be issued on such terms as appear for the moment expedient. Next comes allotment. To take the words of Stirling J. in *Spitzel v. Chinese Corp'n.*, (1899) 80 LT 347, 351, he says: "What is an allotment of shares? Broadly speaking it is an appropriation by the directors or the managing body of the company of shares to a particular person".

After examining the various decisions, Sarkar J. observed:

"It is beyond doubt from the authorities to which we have earlier referred, and there are many more which could be cited to show the same position, that in Company Law "allotment" means the appropriation out of the previously unappropriated capital of a company of a certain number of shares to a person. Till such allotment the shares do not exist as such. It is on allotment in this sense that the shares come into existence."

11. The word "distribute" found in cl. (b) of the resolution in the context means to record the distribution of the shares in the books of the company. If the resolution passed at the general meeting of the company on December 30, 1954, is read as a whole, there is no doubt that on that day a portion of the accumulated undivided profits were converted into capital; that capital was divided into bonus

shares and allotted to the ordinary shareholders on the basis of their share holdings. The shares so allotted became the property of the shareholders as from that date subject to the qualification that they are entitled to get dividends on those shares only as from 1st January 1955. Under cls. (b) and (c) of the resolution, certain directions were given to the Directors in the matter of implementation of that resolution. Hence, there was no justification in reducing the rebate firstly under sub-clause (a) of clause (1) of the second proviso to Section D of Part II of the Finance Act, 1956, and secondly, under sub-clause (b) of cl. (1) of the second proviso to Section D of Part II of the Finance Act, 1956.

12. For the reasons mentioned above, we allow this appeal and answer the questions referred to the High Court in favour of the assessee. Revenue shall pay the costs of the assessee both in this Court and in the High Court.

Appeal allowed.

AIR 1970 SUPREME COURT 1756
(V 57 C 374)

(From Madhya Pradesh: 1966 Jab LJ 1159)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

M/s. Anwar Khan Mehboob Co.,
Appellants v. Commissioner of Sales
Tax, Madhya Pradesh, Respondent.

Civil Appeal No. 275 of 1967, D/-
22-4-1970.

**Sales Tax — C. P. and Berar Sales
Tax Act (21 of 1947), S. 2 (g), Explan. I**
— Transaction before Constitution —
Sale under contract of sale entered
into outside State by agents of dealer
in State — When liable to sales tax—
Situs of sale.

Under Section 2 (g), Explanation II, in case of sales (before the Constitution came into force) to attract liability to sales tax under the Act, there must be a sale of goods, and the sale must take place in pursuance of the contract of sale. If these conditions exist, the sale shall be deemed to have taken place within the Province if at the date of the contract of sale the goods are actually within the territory of the taxing province. It is immate-

rial that the contract of sale and the passing of property in the goods take place outside the taxing province. To such a transaction taking place before the Constitution, limitation prescribed by Art. 286 of the Constitution has no application. AIR 1958 SC 452, Rel. on; AIR 1959 SC 887, Ref. (Paras 8, 9)

Cases Referred: Chronological Paras
(1959) AIR 1959 SC 887 (V 46)=

(1959) Supp 2 SCR 702, Commr.
of Sales Tax, Eastern Division,
Nagpur v. Husenali Adamji and
Co. 18

(1958) AIR 1958 SC 452 (V 45)=
1958 SCR 1355, Tata Iron and
Steel Co. Ltd. v. State of Bihar 10

The following Judgment of the Court
was delivered, by

SHAH, J.: The appellants are a firm having their head office at Jabalpur in Madhya Pradesh and branch offices at Lucknow, Kanpur, Faizabad and Bombay. They are engaged in the business of manufacturing and selling bidis, and are registered as dealers under the C. P. and Berar Sales Tax Act, 1947. Between November 1948 and October 12, 1949, the appellants despatched bidis of the value of Rupees 22,60,241-5 to their branch offices outside the State of Madhya Pradesh, and bidis of the value of Rupees 5,35,404-15 under instructions from their branches to other destinations outside the State. The Sales Tax Officer rejected the contention of the appellants that the turnover resulting from the sale of bidis supplied to the branches and under instructions from the branches was not liable to be taxed under the C. P. & Berar Sales Tax Act, 1947, and brought the aggregate turnover of Rs. 27,85,646-4 to tax. In appeal, the Deputy Commissioner reduced the taxable turnover by 5 per cent. The order of the Deputy Commissioner was confirmed in appeal to the Commissioner of Sales Tax. A revision application filed before the Sales Tax Tribunal was unsuccessful.

2. At the instance of the appellants, the Tribunal submitted a statement of case, and referred the following questions to the High Court of Madhya Pradesh for opinion:

"1. Whether, in the facts and circumstances of the case, the transactions amounting to Rs 21,47,228 were sales and, therefore, liable for inclusion in

the turnover of the applicant for assessment to tax?

2. Whether, in the facts and circumstances of the case, the transactions amounting to Rs. 5,35,404-15 were sales and, therefore, liable for inclusion in the turnover of the applicant for assessment to tax?"

The two questions have not been drawn with care. In order to clarify the import of the two questions, the words "sales and therefore" should, in our judgment, be omitted, and the words "liable for inclusion" be substituted by the words "liable to be included". We reframe the questions accordingly.

3. The sales in respect of bidis which resulted in the turnover in question did not take place within the State of Madhya Pradesh. It is common ground that the bidis were appropriated to the contracts of sale outside the State of Madhya Pradesh. The transactions were for a period prior to the Constitution and the authority of a State to levy tax on transactions of sale was not subject to the limitation prescribed by Art. 286 of the Constitution. Section 2(g) of the C. P. and Berar Sales Tax Act, 1947, as then in operation, provided:

"Sale" with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods made in course of the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge.

x x x x x x
Explanation (II).—Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in the Central Provinces and Berar at the time when the contract of sale as defined in that Act in respect thereof is made, shall, wherever the said contract of sale is made be deemed for the purpose of this Act taken place in the Central Provinces and Berar."

This Act was enacted in exercise of the powers conferred upon the Provincial Legislature by Entry 48, List II, Seventh Schedule to the Government of India Act, 1935. In exercise of that power the Legislature was competent to enact a law for levying sales tax acting on the principle of territorial nexus, i.e., the province could fix upon

one or more ingredients of sale, and make it the foundation for imposing liability for sales tax. The Provincial Legislature, relying upon either the manufacture of the goods within the province, or the existence of the goods at the date of the contract of sale within the province, or the making of the contract of sale within the territory as the basis, could provide for levying sales tax. Sale within the territory was not a condition of the exercise of power to levy sales tax.

4. The Sales Tax Officer held that the appellants had despatched bidis to their branch offices after receiving previous orders or contracts of sale which were "collected by" the appellants' "travelling salesmen, depot managers or other merchants or salesmen, in respect of goods manufactured and situated in the State of Madhya Pradesh and on that account Explanation 2 to Section 2(g) of the Act was attracted and the transfers were sales within the State."

5. In appeal the Deputy Commissioner of Sales Tax observed:

"From the insistent demands of the branch managers, it is evident that the appellants' bidis were in great demand in those markets. The buyers were anxious to get stocks of appellants' brands of bidis and they were placing orders on the branches so that there would be an uninterrupted supply of bidis. It is also amply clear that in a very large number of cases, orders were already accepted by the branches for the supply of bidis. Those circumstances lead to the inevitable conclusion that a large proportion of the despatches were covered by previous orders accepted by the branches or head office."

6. The Commissioner of Sales Tax agreed with the finding of the Deputy Commissioner. He observed that the "branches had collected orders from customers and had forwarded those orders to the head office at Jabalpur where the orders were executed for despatch of goods to the places where the branches existed." In his view, the bidis were despatched in execution of orders of the customers forwarded by the branches. He rejected the contention of the appellants that the bidis were "sent to the branches to replenish dwindling stock." The Sales Tax Tribunal in rejecting the

revision application also expressed a similar view.

7. The High Court observed:

"When the definition of 'sale' is read with the Second Explanation it is apparent that if on the date when the agreement of sale is entered into with respect to any goods and if the goods are in existence in the Province of Central Provinces and Berar on the date of the agreement, it is deemed that the sale takes place within the Province of Central Provinces and Berar, though, in fact, under the provisions of the Indian Sale of Goods Act, 1930, the sale may take place outside the province when the goods are appropriated towards the contract."

8. Section 4 of the C. P. and Berar Sales Tax Act, 1947, is the charging section; it renders every dealer whose turnover exceeds the specified amount in respect of sales of goods in Madhya Pradesh liable to pay sales tax. Under the Act, tax is levied on sale. By the definition in Section 2 (g), the sale is defined as transfer of property in goods for cash or deferred payment or for other valuable consideration. Under the provisions of the Sale of Goods Act, 1930, 'sale' would ordinarily take place where goods are by mutual agreement appropriated towards the contract. Explanation II to Section 2 (g), however, prescribes for the purposes of the C. P. and Berar Sales Tax Act a fictional situs of the sale. If at the date of the contract of sale, goods are actually within the province, the sale, wherever it takes place, is deemed by a legal fiction to take place within the province. The condition of liability to tax is the existence of goods within the province at the date of the contract of sale; it is immaterial that the contract of sale and the passing of property in the goods take place outside the taxing province.

9. To attract liability to sales tax under the Act there must be a sale of goods, i.e., there must be a transfer of property in goods for cash or deferred payment or for other valuable consideration, and the sale must take place in pursuance of the contract of sale. If these conditions exist, the sale shall be deemed to have taken place within the province if at the date of the contract of sale the goods are actually within the territory of the province.

10. This Court held in *Tata Iron and Steel Co. Ltd. v. State of Bihar*, 1958 SCR 1355 = (AIR 1958 SC 452), that under the Government of India Act, 1935, the Provincial Legislature was competent to levy sales tax, relying upon the theory of territorial nexus, in respect of sales which took place outside the province. This Court observed that the sales tax may be levied only on completed sales, but the theory of territorial nexus may be utilised for fixing one of several ingredients of sale as furnishing a connection between the taxing province and the sale. The decision of this Court in *Commr. of Sales Tax, Eastern Division, Nagpur v. Husenali Adamji and Co.*, (1959) Supp 2 SCR 702 = (AIR 1959 SC 887), does not make any departure from the rule enunciated in *Tata Iron and Steel Co. Ltd.'s case*, 1958 SCR 1355 = (AIR 1958 SC 452). In that case the Court held that goods which were not in existence at the date of the contract of sale will not be deemed by virtue of the Second Explanation to Sec. 2 (g) of the Central Provinces and Berar Sales Tax Act, 1947, to have been sold within the province, merely because the goods had subsequently come into existence. The case related to sales tax on sale of logs of wood. At the date of the agreement of sale, the logs were unascertained goods, for they were still to be cut in the shape of logs from standing trees. The Court held that Explanation II to Section 2 (g) of the Central Provinces and Berar Sales Tax Act, 1947, did not render the sale of the logs of wood liable to sales tax, for at the date of the contract of sale the logs of wood agreed to be sold were not in existence.

11. The Sales Tax authorities did not attempt to determine whether the date of the contracts pursuant to which the goods were despatched by the head office, the goods were in existence. They assumed that the liability to tax arose if it was shown that the contracts for sale of bidis were made by the employees or agents of the appellants and the bidis were despatched pursuant to those contracts. The High Court observed that Section 2 (g) "indicated that the fiction of sale taking place within the province would arise only if the goods were in

existence at the date of the contract of sale". The High Court, however, did not proceed to consider whether in respect of the bidis despatched by the appellants the condition of the existence of the bidis within the province was satisfied. It must, however, be observed that at no stage in the proceeding for assessment to tax, the attention of the authorities was invited that the liability to tax depended upon proof of the existence of the bidis within the territory of the province.

12. Mr. Karkhanis for the appellants requested us to call for a supplementary statement of the case and then answer the questions. We do not deem it necessary to accede to that request. Under Section 23, subsection (5) of the C. P. and Berar Sales Tax Act, 1947, the Tribunal will decide the case according to the answer recorded by this Court.

13. We proceed to answer the two questions as follows:

1. The turnover arising out of transactions aggregating to Rs. 21,47,228 is liable to sales tax in so far as it arises out of sales made in pursuance of contracts relating to goods which were at the date of the contract in existence within the province.

2. The turnover arising out of transactions amounting to Rs. 5,35,404-15 is liable to sales tax in so far as it arises out of sales made in pursuance of contracts relating to goods which were at the date of the contract in existence within the province.

14. There will be no order as to costs.

Answers accordingly.

AIR 1970 SUPREME COURT 1759
(V 57 C 375)

(From: Kerala)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Raman Nadar Viswanathan Nadar and others, Appellants, v. Snehappoo Rasalamma and others, Respondents.

Civil Appeal No. 2467 of 1966, D/- 17-9-1969.

(A) Hindu Law — Will — Bequest in favour of unborn person is void—

*(Appeal Suit No. 848 of 1960, D/- 27-3-1963—Ker.).

DN/EN/E844/69/RGD/T

Tagore's case, (1872) Ind App Supp 47 (PC) though held wrongly decided followed on ground that it had stood a great length of time — Such bequest cannot be treated as family arrangement.

Under pure Hindu Law (which applied in Travancore at relevant time) a bequest to an unborn person or person not existing in contemplation in law is void. (Para 5)

Although there is no authority in Hindu Law to justify the doctrine that a Hindu cannot make a gift or bequest for the benefit of an unborn person yet that doctrine has been engrafted on Hindu Law by the decision of the Judicial Committee, in Tagore's case, (1872) Ind App Supp 47 (PC). (Para 7)

The decision in Tagore's case was based on wrong reading of the relevant verse in Dayabhaga. But since the decision had stood a great length of time and on the basis of that decision rights have been regulated, arrangements as to property have been made and titles to property have passed, this is a proper case in which the maxim 'communis error facit jus' may be applied. The principle underlying the maxim is that "the law so favours the public good, that it will in some cases permit a common error to pass for right. (Paras 9, 10)

The doctrine in Tagore's case has been altered by three Acts, namely, the Hindu Transfers and Bequests Act, 1 of 1914, the Hindu Disposition of Property Act of 1916 and the Hindu Transfers and Bequests (City of Madras) Act, 1921. The legal position under these Acts is that no bequest shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of the testator's death. This rule, however, is subject to the limitations and provisions contained in Sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

(Since none of these Acts was in force on the relevant date, the doctrine of pure Hindu Law applied.)

(Para 12)

Assuming without deciding that a family provision is an exception to the rule of pure Hindu Law stated above, a provision in a will whereby the testator directs that his properties after his death shall be taken by his nephews or in their absence by his

nieces cannot be characterised as a family provision. The object of such a disposition is obviously not to make a family provision but to chart a course for future devolution of the testator's properties. (Para 13)

(B) Hindu Law — Family arrangement — Bequest in favour of unborn persons void — It cannot be held as family arrangement. (Para 13)

(C) Hindu Law — Will — Joint will by brothers — Will not intended to operate or to come into effect after death of both testators, reading the will as a whole and not in isolation as it must be — So the argument that bequest in favour of persons unborn at the time of execution of will but before the death of one of the testators, must hold good is untenable. (Paras 14, 15)

(D) Succession Act (1925), S. 105 — Joint bequest by A and B in favour of daughters of B subject to defeasance on sons being born to B before his death — Son born to B before his death — Upon his death, there is no valid bequest to daughters but there is intestacy and Hindu Succession Act applied — Son would not take under the will because he was unborn at the death of A. (Para 16)

Cases Referred: Chronological Paras
(1881) 6 AC 740, Charles Dalton
v. Henry Angus & Co. 10
(1877) 3 QBD 85 = 47 LJQB
163, Angus & Co. v. Dalton 10
(1872) Ind App Supp 47 = 9 Beng
LR 377 (PC), Jatindra Mohan
Tagore v. Ganendra Mohan
Tagore 7, 9, 11,
12, 13, 14

Mr. Sarjoo Prasad, Senior Advocate
(M/s. P. K. Pillai and M. R. K. Pillai,
Advocates, with him), for Appellants;
Mr. V. K. Krishna Menon, Senior
Advocate (M/s. R. Thiagarajan and K.
Jayaram, Advocates, with him), for
Respondents Nos. 1 to 3.

The following Judgment of the Court
was delivered by

RAMASWAMI, J.—This appeal is
brought by certificate from the judg-
ment of the High Court of Kerala in
A. S. No. 848 of 1962 dated March 27,
1963 reversing the decree of the Prin-
cipal Subordinate Judge, Trivandrum
in O. S. No. 182 of 1957 dated May 23,
1960.

2. The father of the plaintiffs who
are appellants herein was a Hindu

Nadar, namely Raman Nadar. He had
an elder brother named Krishnan
Nadar. On May 9, 1946, the said
Krishnan Nadar and Raman Nadar
jointly executed a deed of will Ex. P-2
in respect of the assets of Krishnan
Nadar. On the date of the will,
Raman Nadar had only three daugh-
ters and no sons. Krishnan Nadar
died on December 5, 1947. After the
death of Krishnan Nadar the appel-
lant's mother was married to Raman
Nadar who is the father of the appel-
lants. It is specifically provided in
the will Ex. P-2 that in the event of
Raman Nadar begetting a son or sons
in future, those male issues will suc-
ceed to the assets of Krishnan Nadar
to the exclusion of the daughters. The
material portion of the will, Ex. P-2,
reads as follows:

"Deed of will executed by Krishnan,
aged 51, Nadar, son of Kaliyambi,
merchant, Makkavazhi, Kuzhiamvila-
kathu Veettil, Melkaladi, Airanimut-
tam, Pakuthy, Nellamn Adhikaram
and his brother Raman, son of the said
Kaliyambi of do., aged 39, merchant,
on 26th Madam, 1111 M.E. with their
own consultation and to their entire
satisfaction. Some properties have
been acquired in the name of the 1st
named and in the name of the 2nd
named out of love and affection to-
wards him and his children, with the
self-acquired money of the 1st named
and without the income of the Tarwad
properties of the 1st named and with-
out the help of the other members of
the Tarwad or the 2nd named. They
are held by the 1st named in his pos-
session and enjoyed by him till this
date. The 1st named has, till the end
of his life, absolute freedom, author-
ity and right to alienate (the proper-
ties) in whatever manner he likes and
to execute deeds. The first named is
unmarried and the second named has
married Parvathy alias Snehappoo
daughter of Sarah, Maraikkamuttath
Veettil, Vazhuthoor Desom, Neyyat-
kara Taluk, through whom he has
three daughters Ammukutty, aged 14,
Chellamma, aged 10 and Rajammal,
aged 5 but no son. As the first named
felt himself desirous of making during
his life provision for the devolution
after his life of the movable and im-
movable properties belonging to him in
absolute rights as aforesaid, the fol-
lowing provisions regarding them are
made: The first named till the end of

his life will have the right to pay the land revenue to enjoy and dispose in any manner whatsoever all the movable and immovable properties that belong or may belong to himself. After the life of the first named, all the properties abovesaid will be taken and enjoyed by the second named maintaining his children named above and those born to him later and without alienating or wasting the properties. After the life of the second named, if he leaves behind no sons, the three daughters named above and the daughters, if any, born hereafter may enjoy all the movable and immovable properties that may be found to belong to the first named and the second named, either in common or in equal shares, effecting mutation, taking pattahs and paying the revenue in their own names, but without making any alienation thereof. If there be sons born to the second named, they will take after the life of the second named all the movable and immovable properties of the first named and the 2nd named and enjoy them for ever, effecting mutation, taking pattahs and paying revenue, and with all powers of disposal; and in that event, the daughters of the 2nd named will not have and should not claim any right, and they will not get any right."

3. Soon after the death of Krishnan Nadar defendants 3 and 4 and the mother of the 5th defendant as plaintiffs filed O.S. No. 37 of 1124 M. E. for the administration of the estate of the deceased Krishnan Nadar. The mother of the appellants was made one of the defendants in that suit and the allegation was that Raman Nadar had contracted an illicit relationship with her and that he had executed a gift deed Ex. D-1 in her favour in respect of some of the plaint items. O.S. No. 37 of 1124 was dismissed on the ground that the plaintiffs of that suit had lost their rights under the will on the birth of a son to Raman Nadar through his second wife on February 7, 1951 during the pendency of the suit. The plaintiffs in O.S. No. 37 of 1124 filed A.S. No. 98 of 1955 against the aforesaid decree and that was disposed of by a Division Bench of the Kerala High Court on February 2, 1957. The High Court observed as follows:

"We do not consider it proper to decide this question (of the legitimacy of

the son born to the first defendant in his second marriage) in this suit. This can be gone into in a suit, if any, instituted by or on behalf of the son. The 1st defendant had no right to revoke the will after Krishnan Nadar's death.The plaintiffs do not and cannot get the right to possession of the properties until after the 1st defendant's death but a right to maintenance from the income of the properties has been provided for the plaintiffs by Ex. A (the will) and this they are entitled to get. The 1st defendant is not entitled to do any act which affects this right of the plaintiffs."

The High Court remanded the suit for fresh disposal to the Additional Subordinate Judge, Trivandrum. After the suit went back on remand the Additional Subordinate Judge, Trivandrum, held that the plaintiffs were not entitled to any relief and dismissed the suit. The daughters of defendant No. 1 preferred an appeal, A.S. No. 340 of 1959 to the High Court.

4. Meanwhile the appellants instituted O. S. No. 182 of 1957 for a declaration that the first defendant had only a life estate in the properties of Krishnan Nadar with the remainder vested in them under the will referred to above. The suit was decreed by the Principal Subordinate Judge, Trivandrum, who held that the second marriage of the 1st defendant was legal and the sons born out of that marriage were entitled to Krishnan Nadar's property subject to the life estate of the first defendant. It was further held that the daughters of the 1st defendant (plaintiffs in O.S. No. 37 of 1124) were not entitled to any right over the properties. The daughters of the 1st defendant preferred an appeal against the decree of the Principal Subordinate Judge being A.S. No. 848 of 1960. The High Court decided this appeal and A.S. No. 340 of 1957 by a common judgment on March 27, 1963. Appeal A.S. No 848 of 1960 was allowed in whole and suit O. S. No. 182 of 1957, filed by the appellant was dismissed. A.S. No. 34 of 1959 was partly allowed and appellants 1 and 2 (being the first two plaintiffs in O.S. No. 37 of 1124) were held entitled to maintenance of Rs. 50 per head per mensem from February 18, 1957. The alienations, Exs. C, D and E were held not binding upon the plaintiffs in that suit nor to have any force beyond

the life of the 1st defendant. The other prayer sought by the plaintiffs in the appeal was disallowed.

5. In dismissing O.S. No. 182 of 1957 the High Court took the view that the legal validity of the bequests in Ex. P-2 had to be ascertained as on the date of Krishnan Nadar's death which was December 5, 1947. The marriage of the first defendant took place on 14-1-1124 (corresponding to August 29, 1948) and the first child of that marriage was born on February 7, 1951. The sons of the 1st defendant born of his second wife were, therefore, not in existence at the time of the death of the testator Krishnan Nadar. Krishnan Nadar belonged to the State of Travancore and all his properties were located in that State where the doctrine of pure Hindu Law reigned supreme unaffected by any legislation. The High Court held that according to pure Hindu Law a gift cannot be made in favour of a person who was not in existence at the date of the gift. A person capable of taking under a will must either in fact or in contemplation of law be in existence at the death of the testator. The devise in favour of plaintiffs in O.S. No. 182 of 1957 was void as they were not born at the time of death of Krishnan Nadar. After the life estate of the first defendant, the daughters became entitled to the properties for their lifetime.

6. The question involved in this appeal is whether the High Court was right in holding that plaintiffs have not established their title to the disputed properties.

7. Although there is no authority in Hindu Law to justify the doctrine that a Hindu cannot make a gift or bequest for the benefit of an unborn person yet that doctrine has been engrafted on Hindu Law by the decision of the Judicial Committee. This doctrine was laid down for the first time in Tagore's case, (1872) Ind App Supp 47 (PC), in which it was held by the Judicial Committee that a Hindu cannot make a gift in favour of a person who is not in existence either in fact or in contemplation of law at the time the gift was to take effect. The Judicial Committee purported to base its decision on a passage in Dayabhaga, Chap. 1, verse 21 as appears from the following passage in the judgment:

"This makes it necessary to consider the Hindu Law of Gifts during life and wills, and the extent of the testator's power, whether in respect of the property he deals with or the person upon whom he confers it. The Law of Gifts during life is of the simplest character. As to ancestral estate it is said to be improper that it should be alienated by the holder, without the concurrence of those who are interested in the succession, but by the law as prevailing in Bengal at least (1) the impropriety of the alienation does not affect the legal character of the act (*factum valet*), and it has long been recognised as law in Bengal that the legal power of transfer is the same as to all property, whether ancestral or acquired. It applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect so as to fall within the principle expressed in the *Dayabhaga*, Chap. 1, verse 21, by the phrase 'relinquishment in favour of the donee who is a sentient person'. By a rule now generally adopted in jurisprudence this class would include children in embryo, who afterwards come into separate existence." (pp. 66-67).

But the Judicial Committee was apparently under some misconception with respect to the meaning of the words of *Dayabhaga*. The whole sentence in the original is as follows:

दानं हि अन्तोऽप्यविज्ञानादेव दातव्यापरात सम्प्र-
दानस्य द्वयं स्वामित्वम्

of which the following is the correct translation:

"Since in a gift the donee's ownership in the thing (given) arises from the very act of the donor, consisting of the relinquishment of his ownership with the intention of passing the same to a sentient being."

8. The sentence neither expresses nor implies that the "sentient being" must be in existence or be present at the time and place of the relinquishment. On the contrary, the whole argument contained in paragraphs 21 to 24 of Chap. I of *Dayabhaga* shows that a gift is completed by the donor's act alone, the acceptance of the donee being not necessary. Indeed, in the very next passage, *Dayabhaga* speaks of gifts to God as showing that the

validity of the gifts does not depend upon acceptance.

9. Mr. Sarjoo Prasad suggested that the matter required reconsideration. But it is manifest that the decision of the Judicial Committee in Tagore's case, (1872) Ind App Supp 47 (PC) (supra) has stood a great length of time and on the basis of that decision rights have been regulated, arrangements as to property have been made and titles to property have passed. We are hence of the opinion that this is a proper case in which the maxim 'communis error facit jus' may be applied.

10. The principle underlying the maxim is that "the law so favours the public good, that it will in some cases permit a common error to pass for right"; as an example of which may be mentioned, the case of common recoveries in English Law, which were fictitious proceedings introduced by a kind of pia fraus to elude the statute de Donis, and which were at length allowed by the Courts to be a bar to an estate tail, so that these recoveries however clandestinely introduced, became by long use and acquiescence a legal mode of conveyance whereby a tenant in tail might dispose of his lands. There is a reference made to this principle by Lord Blackburn in his speech in *Charles Dalton v. Henry Angus & Co.*, (1881) 6 AC 740 at p. 812, as follows:

"I quite agree with what is said by the late Chief Justice Cockburn, ((1877) 3 QBD 85 at p. 105), that where the evidence proved an adverse enjoyment as of right for twenty years, or little more, and nothing else, 'no one had the faintest belief that any grant had ever existed, and the presumption was known to be a mere fiction'. He thinks that thus to shorten the period of prescription without the authority of the Legislature was a great judicial usurpation. Perhaps it was. The same thing may be said of all legal fictions, and was often said (with, I think, more reason) of recoveries. But I take it that when a long series of cases have settled the law, it would produce intolerable confusion if it were to be reversed because the mode in which it was introduced was not approved of: even where it was originally a blunder and inconvenient, communis error facit jus.

11. The doctrine in Tagore's case (1872) Ind App Supp 47 (PC) (supra), has been altered by three Acts, namely, the Hindu Transfers and Bequests Act, 1 of 1914, the Hindu Disposition of Property Act of 1916 and the Hindu Transfers and Bequests (City of Madras) Act, 1921. The legal position under these Acts is that no bequest shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of the testator's death. This rule, however, is subject to the limitations and provisions contained in Sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

12. It is, however, not disputed in the present case that on the relevant date none of the three Acts was operative and the doctrine of pure Hindu Law was applicable to the Travancore State. It follows that the principle laid down in Tagore's case, (1872) Ind App Supp 47 (PC) (supra), applied and the bequests in favour of the sons of the 1st defendant are void and of no legal consequence.

13. On behalf of the appellants it was contended that the bequest in favour of the sons of the 1st defendant was in the nature of a family provision and, therefore, fell outside the principle laid down in Tagore's case, (1872) Ind. App Supp 47 (PC). In our opinion, there is no justification in this argument. Assuming without deciding that a family provision is an exception to the rule of pure Hindu Law stated above a provision in a will whereby the testator directs that his properties after his death shall be taken by his nephews or in their absence by his nieces cannot be characterised as a family provision. The object of such a disposition is obviously not to make a family provision but to chart a course for future devolution of the testator's properties.

14. The argument was stressed on behalf of the appellants that the will Ex. P-2 was a joint will executed by Krishnan Nadar and Raman Nadar and it was designed to take effect only after the death of both the testators. As the sons of the 1st defendant must necessarily be born before that event the principle in Tagore's case, (1872) Ind App Supp 47 (PC) (supra) was not attracted. Reference was made to the following passage from Jarman on Wills, 8th Edition.

"Two or more persons may make a joint will, which, if properly executed by each, is, so far as his own property is concerned, as much his will, and is as well entitled to probate upon his death, as if he had made a separate will. But a joint will made by 2 persons, to take effect after the death of both, will not be admitted to probate during the life of either. Joint wills are revocable at any time by either of the testators during their joint lives, or, after the death of one of them, by the survivor."

15. In our opinion there is no warrant for this argument. The will Ex. P-2 contains separate provisions regarding the devolution of the properties of each of the testators. In regard to the properties of Krishnan Nadar it devises as life estate to the 1st defendant and the remainder to his sons or in their absence to his daughters. In regard to the properties of Raman Nadar the devise is to his sons and in their absence to his daughters. It is, therefore, not possible to accept the argument that the will was intended to operate or to come into effect after the death of both the testators. In regard to Krishnan Nadar's properties the life estate devised in favour of the 1st defendant must necessarily take effect and remain in force during the life of the 1st defendant and not after that. It is true that at the end of the will there is a clause that both the testators have the right to revoke the will during the lives and that the Will will take effect only subsequent to their death. But the true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory. It must, therefore, be held that as the express devise to the 1st defendant for his life is a disposition intended to take effect after the death of Krishnan Nadar and before the death of the 1st defendant, the last clause in the will cannot be literally correct.

16. It was then contended on behalf of the appellants that in any event the High Court was in error in holding that the title of the plaint properties vested in the daughters of the 1st defendant under the terms of the will, Ex. P-2. It appears that during the pendency of the appeal defendant No. 1

Raman Nadar died on May 20, 1969 and the question, therefore, arises whether the daughters are entitled to a life interest in the plaint properties after the death of defendant No. 1. It is manifest from the will that the bequest to the daughters is subject to the prior condition that the defendant No. 1 leaves behind no sons at the date of his death. The relevant portion of Ex. P-2 states:

"After the life of the second named, if he leaves behind no sons, the three daughters named above and the daughters, if any, born hereafter may enjoy all the movable and immovable properties that may be found to belong to the first named and the second named either in common or in equal shares....."

The bequest to the daughters was, therefore, defeasible on the sons being born to defendant No. 1. Hence, upon the death of defendant No. 1 on May 13, 1969 there was no valid bequest to the daughters. In other words, there was an intestacy and the provisions of the Hindu Succession Act, 1956 (Act No. 30 of 1956), would be applicable. The sons of defendant No. 1 cannot take under the will because they were unborn on the date of the death of the testator Krishnan Nadar. The daughters also cannot take under the will as the bequest in their favour was subject to the defeasance clause. It is evident that the appellants would be entitled to their lawful share of the properties of Krishnan Nadar under the provisions of the Hindu Succession Act, 1956 and they are entitled to a declaration to that effect and other consequential reliefs. But it is not possible for us to finally dispose of this appeal because there was an issue in the trial Court as to whether the appellants were the legitimate sons of defendant No. 1. The case of the defendants 3 to 5 was that there was no legal marriage between the 1st defendant and the mother of the plaintiffs. But the assertion of the plaintiffs was that their mother married the 1st defendant after getting herself converted into Hinduism and such marriage was legally valid and the plaintiffs are the legitimate children of the 1st defendant. The trial Court decided the issue in favour of the plaintiffs but the High Court has not gone into the question nor recorded a finding as to whe-

ther the plaintiffs are the legitimate sons of defendant No. 1.

17. For these reasons we hold that this appeal must be allowed, the judgment of the Kerala High Court dated March 27, 1963 in A.S. No. 848 of 1930 should be set aside and the appeal should be remanded to the High Court for determining the issue whether the plaintiffs were the legitimate sons of defendant No. 1 and thereafter dispose of the appeal in accordance with law.

18. The parties will bear their own costs up to this stage. The application made by the plaintiffs for the appointment of a Receiver will be dealt with by the High Court.

Appeal allowed.

AIR 1970 SUPREME COURT 1765
(V 57 C 376)

(From: Goa)*

S. M. SIKRI AND I. D. DUA, JJ.

Uttam Bala Revankar, Appellant v. Asstt. Collector of Customs and Central Excise, Goa and another, Respondents.

Criminal Appeal No. 20 of 1970, D/-3-8-1970.

Goa, Daman and Diu (Laws) Regulation (12 of 1962), S. 8 — Order No. G. A. D. 74/63/25007 D/-6-11-1968 of Lt. Governor is not ultra vires.

Order applying the existing law to proceedings for offences committed prior to introduction of Criminal P. C. in territory of Goa, Daman and Diu — Though the section enables the Central Government to remove difficulties the Lt. Governor as administrator of the territory could exercise the power of the Government under the Section in view of the provisions of General Clauses Act (1897). Fact that the Lt. Governor purported to pass the order under wrong provision of law would not render it invalid since the power to pass the order subsisted in the Governor under section 8 of the Regulation. AIR 1967 SC 691, Referred to. (Paras 9, 12, 13)

*(Cri. Misc. Appeal No. 19 of 1969, D/-25-8-1969—Goa).

IN/IN/D730/70/MKS/B

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 691 (V 54) =
1967-1 SCR 15, Jalan Trading
Co. (Pvt.) Ltd. v. Mill Mazdoor
Union 10

The following Judgment of the Court was delivered by

SIKRI, J.: This appeal by special leave is from the judgment and order of the Judicial Commissioner, Goa, Daman & Diu, allowing the revision application under section 435 of the Indian Code of Criminal Procedure filed by the State. The only point involved in this appeal is whether the order passed by the Lt. Governor dated November 6, 1963, was invalid. This order reads as under:

"ORDER
GAD/74/63/25007

In exercise of the powers conferred by the Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962 and notwithstanding anything to the contrary contained in any law for the time being in force in this Territory, the Lieutenant Governor makes the following order:

All criminal proceedings in relation to offences committed prior to the date of coming into force of the Criminal Procedure Code shall be carried on under the law in force in the Territory before that date.

By order and in the name of the Lieutenant Governor of Goa, Daman and Diu."

2. Before dealing with the question of the validity of this order it is necessary to give a few facts. On December 20, 1961, Goa, Daman and Diu became part of the territory of India. The residence of the appellant was raided on June 25, 1963, and 72 bars of gold were seized. On November 1, 1963, the Goa, Daman and Diu (Laws) Regulation, 1962 (Regulation No. XII of 1962) hereinafter referred to as the Regulation, was promulgated by the President and published in the Gazette on November 22, 1962. The effect of Section 3 of the Regulation, read with the Schedule, was inter alia to extend the provisions of the Code of Criminal Procedure, 1898, to Goa, Daman and Diu. Section 3 (2) of the Regulation enabled the Lt. Governor to fix the date of coming into force of the Act in Goa, Daman and Diu. It appears that by notification dated September 24, 1963, the date of the coming

into force of the Indian Penal Code and the Code of Criminal Procedure was changed from October 1, 1963, to November 1, 1963. Accordingly, it is the latter date on which the Code of Criminal Procedure came into force in Goa, Daman and Diu.

3. Section 7 of the Regulation provides:

"Until the relevant provisions of the Code of Criminal Procedure, 1898, are brought into force in Goa, Daman and Diu, all offences under any Act shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the corresponding law in force in Goa, Daman and Diu."

The effect of S. 7, as is clear from the section, was that offences committed prior to the coming into force of the Criminal Procedure Code were to be investigated, inquired into, etc., under the provisions of the corresponding law in force in Goa, Daman and Diu.

4. Section 8 of the Regulation provides:

"If any difficulty arises in giving effect in Goa, Daman and Diu, to the provisions of any Act extended by this Regulation to that Union territory, the Central Government may, by order in the Official Gazette, make such provisions or give such directions as appear to it to be necessary for the removal of the difficulty."

5. It appears that some difficulties were experienced by the Lt. Governor and he purported to pass the impugned order which we have set out above.

6. It will be noticed that the impugned order does not refer to section 8 of the Regulation but refers instead to Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962. We have seen this order and it is common ground that this order did not enable the Lt. Governor to pass the impugned order.

7. On April 20, 1966, a complaint was filed against the appellant in the Court of Judicial Magistrate Ist Class, Margao, under the Defence of India Rules. The prosecution was challenged on various grounds but these grounds failed before the Judicial Magistrate. The order of the Judicial Magistrate is not on the record. A revision was filed to the Sessions Judge, who first discussed the question of jurisdiction. He held that by

virtue of the impugned order the procedure to be followed in the case is one laid down by the Portuguese Criminal Procedure Code and not by the (Indian) Code of Criminal Procedure, 1898.

8. On a revision filed by the State, the learned Judicial Commissioner came to the conclusion that the impugned order was ultra vires. He agreed with the Government Pleader that the impugned order was not in conformity with the 1962 Order (Goa, Daman and Diu (Administration) Removal of Difficulties Order) passed by the Central Government.

9. It is common ground that if a power subsists and the Lt. Governor can justify the impugned order under any law, the State is not debarred from relying on that law. It seems to us that section 8 of the Regulation clearly authorised the Lt. Governor to pass the impugned order.

10. The learned counsel for the State says that the word "difficulty" in section 8 of the Regulation has to be interpreted in a very narrow sense and in this connection relies on the following observations of Hidayatullah, J., as he then was, in *Jalan Trading Co. (Pvt.) Ltd. v. Mill Mazdoor Union*, (1967) 1 SCR 15 at p. 59 = (AIR 1967 SC 691 at p. 719):

"The order, of course, would be passed within the four corners of the parliamentary legislation and would only apply the Act to concrete cases as the courts do when they consider the application of an Act."

He says that there was no concrete case arising in this case and, therefore, the impugned order cannot be justified by reference to section 8 of the Regulation. But Hidayatullah, J., was in minority and Shah, J., speaking for the majority, proceeded on the basis that the section under consideration authorised the Government to determine for itself what the purposes of the Act were and to make provisions for removal of doubts or difficulties. Shah, J. did not give any limited meaning to the word "difficulty" in that case.

11. We may mention here that neither the appellant nor the respondent has urged before us that S. 8 of the Regulation itself is invalid.

12. It seems to us that difficulty was bound to arise in giving effect to

the Code of Criminal Procedure because this Code contemplates investigation and trial under the Code. If investigations had been done under the Portuguese Criminal Procedure Code, unless there was some clear provision to deem that investigation as investigation under the Code of Criminal Procedure, fresh investigations under the Code of Criminal Procedure would have to be undertaken. Be that as it may, whatever the difficulties which impelled the Lt. Governor to act, he was competent to make provisions to remove the difficulties.

13. We may mention that although section 8 of the Regulation enables the Central Government to remove the difficulty, by reading the definition of the "Central Government" in the General Clauses Act, the Administrator of Goa, Daman and Diu is entitled to exercise the powers of the Central Government, and the Lt. Governor is the Administrator of Goa, Daman and Diu. We are accordingly of the opinion that the impugned order is valid and the prosecution must be conducted in accordance with its provisions.

14. In the result the appeal is allowed, the judgment and order of the Judicial Commissioner set aside and that of the learned Sessions Judge restored.

Appeal allowed.

AIR 1970 SUPREME COURT 1767 (V 57 C 377)

(From: Allahabad)

S. M. SIKRI AND I. D. DUA, JJ.

The Aligarh Municipal Board and others, Appellants v. Ekka Tonga Mazdoor Union and others, Respondents.

Criminal Appeal No. 188 of 1966, D/- 4-8-1970.

(A) Contempt of Courts Act (1952), Ss. 1 and 3 — Contempt for breach of prohibitive order of Court — Knowledge of exact order is sufficient — Official communication not a condition precedent when there is no reason to doubt authenticity of it.

In order to justify action for contempt of court for breach of prohibitive order it is not necessary that the order should have been officially serv-

ed on the party against whom it is granted, if it is proved that he had knowledge of the exact order aliunde and he knew that it was intended to be enforced. Official communication is not a condition precedent, provided there is no valid reason to doubt the authenticity of the order conveyed to him. (Paras 5, 8)

(B) Contempt of Courts Act (1952), S. 4 — Sentence — Employing subterfuge to avoid compliance of undoubted order of Court — Effect — If aggravates the contempt.

Contempt proceeding against a person who has failed to comply with the Court's order serves a dual purpose: (1) Vindication of the public interest by punishment of contemptuous conduct and (2) coercion to compel the contemner to do what the law requires of him. The sentence imposed should effectuate both these purposes. To employ a subterfuge to avoid compliance of a court's order about which there could be no reasonable doubt may in certain circumstances aggravate the contempt. (Para 5)

(C) Contempt of Courts Act (1952), Ss. 1 and 3 — Corporate body can be punished for contempt.

A corporation (Municipal Board in the case) is liable to be punished by imposition of fine, and by sequestration for contempt for disobeying orders of competent Courts directed against them. A command to a Corporation is in fact a command to those who are officially responsible for the conduct of its affairs. If they, after being apprised of the order directed to the Corporation, prevent compliance or fail to take appropriate action, within their power, for the performance of the duty of obeying those orders, they and the corporate body are both guilty of disobedience and may be punished for contempt. (Para 6)

(D) Contempt of Courts Act (1952), Ss. 1 and 3 — Charge of contempt of Court for disobeying its order — Those who assert that alleged contemnors had knowledge of order must prove this fact beyond reasonable doubt — In case of doubt benefit ought to go to person charged. (Para 8)

The following Judgment of the Court was delivered by

DUA, J.: In this appeal by special leave. (1) The Aligarh Municipal

Board, (2) The Executive Officer of the Board, (3) Shri Kanhaiyalal, Demand Inspector of the Board, (4) Ahmad Khan, peon and (5) Hoti Lal, Munshi of the Board, challenge the order of the Allahabad High Court dated 7th December, 1965 holding them guilty of contempt of that court for having disobeyed the stay order passed by it on the 29th of March, 1965.

2. It appears that there was some dispute in regard to the realisation of fees claimed by the Municipal Board of Aligarh from Ekkawalas and Tongawalas for the use of the Municipal stands at various places in Aligarh city. The two suits, filed by the Ekka Tonga Mazdoor Union in this connection had been decided in its favour. As the Board still persisted in realising the fees the said Union along with six of its members filed a writ petition against the Board in the Allahabad High Court. This petition was admitted on the 29th January, 1965. The Court also made an interim order of stay on that date.

That order reads:

"During the pendency of the application the respondent shall not realise any fees for the use of stands on Rathras Road, Bannadevi Road, Shri Sikandra Rao Road and Chatari Road from petitioners Nos. 2 to 7".

According to the version given by Bhagwan Das, Secretary of the Union which has been accepted by the High Court, and in our opinion rightly, a certified copy of the said order was obtained by him from the High Court on the same day, i.e., 29th March, 1965. Bhagwan Das reached Aligarh on the 30th March with that copy. On 31st March, 1965 he went to the office of the Board and handed over to the office a letter addressed to the Officer-in-charge stating that the High Court had stayed the realisation of stand fees in W. P. No. 621 of 1964 but that order was not being obeyed. With that letter he annexed an uncertified copy of the stay order. Bhagwan Das secured from the office of the Board a memorandum acknowledging receipt of his letter. He also showed the certified copy of the stay order to the Executive Officer, the Demand Inspector, and the Receiving Clerk, before filing with the office of the Municipal Board his letter and the uncertified copy of the order.

These papers reached the Executive Officer the same day, that is, 31st March, 1965 at about 4 p.m. The Executive Officer directed the Demand Inspector as follows:

"D. I.

— Please to report in the matter (O. C.) may also kindly see."

The Officer-in-charge passed the following order on 1st April, 1965:

"Seen. Orders of the High Court should be obeyed".

When this order went back to the Executive Officer with Bhagwan Das's letter and a copy of the stay order annexed therewith, he directed:

"D. I. to note and comply"

and sent the papers to be placed forthwith before the Demand Inspector Kanhaiyalal Sharma. Those papers reached the Demand Inspector on the 2nd April, 1965 at 4 p.m. On the night of 1st April the Executive Officer went away to Lucknow on official work and returned to Aligarh on 5th April. In his absence the Medical Officer of Health acted as Executive Officer. The Demand Inspector, instead of complying with the directions of the Executive Officer and the Officer-in-charge, recorded a note on 3rd April addressed to the Executive Officer, pointing out that the copy of the order of the High Court was not a certified copy and suggesting that if considered proper the opinion of the Municipal counsel on the point be obtained. These papers were placed before the Executive Officer on 5th April and not before the Health Officer acting as Executive Officer during his absence. On the morning of 5th April the Executive Officer recorded the following order:

"Today D. I.

The orders of O. C. and the High Court are clear and need compliance at once. Municipal counsel be also please apprised and his report and advice taken."

In spite of these clear directions, the Demand Inspector again, instead of immediately complying with them, passed on the papers to the Municipal Counsel who also expressed his opinion that the order of the High Court had to be obeyed. The Counsel further advised that

the Board's lawyer at Allahabad should be asked to - move the High Court for - getting the stay order vacated. This opinion was given on that very day. Curiously the Demand Inspector even then did not feel satisfied. He again sought the directions of the Executive Officer whether on perusal of the opinion of the Municipal Counsel the realisation of the stand fee had to be stopped. The Executive Officer reminded the Demand Inspector of his earlier directions by recording on 5th April, 1965:

"There are orders already on page overleaf, that the orders of the High Court be obeyed. That be done forthwith."

Even after this note the Demand Inspector did not realise the urgency of the matter and did not consider it proper to send forthwith and without avoidable delay directions to the relevant octroi posts to stop realisation of stand fees. Such directions were only sent in the afternoon of 6th April, with the result that the stay order made by the High Court on 29th March, 1965 was acted upon only with effect from 7th April, 1965. The stand fee thus continued to be realised as usual till 7th April, 1965 though the Municipal Board and the concerned officers of the Board had been apprised of the orders as early as 31st March, 1965 and the Officer-in-charge as also the Executive Officer had expressly directed that the orders of the High Court be obeyed.

3. On behalf of the appellants it was contended that Bhagwan Das had not annexed with his letter the certified copy of the stay order and the appellants were therefore fully justified in verifying and assuring themselves of the authenticity of the stay order before issuing directions stopping realisation of stand-fees from the six respondents (nos. 2 to 7). It was further contended that there is no evidence of stand fees having actually been collected from them. This was in substance the main submission raised by Mr. Rana on behalf of the appellants. It was added that Bhagwan Das had without any material made an allegation on 31st March, 1965 that the stay order was not being obeyed. The conduct of the appellants in not taking on their face value the averment contained in Bhagwan Das's letter, was bona fide and reasonable said

the counsel. It was strongly argued that the appellants were not guilty of contempt of court because they had not been officially served with the order and they were not sure if any stay order had in fact been made; and also about its exact terms; in any event they had offered an unqualified apology which should have been accepted.

4. The High Court has accepted Bhagwan Das's version as already noticed by us. We have not been persuaded to disagree with that view. It is, therefore, clear that the certified copy was in fact with Bhagwan Das on 31st March, 1965 and the same in our view must have been shown to the officers concerned as stated by him on oath. According to the evidence the Executive Officer Mr. G. B. Mathur, recorded in the High Court on 19th October, 1965, the Officer-in-charge was his superior officer and all orders made by the Officer-in-charge demanded immediate obedience by all subordinate officers. He also accepted the correctness of the order of the Officer-in-charge dated 1st April, 1965 directing every one concerned to obey the order of the High Court. This evidence in our view concludes the matter and it is futile on the part of the appellants to seek shelter behind the argument based on the omission on the part of Bhagwan Das to annex with his letter the certified copy of the stay order. When the copy of the order attached with Bhagwan Das's letter was accepted by the Officer-in-charge as authentic and when he had considered it proper to direct that the order be obeyed and when thereafter the Executive Officer had also endorsed that direction, we find it extremely difficult to appreciate the attitude adopted by Shri Kanhaiya Lal Sharma, the Demand Inspector, the attitude in which he persisted till 6th April. Such an attitude cannot be considered bona fide or reasonable on the facts and circumstances of this case. The submission that the stay order is not shown to have been disobeyed because no receipts of realisation of stand-fee from respondents 2 to 7 have been proved is also difficult to accept in face of the evidence of the Executive Officer. He has stated on oath in the High Court, to quote his own words, "During the period 1-4-65 and 5-4-65

realisation of taxes must have been as was being done from before."

5. In view of this statement the realisation of stand fee from respondents Nos. 2 to 7 even after intimation of the stay order was given to the Demand Inspector must be considered to have been rightly upheld by the High Court. As a matter of fact the affidavit of Pannalal, respondent No. 7 in this Court which we have no reason to disbelieve also supports this conclusion. It may also be pointed out that in order to justify action for contempt of Court for breach of a prohibitive order it is not necessary that the order should have been officially served on the party against whom it is granted if it is proved that he has notice of the order aliunde and he knew that it was intended to be enforced. Official communication is not a condition precedent, provided there is no valid reason to doubt the authenticity of the order conveyed to him. In the present case we are not at all satisfied that the Demand Inspector Shri Kanhaiyalal Sharma had any real justification for doubting the authenticity of the order conveyed to him and to the other officers of the Board by Bhagwan Das. Indeed, we are also of the view that the certified copy of the order had actually been shown to him. We have, therefore, no doubt that the Demand Inspector is guilty of contempt of court by knowingly and deliberately disobeying the order of the High Court. It was, however, contended that the sentence imposed on him is too severe. We are unable to agree. Contempt proceeding against a person who has failed to comply with the Court's order serves a dual purpose: (1) vindication of the public interest by punishment of contemptuous conduct and (2) coercion to compel the contemner to do what the law requires of him. The sentence imposed should effectuate both these purposes. It must also be clearly understood in this connection that to employ a subterfuge to avoid compliance of a Court's order about which there could be no reasonable doubt may in certain circumstances aggravate the contempt. The Demand Inspector in the present case, as is clear from his counter-affidavit and other material on the record, has attempted to employ such a subterfuge. And finally he has all through stuck to his insis-

tence on justification without any expression of regret, leave alone apology. We have accordingly no hesitation in upholding the order against him.

6. In regard to the appeal by the Municipal Board it was contended that the Board being a Corporation it acts through natural persons and, therefore, it cannot be convicted of contempt of court. This submission is unacceptable. The law as it exists today admits of no doubt that a Corporation is liable to be punished by imposition of fine and by sequestration for contempt for disobeying orders of competent courts directed against them. A command to a Corporation is in fact a command to those who are officially responsible for the conduct of its affairs. If they, after being apprised of the order directed to the Corporation, prevent compliance, or fail to take appropriate action, within their power, for the performance of the duty of obeying those orders, they and the corporate body are both guilty of disobedience and may be punished for contempt. The appeal on behalf of the Municipal Board thus also fails and is dismissed.

7. In regard to the Executive Officer, he seems to have directed the Demand Inspector, who was responsible for collecting the fees, to obey the stay order. His directions seem to us to be clear and unambiguous. After recording his order on 1st April he had to go out of town on official duty and he returned only on 5th April. On his return again he recorded clear instructions categorically directing obedience of the High Court's order. His case is thus clearly distinguishable from that of the Demand Inspector and we are inclined to allow his appeal. He has also offered an unqualified apology.

8. The case against Ahmad Khan, peon, and Hoti Lal, Muharrir or Munshi of the Board also seems to us to be distinguishable. They were not included in the array of alleged contemnors in the original application but were added subsequently by means of an application dated 14th September, 1965. They were duty bound to obey the orders of their superior officers and in the absence of any order from the Demand Inspector who was apparently the immediate

superior officer in charge of the realisation of stand fees and particularly when they are not shown to be aware of the stay orders issued by the High Court, they could not be expected to stay their hands in the matter of realisation of stand-fees. It is common case of the parties that no direction had been sent by any superior officer to the octroi posts or to these persons to stay realisation of stand fees from respondents nos. 2 to 7. It is true that these respondents have alleged that they had informed these appellants as well about the existence of the High Court's order but we are inclined to think that assuming this allegation to be correct Ahmad Khan and Hoti Lal were both justified on the facts and circumstances of this case in not taking this oral information on its face value and accepting it as conclusive. In order to bring home a charge of contempt of court for disobeying orders of Courts those who assert that the alleged contemnors had knowledge of the order must prove this fact beyond reasonable doubt. As observed earlier it is of course not necessary to prove formal service of the order by official routine and knowledge of the exact order aliunde would suffice. In case of doubt, however, benefit ought to go to the person charged. We are far from satisfied that these two appellants are shown to have been aware of the exact terms of the stay order, which they were bound to obey even in the absence of a direction to that effect from their superior officers. They have also offered unqualified apology. Their appeals are allowed and the order of fine imposed on them set aside.

9. In the final result the appeal on behalf of the Executive Officer, appellant no. 2 and of Ahmad Khan and Hoti Lal, appellants nos. 4 and 5 are allowed and their conviction and sentence set aside. The fines, if paid, will be refunded. The appeal on behalf of the Municipal Board, appellant no. 1 and of Shri Kanhaiyalal Sharma, Demand Inspector, appellant no. 3 are dismissed.

Orders accordingly.

AIR 1970 SUPREME COURT 1771
(V 57 C 378)

M. HIDAYATULLAH C. J., J. M. SHELAT, G. K. MITTER, C. A. VAIDIALINGAM AND A. N. RAY, JJ.

In Writ Petn. No. 182 of 1969: Shri Ramtanu Co-operative Housing Society Ltd. and another, Petitioners v. State of Maharashtra and others, Respondents.

In Writ Petns. Nos. 42 to 45 of 1968. Ganpat Gosavi Patil and others, Petitioners v. State of Maharashtra and others, Respondents.

Writ Petns. Nos. 182 of 1969 and 42 to 45 of 1968, D/- 5-8-1970.

(A) Constitution of India, Art. 246, Seventh Schedule, List II Entry 24, List I, Entries 7 and 52—Maharashtra Industrial Development Act, 1961 (3 of 1962) — Validity—Act is within legislative competence of Maharashtra State.

In deciding the pith and substance of the legislation, the true test is not to find out whether the Act has encroached upon or invaded any forbidden field but it is the true intent of the Act which will determine the validity of the Act. 'Industries' come within Entry 24 of the State List subject to the provision of Entry 7 and Entry 52 of the Union List of the Constitution. The establishment, growth and development of industries in the State of Maharashtra do not fall within Entry 7 and Entry 52 of the Union List. They are within the State list of 'industries.' In order to achieve growth of industries it is necessary not only to acquire land but also to implement the purposes of the Act. The Corporation is therefore established for carrying out the purposes of the Act. The Corporation under the Act is not a trading corporation. Thus the State of Maharashtra is competent to enact the Act.

(Paras 15, 20)

(B) Constitution of India, Art. 14 — Maharashtra Industrial Development Act, 1961 (3 of 1962) — Validity — No procedural discrimination between the Act and the Land Acquisition Act, 1894.

There is no procedural discrimination between the Maharashtra Industrial Development Act and the Land

Acquisition Act. The Maharashtra Industrial Development Act is a special one having the specific and special purpose of growth, development and organisation of industries in the State of Maharashtra. The Act has its own procedure and there is no provision in the Act for acquisition of land for a company as in the case of Land Acquisition Act. The Land Acquisition Act is a general Act and that is why there is a specific provision for acquisition of land by the State for public purpose and acquisition of land by the State for companies. Under the Land Acquisition Act acquisition is at the instance of and for the benefit of a company, whereas under the Maharashtra Act acquisition is solely by the State for public purposes. The two Acts are dissimilar in situations and circumstances. In the Maharashtra Act there is no restriction on the powers of the Collector in the matter of determination of compensation, although the approval of Government may be necessary in the Government interest. (Para 21)

The following Judgment of the Court was delivered by

RAY, J.: These petitions raise two principal questions. First, whether the State of Maharashtra (hereinafter referred to as the State) is competent to enact the Maharashtra Industrial Development Act, 1961 (hereinafter referred to as the Act); secondly, whether there is procedural discrimination between the Maharashtra Industrial Development Act, 1961 and the Land Acquisition Act, 1894.

2. The contentions of the petitioners are that the Act is for the incorporation, regulation and winding up of the Maharashtra Development Corporation (hereinafter referred to as the Corporation) and that the Corporation is a trading one and therefore the impugned legislation falls within Entry 43 of List I of the Seventh Schedule of the Constitution. On behalf of the State it is said on the other hand that the Act is for the growth and development of Industries in the State of Maharashtra and for acquisition of land in that behalf and the Corporation is established for carrying out the purposes of the Act, and, therefore, the legislation is valid.

3. The true character, scope and intent of the Act is to be ascertained

with reference to the purposes and the provisions of the Act. The Act is one to make a special provision for securing the orderly establishment in industrial areas and industrial estates of industries in the State of Maharashtra, and to assist generally in the organisation thereof, and for that purpose to establish an Industrial Development Corporation, and for purposes connected with the matters aforesaid.

4. The Corporation is established for the purpose of securing and assisting the rapid and orderly establishment and organisation of industries in industrial areas and industrial estates in the State of Maharashtra. The Corporation consists of 8 members two of whom are nominated by the State Government of whom one shall be the Financial Adviser to the Corporation, one member nominated by the State Electricity Board, one member nominated by the Housing Board and three members nominated by the State Government, from amongst persons appearing to Government to be qualified as having had experience of, and having shown capacity in, industry or trade or finance or who are in the opinion of the Government capable of representing the interest of persons engaged or employed therein, and the Chief Executive Officer of the Corporation, who shall be the Secretary of the Corporation.

5. The functions of the Corporation shall be generally to promote and assist in the rapid and orderly establishment, growth and development of industries in the State of Maharashtra and to establish and manage industrial estates at places selected by the State Government, develop industrial areas selected by the State Government for the purpose and make them available for undertakings to establish themselves, assist financially by loans industries to move their factories into such estates or areas, and to undertake schemes or works, either jointly with other corporate bodies or institutions, or with Government or local authorities, or on an agency basis, in furtherance of the purposes for which the Corporation is established and all matters connected therewith.

6. An industrial area under the Act means any area declared to be an industrial area by the State Government by notification in the Official

Gazette which is to be developed and where industries are to be accommodated. An industrial estate under the Act means any site selected by the State Government, where the Corporation builds factories and other buildings and makes them available for any industries or class of industries. Development under the Act means the carrying out of building, engineering, quarrying or other operations in, on, over or under land, or the making of any material change in any building or land, and includes redevelopment, but does not include mining operations. Amenity under the Act includes road, supply of water or electricity, street lighting, drainage, sewerage, conservancy and such other conveniences as the State Government may by notification in the Official Gazette specify to be an amenity for the purposes of the Act.

7. We have referred to these expressions, industrial area, industrial estate, development and amenity in order to appreciate the general powers of the Corporation to discharge the functions of the Corporation in regard to the establishment, growth and development of industries in the State. These powers are to acquire and hold property, moveable and immoveable for the performance of any of its activities, and to lease, sell, exchange or otherwise transfer any property held by the Corporation on such conditions as may be deemed proper by the Corporation and also to purchase by agreement or to take on lease or under any form of tenancy any land, to erect such buildings and to execute such other works as may be necessary for the purpose of carrying out its duties and functions, to provide or cause to be provided amenities and common facilities in industrial estates and industrial areas and construct and maintain or cause to be maintained works and buildings therefor, to make available buildings on hire or sale to industrialists or persons intending to start industrial undertakings to construct buildings for the housing of the employees of such industries, to allot factory sheds or such buildings or parts of buildings, including residential tenements to suitable persons in the industrial estates established or developed by the Corporation, and to do such other things and perform such acts as it may think

necessary or expedient for the proper conduct of its functions, and the carrying into effect the purposes of this Act.

8. Broadly stated the functions and powers of the Corporation are to develop industrial areas and industrial estates by providing amenities of road, supply of water or electricity, street lighting, drainage, sewerage, conservancy and other conveniences, secondly to construct works and buildings, factory sheds and thirdly, to make available buildings on hire or sale to industrialists or persons intending to start industrial undertakings and to allot factory sheds, buildings, residential tenements to suitable persons in industrial estates established or developed by the Corporation and to lease, sell, exchange or otherwise transfer any property held by the Corporation on such conditions as may be deemed proper by the Corporation.

9. The development of industrial areas and industrial estates is intended to serve two objects. In the first place, there is to be an orderly establishment and growth of industries in the Bombay Poona sector. The second object is to secure dispersal of industries from the congested areas of the Bombay Poona sector to the underdeveloped parts of the State. The industrial areas are broadly classified into two categories, namely, first, those meant for engineering and other industries which are not obnoxious and, secondly those meant for chemical industries. The establishment and growth of industries in the State is inextricably bound up with availability of land. Available land is limited. Such limited supply leads to speculation in land. Power is therefore required for compulsory acquisition of land to achieve the purposes of the Act. At the same time, land owners are not to be deprived of the legitimate benefit of reasonable increase in land values in a developing economy.

10. Development of chemical industries requires long stretches of pipelines to be laid for moving gas and other liquid chemical products. The growth of industries in the State by establishment of industrial areas and industrial estates also means laying pipelines for carrying gas, water, electricity and constructing sewerage

and drains. These amenities are essential. The absence of amenities is envisaged and answered in the Act by empowering the Corporation to provide these essential amenities, facilities and conveniences.

11. The principal functions of the Corporation in regard to the establishment, growth and development of industries in the State are first to establish and manage industrial estates at selected places and secondly to develop industrial areas selected by the State Government. When industrial areas are selected the necessity of acquisition of land in those areas is apparent. The Act, therefore, contemplates that the State Government may acquire land by publishing a notice specifying the particular purpose for which such land is required. Before the publication of the notice, the owner of the land is given an opportunity to show cause as to why the land should not be acquired. After considering the cause shown by the owner the State Government may pass such orders as it deems fit. When a notice is published for acquisition of land, the land shall, on and from the date of such publication, vest absolutely in the State Government free from all encumbrances. Where the land has been acquired for the Corporation or any local authority, the State Government shall, after it has taken possession of the land, transfer the land to the Corporation or that local authority, for the purposes for which the land has been acquired subject to such terms and conditions which the State Government may deem fit to impose. We have already noticed that for the purpose of the Act, namely, the establishment and development of industries in the State the Corporation will establish industrial estates and develop industrial areas.

12. Apart from establishing industrial estates and developing industrial areas the Corporation may dispose of any land acquired by the State Government and transfer to the Corporation without undertaking or carrying out any development thereof or transfer such land after undertaking or carrying out any development as it thinks fit. These powers of the Corporation with respect to the disposal of land are to be exercised so far as practicable,

that where the Corporation proposes to dispose of by sale any such land without any development having been undertaken or carried out thereon, the Corporation shall offer the land in the first instance to the persons from whom it was acquired if they desire to purchase it subject to such requirements as to its development and use as the Corporation may think fit to impose. Again, the persons who are residing or carrying on business or other activities on any such land shall, if they desire to obtain accommodation on land belonging to the Corporation and are willing to comply with any requirements of the Corporation as to its development and use, have an opportunity to obtain thereon accommodation suitable to their reasonable requirements on terms settled with due regard to the price at which any such land has been acquired from them.

13. The other provisions in the Act are that the State Government may upon such conditions as may be agreed between the State Government and the Corporation, place at the disposal of the Corporation any land vested in the State Government. After any such land has been developed by, or under the control and supervision of the Corporation, it shall be dealt with by the Corporation in accordance with the regulations made, and directions given by the State Government in this behalf. Further, if any land placed at the disposal of the Corporation is required at any time thereafter by the State Government, the Corporation shall replace it at the disposal of the State Government upon such terms and conditions as may be mutually agreed upon.

14. There are two other important provisions in the Act. In the first place, the State Government may issue to the Corporation such general or special directions as to policy as it may think necessary or expedient for the purpose of carrying out the purposes of the Act, and the Corporation shall be bound to follow and act upon such directions. These directions will be in the field of establishment and management of industrial estates and development of industrial areas and carrying out the other powers of the Corporation in regard to the provisions of amenities and common fac-

lities and assisting industrialists or industrial undertakings in obtaining buildings or factory-sheds or residential tenements or land for development of industries. The second important provision is that when the State Government is satisfied that the purposes for which the Corporation is established under the Act have been substantially achieved so as to render the continued existence of the Corporation in the opinion of the State Government unnecessary that Government may by notification in the Official Gazette declare that the Corporation shall be dissolved with effect from such date as may be specified in the notification and the Corporation shall be deemed to be dissolved accordingly. Upon such dissolution, all properties, funds and dues which are vested in or realisable by the Corporation shall vest in or be realised by the State Government and all liabilities enforceable against the Corporation shall be enforceable against the State Government.

15. It is in the background of the purposes of the Act and powers and functions of the Corporation that the real and true character of the legislation will be determined. That is the doctrine of finding out the pith and substance of an Act. In deciding the pith and substance of the legislation, the true test is not to find out whether the Act has encroached upon or invaded any forbidden field but what the pith and substance of the Act is. It is that true intent of the Act which will determine the validity of the Act. Industries come within Entry 24 of the State List subject to the provision of Entry 7 and Entry 52 of the Union List of the Constitution. Entry 7 of the Union List relates to industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war. Entry 52 of the Union List relates to industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest. The establishment, growth and development of industries in the State of Maharashtra does not fall within Entry 7 and Entry 52 of the Union List. Establishment, growth and development of industries in the State is within the State List of industries. Furthermore, to effectuate the purposes of the development of in-

dustries in the State it is necessary to make land available. Such land can be made available by acquisition or requisition. The Act in the present case deals with acquisition of land by the State and on such acquisition, the State may transfer the land to the Corporation which again may develop it itself and establish industrial estates or may develop industrial areas. Acquisition or requisition of land falls under Entry 42 of the Concurrent List. In order to achieve growth of industries it is necessary not only to acquire land but also to implement the purposes of the Act. The Corporation is therefore established for carrying out the purposes of the Act. The pith and substance of the Act is establishment, growth and organisation of industries, acquisition of land in that behalf and carrying out the purposes of the Act by setting up the Corporation as one of the limbs or agencies of the Government. The powers and functions of the Corporation show in no uncertain terms that these are all in aid of the principal and predominant purpose of establishment, growth and establishment of industries. The Corporation is established for that purpose. When the Government is satisfied that the Corporation has substantially achieved the purpose for which the Corporation is established, the Corporation will be dissolved because the *raison d'être* is gone. We, therefore, hold that the Act is a valid piece of legislation.

16. The petitioners contended that the Corporation was a trading one. The reasons given were that the Corporation could sell property, namely, transfer land; that the Corporation had borrowing powers; and that the Corporation was entitled to moneys by way of rents and profits. Reliance was placed on the report of the Corporation and in particular on the income and expenditure of the Corporation to show that it was making profits. These features of transfer of land, or borrowing of moneys or receipt of rents and profits will by themselves neither be the indicia nor the decisive attributes of the trading character of the Corporation. Ordinarily, a Corporation is established by shareholders with their capital. The shareholders have their Directors for the regulation and management of the

Corporation. Such a Corporation set up by the shareholders carries on business and is intended for making profits. When profits are earned by such a Corporation they are distributed to shareholders by way of dividends or kept in reserve funds. In the present case, these attributes of a trading Corporation are absent. The Corporation is established by the Act for carrying out the purposes of the Act. The purposes of the Act are development of industries in the State. The Corporation consists of nominees of the State Government, State Electricity Board and the Housing Board. The functions and powers of the Corporation indicate that the Corporation is acting as a wing of the State Government in establishing industrial estates and developing industrial areas, acquiring property for those purposes, constructing buildings, allotting buildings, factory sheds to industrialists or industrial undertakings. It is obvious that the Corporation will receive moneys for disposal of land, buildings and other properties and also that the Corporation would receive rents and profits in appropriate cases. Receipts of these moneys arise not out of any business or trade but out of sole purpose of establishment, growth and development of industries.

17. The Corporation has to provide amenities and facilities in industrial estates and industrial areas. Amenities of road, electricity, sewerage and other facilities in industrial estates and industrial areas are within the programme of work of the Corporation. The fund of the Corporation consists of moneys received from the State Government, all fees, costs and charges received by the Corporation, all moneys received by the Corporation from the disposal of lands, buildings and other properties and all moneys received by the Corporation by way of rents and profits or in any other manner. The Corporation shall have the authority to spend such sums out of the general funds of the Corporation or from reserve and other funds. The Corporation is to make provision for reserve and other specially denominated funds as the State Government may direct. The Corporation accepts deposits from persons, authorities or institutions to whom allotment or sale of land, buildings, or

sheds is made or is likely to be made in furtherance of the object of the Act. A budget is prepared showing the estimated receipts and expenditure. The accounts of the Corporation are audited by an auditor appointed by the State Government. These provisions in regard to the finance of the Corporation indicate the real role of the Corporation, viz., the agency of the Government in carrying out the purpose and object of the Act which is the development of industries. If in the ultimate analysis there is excess of income over expenditure that will not establish the trading character of the Corporation. There are various departments of the Government which may have excess of income over expenditure.

18. The Corporation is not a Government company within the meaning of Section 617 of the Companies Act, 1956 nor can the Companies Act, 1956 be said to apply to the Corporation because under the provisions contained in section 616 of the Companies Act that Act will apply to a company governed by any special Act except in so far as the provisions of the Companies Act are inconsistent with the provisions of such special Act. The provisions of the Act in the present case in regard to incorporation, functions, powers and dissolution of the Corporation show that the purposes and objects of the Act and the functions and powers of the Corporation are like the warp and the weft of the fabric of development of industries by the State.

19. There are two provisions of the Act which are not to be found in any trading Corporation. In the first place, the sums payable by any person to the Corporation are recoverable by it under this Act as an arrear of land revenue on the application of the Corporation. Secondly, on dissolution of the Corporation the assets vest in and the liabilities become enforceable against the State Government.

20. The underlying concept of a trading Corporation is buying and selling. There is no aspect of buying or selling by the Corporation in the present case. The Corporation carries out the purposes of the Act, namely, development of industries in the State. The construction of buildings,

the possession of the mutwalli. Whatever method is adopted, it must be established that the settlor had divested himself of his possession as Malik and his possession after the creation of the wakf was only as mutwalli and not in any other capacity.

15. Last but not the least, the decision of the Supreme Court in Thakur Mohd. Ismail v. Thakur Sabir Ali, AIR 1962 SC 1722 may be taken as putting a final seal on the question. In that case a wakf alal-aulad was created by Thakur Asghar Ali in 1925. The wakf property comprised partly of the property known as Tipraha Estate in the district of Bahraich, governed by the provisions of the Oudh Estates Act No. 1 of 1869, and partly of certain other properties which Asghar Ali himself had acquired in his lifetime. A question arose as to whether the wakf in so far as it related to Tipraha Estate was hit by Section 12 of the Oudh Estates Act, which restricted transfers or bequests of taluqdari properties governed by the Act. The validity of the wakf in question was challenged on the ground that in view of Section 12 of the Oudh Estates Act no such wakf could be legally created. Their Lordships of the Supreme Court upheld this contention observing that when a wakf governed by the Mussalman Wakf Validating Act, 1913 is created, there is a transfer of the property covered by the wakf and the transfer is in favour of God Almighty in whom the property subject to wakf becomes vested. It was further observed that the wakfs-alal-aulad which have become valid after Act 6 of 1913 must be held to be gifts of property to God Almighty for certain purposes and are clearly transfers within the meaning of that term in Section 12 of the Oudh Estates Act. Therefore, the wakf created by Asghar Ali in respect of Tipraha Estate was held to be invalid because it contravened Section 12 of the Oudh Estates Act. Further, the Supreme Court observed that once the wakf failed, Mohd. Ismail could not claim to remain in possession, for his right to remain in possession depended upon his being mutwalli of the wakf. A reading of the judgment of the Supreme Court in the case noted above, would show that the view expressed by the Supreme Court clearly was that even in a case of a wakf alal-aulad there is a transfer of property and the property which is the subject-matter of a wakf stands transferred to God Almighty. It must, therefore, be held that the view to the contrary expressed by the Division Bench of this Court in Qamar's case, AIR 1933 All 407 was not legally correct.

16. It was urged before us that the law applicable to public wakfs cannot be applied with equal force to a private wakf or wakf alal-aulad. Private wakfs or wakfs alal-aulad, it was submitted, are en-

tirely governed by the provisions of the Mussalman Wakf Validating Act, 1913, under which the wakf property vested in the mutwalli or beneficiary and not in God Almighty. This contention is completely negated by the decision of the Supreme Court in Thakur Mohd. Ismail's case, AIR 1962 SC 1722 (supra). Even if this contention is judged with reference to the provisions of Act 6 of 1913, independently of the decision of the Supreme Court, it will be found that the submission has no force, as would instantly appear.

17. It is a matter of history that the Mussalman Wakf Validating Act of 1913 was specifically enacted to override the decision of the Judicial Committee in Abdul Fata Mahomed v. Russomoy, (1894) 22 Ind. App. 76 in which it was held that wakfs for the aggrandisement of the family of the wakifs were invalid in law. The object of the Act was to validate such wakfs. Therefore, one has to see whether in that Act there is anything warranting the legal proposition canvassed on behalf of the appellants in the instant case that the wakf property vested in the mutwallis and not in God Almighty. It may be noted that Act 6 of 1913 is equally applicable to Shias and Sunnis, except that in the case of Sunnis, the person creating a wakf may provide also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents or profits of the property dedicated.

18. Wakf, under the Act, means the permanent dedication by a person professing Muslim faith of any property for any purpose recognised by the Mohammedan Law as religious, pious or charitable. Having defined wakf, the Act further provides that it shall be lawful for any person professing Muslim faith to create a wakf, which in all other respects is in accordance with the provisions of Muslim law, for purposes, including the maintenance and support wholly or partially of his family, children or descendants; provided always, however, that the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognised by the Muslim Law as religious, pious or charitable purpose of a permanent character. The Act further lays down that no such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf. There is nothing in this Act from which it can be spelled out that in the case of a wakf-alal-aulad the wakf property does not vest in the God Almighty or the wakf itself, but vests in the mutwalli or mutwallis. It may here be again mentioned that the consensus of judicial opinion is that the legal status

and position of a mutwalli under a wakf under the Musalman Law is that of a Manager or Superintendent. Unless so provided in the deed of wakf, a mutwalli, although charged with the duty and obligation of managing the wakf property, can have no beneficial interest even in the income of the wakf. Under the Mohammedan Law, a wakf can even appoint a non-Mohammedan to be the mutwalli of the wakf property, who can possibly have no beneficial interest in the income thereof except by way of remuneration, if so provided in the wakf deed. It is, therefore, not possible to accept the argument that merely because, in a wakf-alal-aulad, beneficial interest has been made solely enjoyable by the family members and descendants of the wakf, they have any inherent right or can as of right claim to be entitled to manage the wakf property. The right of management is derived under the deed of wakf itself or under the relevant law or usage, as the case may be, but this right of management or mutwalli-ship is not necessarily dependent on or co-existent with any benefit conferred on the mutwalli. A mutwalli may have the exclusive right or management of the wakf property, without having any beneficial interest therein. Conversely, a beneficiary having an exclusive beneficial interest, for the time being, may have no right of management at all. Therefore, there does not appear to exist any legal basis for holding that in the case of a wakf-alal-aulad the wakf property vests in the mutwalli and not in God Almighty.

19. There is yet another reason why the contention that in case of private wakf or wakf-alal-aulad the property vests in the Mutwalli cannot be accepted. Apparently, there does not exist any rational basis upon which a distinction may be made between a public wakf and a private wakf in regard to the vesting of the wakf property and none has been shown to us. The creation of a wakf is essentially based upon a legal fiction, the fiction being that the property vests in God and in perpetuity, but income from the property is permitted to be utilised for certain specified purposes, which, under the Muslim Law are recognised as pious or religious. Under the Mussalman Wakf Validating Act, this fiction appears to have been extended to cases of private wakfs or wakfs-alal-aulad, i.e. wakfs of which the object is, in praesenti and for an indefinite period in future, to confer benefits on the members of the wakf's family or his descendants. As soon as the wakf is created the legal fiction comes into existence and ensures a permanent dedication by vesting the proprietary title in God, at the same time making the income or profit of the wakf's property available to the beneficiaries so long as they exist and then for charitable and religious purposes.

20. Obvious difficulties are bound to arise if it is held that in case of wakf-alal-aulad the proprietary right or ownership in the wakf property vests in the Mutwalli or the beneficiaries. If such a vesting takes place, then it will legally create a heritable and transferable estate in the hands of the persons in whom the title has vested and once such vesting takes place, there cannot be any divesting of such proprietary title, so as to ultimately vest the property in God. Indeed, there may be nothing left out of the corpus of the wakf property to be vested in God at all, when the occasion arises on the failure of the line of succession of the descendants of the wakf. If any property is still left when the line of descendants or beneficiaries becomes extinct, the rule of bona vacantia will operate so as to vest the property in the State. The permanency of the dedication which is basically the fundamental principle involved in a wakf cannot exist or be ensured, if it is held that the proprietary title does not vest in God from the very inception of the creation of the wakf but vests in the Mutwalli or beneficiaries for the time being.

21. From what has been stated above, it necessarily follows that in every case of a wakf, whether public, or private, the wakf property vests in God Almighty or in the wakf itself as an institution or a foundation eo nomine and not in the Mutwalli or the beneficiary. Here, a sentence from the judgment of Mr. Amner Ali, J. in *Vidya Varutti's case* (supra) may be aptly quoted:—

"Religious institutions, known under different names, are regarded as possessing the same 'juristic' capacity and gifts are made to them eo nomine."

Such being the legal position no amount of cultivation by the Mutwalli or even the beneficiary could make the wakf land so cultivated the personal *Khudkasht* of the Mutwalli or the beneficiary under the tenancy laws obtainin^r prior to the coming into force of the U. P. Zamindari Abolition and Land Reforms Act (U. P. Act 1 of 1951). Therefore, by virtue of personal cultivation of wakf land no Mutwalli, even if he was also a beneficiary, could have personally acquired *Bhumidari* rights under Section 18(1) (a) of the aforesaid Act, the material part of which runs thus:—

Section 18(1)—Subject to the provisions of Sections 10, 15, 16 and 17 all lands—

(a) in possession of or held or deemed to be held by an intermediary as Sir, *Khudkasht* or an intermediary's grove, on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such intermediary who shall subject to the provisions of this Act be entitled to take or retain possession as a *bhumidhar* thereof."

As such, it follows that as a result of cultivating waqf land personally, the co-Mutwalli concerned, who was also a beneficiary, did neither become the sole bhumidhar of the land nor co-bhumidhar with the other co-mutwalli. Bhumidhari rights, if at all, could have only accrued in favour of God or the waqf as a result of actual cultivation of waqf land by a Mutwalli.

22. Ordinarily, cultivation of wakf land by a Mutwalli must be treated as cultivation done in his capacity as manager or Superintendent of the waqf. Therefore, waqf land so cultivated before the coming into force of U. P. Act 1 of 1951 would have become God's Khudkasht or that of the waqf itself, provided, however, other requisite conditions, if any, under the then existing tenancy laws were also satisfied. Mr. Sadiq Ali posed a legal proposition that cultivation of waqf land by a Mutwalli, be he a beneficiary as well or not, must under all circumstances be treated as or deemed to be cultivation done for and on behalf of God or the wakf itself; the resultant corollary being that the land concerned initially became Khudkasht and subsequently Bhumidhari of God or the wakf. This highly attractive and apparently sound enunciation of law, however, was not supported by the learned counsel by any authoritative text of Mohamadan law, opinion of a noted Muslim Jurist or judicial decision on the point reported or otherwise. Reference was made by the learned counsel to Sections 527 and 533 of Tyabji's Muslim Law (Fourth Edition) which are quoted below:—

527. "The mutwalli has no ownership, right or estate in waqf property; in that respect he is not a trustee in the technical sense; he holds the property as a manager for fulfilling the purpose of the waqf."

533. "The mutwalli may grant a lease for a year of a house dedicated to the poor or other charitable object, and a lease for three years of lands; and the lease in either case is not determined by his death. A lease granted by the mutwalli for a longer term than for one year or three years respectively, is not void but voidable."

In this connection Section 529 also may be quoted:

529. "The mutwalli may do all acts reasonable and proper for the protection of the waqf property, and for the administration of the waqf."

23. In view of the specific questions referred by the Division Bench for answer, it is neither necessary for us nor would it appropriately lie in our province to consider or decide the somewhat intricate question as to whether a Mut-

walli-cum-beneficiary, specially a co-mutwalli who is also a beneficiary, legally could or could not acquire any other tenancy rights over waqf land. Nor are we called upon to pronounce our view on the question as to whether by virtue of personal cultivation of waqf land by a co-mutwalli-cum-beneficiary, the person concerned acquired any other tenancy rights, either personally or jointly with the other co-mutwalli prior to or on the coming into force of the said Act. As regards bhumidhari, it has already been stated that none of the co-mutwallis could or did acquire the rights of a bhumidhar either individually or jointly. Therefore, Sections 527 and 533 of Tyabji's book quoted above and relied on by Mr. Sadiq Ali need no consideration by this Bench.

24. Section 529 of Tyabji's book, however indicates that under certain circumstances, reasonable and proper administration of the waqf estate may necessitate or justify actual cultivation of waqf land by the mutwalli himself. Such cultivation would be cultivation for and on behalf of God or the waqf itself and not personal cultivation of the mutwalli. He must maintain proper accounts in respect of such cultivation in his capacity as mutwalli and be or remain answerable for the income or profits of the same. If such venture results in loss, the mutwalli, in order to avoid or escape personal liability therefor, may have to show that he had acted within his powers as a prudent manager in good faith. But a mutwalli, specially when he is a beneficiary as well, may himself embark upon a venture of cultivation utilising waqf land to earn profit for himself. If not prohibited under the deed of waqf itself or any mandate of law, such cultivation cannot but be treated either as the exclusive personal enterprise of the mutwalli concerned, the profit or loss entirely being his, or as an enterprise on behalf of all the beneficiaries, provided that such cultivation was done with the consent, express or implied, of the other beneficiaries. If no such consent is established, the person doing such cultivation may even find himself in the unenviable position of being held answerable for the profits but solely liable for the loss. In the very nature of things, all these controversies whenever arising can and must be decided only on the basis of material evidence available, direct or circumstantial. Therefore, as a matter of law, it can neither be held that a co-mutwalli, who is also a beneficiary, in actually cultivating waqf land acted for and on behalf of God or the waqf itself, nor can it be held that it was his exclusive personal cultivation and not cultivation for and on behalf of the entire body of beneficiaries.

25. There is nothing in the U. P. Zamindari Abolition and Land Reforms Act, 1950 precluding acquisition of bhumidhari rights by God or the waqf itself under Section 18(1) (a) thereof. Under that section, by operation of law, the intermediary became bhumidhar of all lands of the category specified therein with the coming into force of the Act. The definitions of the terms "Estate" and "Intermediary" in Section 3 of the Act do not exclude either a waqf estate or a waqf or God. Under Section 27 every intermediary became entitled to receive compensation, and Chapters III and IV, of the Act, which respectively relate to assessment and payment of compensation, do not show that the legislature excluded waqf or God from being recognised or treated as legal entity. Sections 73, 76, 77, 78, 80, 93, 94, 95, 96, 99 of Chapter V of the Act leave no room for doubt that the legislature did expressly recognise waqfs as "Intermediaries" and waqf estates as "Estates" under the Act. Therefore, under Section 18(1) (a) of the Act, the rights of a bhumidhar accrued to or were acquired by waqf or God as intermediary, on other specified requisites being fulfilled. As already observed, whether such rights did or did not accrue or were or were not acquired must in a given case be decided in the light of the evidence adduced and material circumstances.

26. From the discussions in the foregoing paragraphs, the conclusions at which I have arrived apropos the questions referred to us for answer are as follows:—

Under Section 18(1) (a) of the U. P. Zamindari Abolition and Land Reforms Act, 1951 the rights of a bhumidhar did not accrue either in favour of both the co-mutwallis or in favour of that co-mutwalli alone, who was cultivating a land, the proprietary right in respect of which was subject-matter of the waqf. Whether in consequence of cultivation of waqf land personally by a co-mutwalli, who was also a co-beneficiary, the rights of a bhumidhar did or did not accrue in favour of the waqf or God cannot be decided in the abstract as a matter of law, but can and has to be decided on the basis of material evidence, direct or circumstantial, adduced in a given case.

27. The questions are answered accordingly.

28. S. MALIK, J.: I have read the judgment of brother Kirty and agree with him that in a Muslim Waqf the Waqf divests himself of his title in the Waqf property and the Waqf property vests in God. There is no difference in this respect in Shia Waqfs and Sunni Waqfs nor between a Waqf alal-sulad and any other kind of Waqf. My learned brother has dealt at length with the

authorities on the point and it will not serve any useful purpose to cover the same ground.

29. It follows therefrom that a Mutwalli in a Muslim Waqf is merely a Superintendent or Manager of the Waqf property and his rights and liabilities cannot be equated with that of a "Trustee". Under the Indian Trusts Act, 1882 (Act No. 2 of 1882) — which does not affect the rules of the Mohammedan Law as to Waqfs (See Section 1) — as also under the English Law, the legal title to the properties, made a trust of, vests in the Trustee and the equitable title in the cestui que trust. In Section 3 of the Trusts Act a Trust is defined as "an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner."

30. In a Muslim Waqf the legal title to the Waqf property vests in God and the equitable title in the beneficiaries. The Mutwalli even if he be one of the beneficiaries is merely a Manager for fulfilling the purposes of the Waqf. In the discharge of his duties as Mutwalli he must no doubt act like a prudent Manager.

31. By reason of his cultivating the land merely as a Mutwalli in other words, a Manager, a Mutwalli cannot, therefore, acquire for himself Bhumidhari rights under Section 18 of the U. P. Zamindari Abolition and Land Reforms Act, 1950 (U. P. Act No. 1 of 1951). It follows therefrom that his co-Mutwalli also whether he shares in the cultivation or not, cannot become a Bhumidhar.

32. An "Intermediary" is defined in Section 3(12) of the U. P. Zamindari Abolition and Land Reforms Act as follows:—

"Intermediary" with reference to any estate means a proprietor, under-proprietor, sub-proprietor, thekedar, permanent lessee in Avadh and permanent tenureholder of such estate or part thereof."

If the Waqf could be an intermediary under Section 3(12) in case he had not created the Waqf, there is nothing in law which debars God from becoming an intermediary in his place after the creation of the Waqf. Therefore, under Section 18(1) (a) of the Act where an intermediary can become a Bhumidhar, God also, the requisites specified in the Act being fulfilled, can become a Bhumidhar.

33. I agree with my learned brother that "whether in consequence of cultivation of Waqf land personally by a co-Mutwalli, who was also a co-beneficiary, the rights of a Bhumidhar did or did not accrue in favour of the Waqf or God cannot be decided in the abstract as a matter

of law, but can and has to be decided on the basis of material evidence, direct or circumstantial, adduced in a given case."

34. I have not gone into the question as to what right, if any, would accrue to a person, if it is established that he has been cultivating the land in his own right, though he happens to be a Mutwalli, as the point has not been referred to us. It would depend on the facts and circumstances of each case and on a finding as to how far the requisites of the various provisions of the U. P. Zamindari Abolition and Land Reforms Act have been satisfied for acquisition of the rights provided by the Act. In such a case obviously, a co-Mutwalli as such can acquire no rights.

35. **GYANENDRA KUMAR, J.:** I agree with brothers Kirty and S. Malik that the property of a Shia Muslim waqf vests in God and not in a mutwalli or mutwallis, who are mere managers. The waqf in the instant case was the zamindar; hence on creation of the waqf in 1918, God Almighty became the zamindar of the waqf property. However, on the abolition of zamindari he became an intermediary. The questions referred to the Full Bench envisage a case in which the waqf land is neither the sir nor the grove of the intermediary. Therefore, in terms of Section 18(1) (a) of the Zamindari Abolition and Land Reforms Act, the land should have been khudkasht of the intermediary before bhumidhari rights could accrue in his favour, provided other attendant circumstances and facts were present. As seen above, bhumidhari rights under the aforesaid section can accrue only in favour of an intermediary. Being mere managers, the cultivating mutwalli or both the co-mutwallis could not become bhumidhars under S. 18(1) (a) of the Act, as they were not intermediaries.

36. So far as God Almighty is concerned, he could, of course, become an intermediary and then a bhumidhari of the waqf land under Section 18(1) (a), provided the land was being cultivated by Farzand Hasan as a mutwalli and not in his personal capacity. In the former case, the cultivation was obviously being carried on behalf of God, who would thus hold the land and be deemed to be in possession thereof through his manager or mutwalli. Such cultivation done by God, through his mutwalli, would certainly be God's khudkasht and consequently he would be entitled to retain possession thereof as a bhumidar. under, Section 18(1) (a) of the Zamindari Abolition and Land Reforms Act. Normally also a mutwalli will be deemed to be cultivating the waqf land as a mutwalli, unless he proves to the contrary.

37. Nevertheless, if one of the co-mutwallis is cultivating the land in his personal capacity or for himself and on behalf of the other co-mutwalli, certain subordinate rights may accrue to him or them, as the case may be, but not bhumidhari rights under Section 18(1) (a). However, we are not called upon to decide in this case as to what subordinate rights, if any, would accrue to a cultivating mutwalli or both the co-mutwallis, in such event. Thus my answer to the two questions referred to the Full Bench is as under:—

- (1) No bhumidhari rights in the land would accrue in favour of the cultivating mutwalli, much less both the mutwallis.
- (2) However, bhumidhari rights would accrue in the land in favour of God or waqf, under Section 18(1) (a) of the Zamindari Abolition and Land Reforms Act, provided that the mutwalli in question was cultivating the land as a mutwalli, i.e., as manager and agent of God or waqf, who owned and held the land as an intermediary on the relevant date. The question whether mutwalli was cultivating the waqf land as a mutwalli or in his personal capacity for his own benefit must necessarily depend on the facts, evidence and circumstances of each case.

38. **BY THE COURT:—** The questions referred to the Full Bench are answered as follows:—

- (1) No bhumidhari rights in the land would accrue in favour of the cultivating mutwalli, much less both the mutwallis.
- (2) However, bhumidhari rights would accrue in the land in favour of God or waqf, under Section 18(1) (a) of the Zamindari Abolition and Land Reforms Act, provided that the mutwalli in question was cultivating the land as a mutwalli, i.e., as manager and agent of God or waqf, who owned and held the land as an intermediary on the relevant date. The question whether mutwalli was cultivating the waqf land as a mutwalli or in his personal capacity for his own benefit must necessarily depend on the facts, evidence and circumstances of each case.

Reference answered accordingly.

AIR 1970 ALLAHABAD 518 (V 57 C 76)

FULL BENCH

R. S. PATHAK, M. H. BEG AND
R. L. GULATI, JJ.

Commissioner, Sales Tax, U. P., Appellant v M/s. Ram Bilas Ram Gopal, Respondents.

Sales Tax Ref. No. 587 of 1966, D/-
26-2-1969

Sales Tax—U. P. Sales Tax Act (15 of 1948), S. 2(h)—U. P. Wheat Procurement (Levy) Order (1959), Prc., Cls. 3, 2(d) —
—Sale made under Levy Order by licensed dealer to Regional Food Controller —
Nature of, indicated — Licensed dealer is liable to pay sales-tax on such sales.

The sales made by a licensed dealer to the Regional Food Controller under the U. P. Wheat Procurement (Levy) Order, 1959 are 'sales' as contemplated by the Sale of Goods Act, and therefore, 'sales' within the meaning of Section 2(h) of the U. P. Sales Tax Act. That being so the licensed dealer is liable to pay sales tax on such sales. (Paras 16, 30)

The U. P. Wheat Procurement (Levy) Order, 1959 has been made, as its preamble states, for maintaining the supplies of wheat and for securing its equitable distribution and availability at fair prices. It is a measure designed in the interest of social security and public welfare. It requires a licensed dealer and no one else to sell a specified percentage of the wheat with him to the State Government. If its purpose was the compulsory acquisition of wheat it could have, consistent with its object, cast the net wider and enclosed within it all persons, whether dealers or not, who had wheat in stock or procured or purchased it. But it confines itself to a licensed dealer. It selects a person whose business it is to sell. That clearly indicates that what is intended by the Levy Order is a sale transaction. It is true that the Levy Order does not expressly mention that a contract of sale will be entered into between the licensed dealer and the State Government. But the consent under the law of contract need not be express and can be implied. A sale can also take place by operation of law rather than by mutual agreement, express or implied. (Para 9)

Though Cl. 3 of the Levy Order imposes restriction on the licensed dealer to sell fifty per cent of wheat held by him to the Government, it leaves open to negotiation of parties all other details viz. time and mode of payment of the price and the time and the mode of the delivery of wheat. The freedom of contract is not materially impaired merely, because the legislation requires a dealer to enter into a contract of sale with another. A sale under the compulsion of a statute is still

a sale. It is not unknown that legislation itself should supply some of the terms of a contract. Instances are not uncommon where the legislature has intervened to modify the customary terms of a contract or to inject new elements into it. So long as the essential contractual base is not impaired no serious violence is done to the freedom of contract. (Para 12)

The obligations imposed by Cl. 3 of the Levy Order are imposed by legislation. The Levy Order is a piece of legislation made in exercise of legislative power delegated by Section 3(2) of the Essential Commodities Act, 1955. It is a legislative measure made by the State Government, as a delegate exercising legislative power conferred upon it by Parliamentary Statute. Moreover, if the dealer is exposed to penalty for breach of the Levy Order, that is by virtue of Section 7 of the Essential Commodities Act, which makes a breach of the order punishable. Therefore, whatever compulsive or coercive force is used to bring about a transaction under Cl. 3 of the Levy Order, it must be traced to legislation. It cannot be attributed to the State Government as a party to the transaction. Consequently, there is nothing in the Levy Order which can be accused of vitiating the free consent of the parties, as defined under Section 14 of the Contract Act, when entering into the contract of sales. (Case law discussed).

(Para 11)

Cases Referred: Chronological Paras

- (1969) AIR 1060 SC 343 (V 56) =
Civil Appeal No. 1364 of 1066,
D/-27-8-1968, State of Rajasthan 8, 30
v. Karam Chand Thapar
(1968) AIR 1968 SC 478 (V 55) =
(1968) 1 SCR 479, Indian Steel
and Wire Products Ltd. v. State
of Madras 6, 12, 13, 23, 24, 30
(1968) AIR 1968 SC 599 (V 55) =
(1968) 1 SCR 705, Andhra Sugar
Ltd. v. State of Andhra Pradesh
7, 9, 11, 13, 24, 25, 30
(1967) AIR 1967 Cal 338 (V 54) =
(1967) 18 STC 379, S. K. Roy v.
Addl. Member, Board of Revenue,
W. Bengal 15
(1963) AIR 1963 SC 1207 (V 50) =
(1963) Supp 2 SCR 459, New India
Sugar Mills v. Commr. of Sales
Tax, Bihar 5, 6, 7, 22,
23, 24, 26, 30
(1961) 1961 All LJ 528, Dharam
Das Vasan Mal v. Sales Tax Of-
ficer, Banda 14
(1961) 1961-12 STC 205 = ILR
(1962) Cut 322, M/s. Cement Ltd.
v. State of Orissa 15
(1958) AIR 1958 SC 560 (V 45) =
1959 SCR 379, State of Madras v.
Gannon Dunkerley & Co. (Madras)
Ltd. 5, 7, 21, 22, 23

Standing Counsel, for Appellant,

PATHAK, J.:— The assessee deals in foodgrains and oil-seeds at Maudaha in the district of Hamirpur. He supplied foodgrains to the Regional Food Controller under the U. P. Wheat Procurement (Levy) Order, 1959. The turnover of foodgrains so supplied was assessed to sales tax under the U. P. Sales Tax Act. On appeal by the assessee, the Assistant Commissioner (Judicial) Sales Tax excluded that turnover from assessment. The Additional Judge (Revisions) Sales Tax upheld the exclusion, holding that the supplies effected by the assessee to the Regional Food Controller did not amount to a sale for the purpose of Section 2(h) of the U. P. Sales Tax Act. At the instance of the Commissioner of Sales Tax, the Additional Judge (Revisions) has referred the following questions:—

- (1) Whether the sales made to the Regional Food Controller under the U. P. Procurement (Levy) Order, 1959, are sales within the meaning of "Sales" under Section 2(h) of the U. P. Sales Tax Act?
- (2) Whether in the circumstances of the case the assessee is liable to pay sales tax on the sales made to the Regional Food Controller under the provisions of the U. P. Wheat Procurement (Levy) Order, 1959?"

The case came on for hearing before a Division Bench, which because of the importance of the questions raised, referred the case to a larger Bench. The case has now been laid before us.

2. To appreciate the controversy embodied in the questions referred, it is necessary to examine the U. P. Wheat Procurement (Levy) Order, 1959. The "Levy Order", as I shall describe it, was made in exercise of the powers conferred by Section 3(2) of the Essential Commodities Act, 1955. It recites its purpose as the maintenance of supplies of wheat and the securing of its equitable distribution and availability at fair prices. Clause 3 of the Levy Order provides:—

"3. Levy on wheat procured or in stock:

- (1) Every licensed dealer shall sell to the State Government at the controlled prices

- (a) Fifty (50%) per cent of wheat held in stock by him at the commencement of this order: and

- (b) Fifty (50%) per cent of wheat procured or purchased by him every day beginning with the date of commencement of this order and until such time as the State Government otherwise directs.

- (2) The wheat required to be sold to the State Government under sub-cl. (1) shall be delivered by the licensed dealer to the Controller or to such other person as may be authorised by the Controller to take delivery on his behalf."

Clause 4 confers the power of entry, search and seizure on enforcement officers with a view to securing compliance with the Levy Order.

3. The essential question before us is whether when a licensed dealer supplies wheat to the State Government pursuant to Cl. 3 of the Levy order he has effected a sale as defined under Section 2(h) of the U. P. Sales Tax Act and is liable to sales tax under that Act.

4. The contention of the Assessee is that the supplies made by it are not under any contract of sale between it and the State Government but wholly because of the compulsion imposed on it by Cl. 3 of the Levy Order, and therefore, there is no sale and consequently no liability to Sales Tax. The Commissioner urges that the supplies effected under the Levy Order must be considered as made pursuant to an agreement between the assessee and the State Government and the provisions of Cl. 3 of the Levy order do not wholly exclude such agreement. Learned counsel for the parties have sought to support their submissions on the basis of some recent Supreme Court decisions, each party contending that what has been said there supports him. Before anything, therefore, it is appropriate that I refer to those decisions.

5. The first case is *New India Sugar Mills v. Commissioner of Sales Tax Bihar*, AIR 1963 SC 1207. The Assessee there owned a factory in Bihar and in compliance with directions issued by the Controller under the Sugar and Sugar Products Control Order, 1946 despatched sugar to the agents of the State of Madras. In assessment proceedings under the Bihar Sales Tax Act, 1947 the assessee contended that the supplies made by it could not be described as sales because there was no contract of sale. The facts disclose that the Govt. of different States intimated their requirements of sugar to the Sugar Controller of India from time to time. After considering those requisitions and having regard to the statements of stock received from various sugar factories, the Sugar Controller made allotments. An allotment order was sent by him to the factory-owner directing him to supply sugar to the State Government in accordance with despatch instructions to be conveyed by the latter. The State Government was notified of the allotment and upon despatch instructions communicated by it to the factory the sugar was despatched by the factory. It was admitted that those facts represented the course of dealing between the assessee and the State of Madras. The Supreme Court held, by majority (Kapur and Shah, JJ.), that the transactions of despatches of sugar by the assessee pursuant to the directions of the Controller were not the result of any contract of sale.

Reference was made to *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*, 1959 SCR 379 = (AIR 1958 SC 560) where while examining the validity of statutes of provincial legislatures imposing sales tax on the value of goods used in the execution of building contracts, the Supreme Court observed that the expression 'Sale of goods' in Entry 48 of List II of the Seventh Schedule of the Government of India Act, 1935 was a *nomen juris* and must be considered in the identical sense in which it had been understood in the Indian Sale of Goods Act, and the Provincial Legislatures had no power to tax a transaction which was not a sale of goods as understood in that Act. Now Section 4 of the Indian Sale of Goods Act, which defines 'the contract of sale' and 'sale' has been borrowed almost verbatim from Section 1 of the English Sale of Goods Act, and the Court therefore, adverted to what is said in Benjamin on Sale Eighth Edn:—

"To constitute a valid sale there must be a concurrence of the following elements, namely

- (1) parties competent to contract;
- (2) mutual assent;
- (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and
- (4) a price in money paid or promised."

It was pointed out that the second ingredient, namely mutual assent, was wanting in the course of dealing between the assessee, the New India Sugar Mills Ltd., and the State. There was no offer by the State Government to purchase sugar and no acceptance of any offer by the manufacturer. The manufacturer was left with no volition under the Control order, and it was obliged to carry out the order of the Controller to supply the sugar on pain of punishment for breach of the order. Hidayatullah, J. found himself unable to agree. He pointed out that consent under the law of contract need not be express but could be implied, that a sale could also take place by operation of law rather than by mutual agreement, express or implied, and that in the case before the Court when the State Government after receiving the allotment order sent instructions to despatch the sugar and the factory despatched it a contract emerged and consent had to be implied on both sides though not expressed antecedently to the allotment. He observed that although there was compulsion both in selling and buying, a compelled sale was nevertheless a sale, and it could not be said that there was no sale because the freedom to offer and accept was wanting.

6. The next case is *Indian Steel and Wire Products Ltd. v. State of Madras*, AIR 1968 SC 478. The assessee was assessed to sales tax under the Madras

General Sales Tax Act, 1939 on the turnover of steel products supplied by it in pursuance of the orders of the Controller under the Iron and Steel (Control of Production and Distribution) Order, 1941 issued under the Defence of India Act, 1939, Relying principally on *M/s. New India Sugar Mills*, AIR 1963 SC 1207 (Supra) the assessee contended that as it was the controller who determined the persons to whom the goods were to be supplied, the price at which they were to be supplied, the manner in which they were to be transported, and the mode in which the payment of the price was to be made, there was nothing left for the parties to determine by agreement, and, therefore, the transactions could not be considered as sales. The Supreme Court did not accept the contention, observing that while the Controller fixed the base price of the steel products and determined the buyers the parties were free to decide the remaining terms of the contract by consent. It was open to the assessee to agree with its customers as to the dates on which the goods were to be supplied. All orders booked were subject to the assessee's terms of business in force at the time, and it was also open to the assessee to fix the time and mode of payment of the price of the goods supplied. Accordingly, it could not be said, observed the Court, that the transactions were completely regulated and controlled by the controller leaving no room for mutual assent.

7. The third case is *Andhra Sugar Ltd. v. State of Andhra Pradesh*, AIR 1968 SC 599. Under Section 21 of the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1961 the State Government was authorised to levy a tax on the purchase of cane by a factory. It was contended that Section 21 was ultra vires because it proceeded beyond the scope of Entry 54 of List II of the Seventh Schedule of the Constitution which treated with "taxes on the sale or purchase of goods". The submission was that as the factory was compulsorily bound to purchase the cane offered by a cane-grower the "purchase" was not under any agreement for the purchase of the cane and, therefore, on a parity with the reasoning employed in *Gannon Dunkerley & Co. (Mad.) Ltd.*, 1959 SCR 379 = (AIR 1958 SC 560) (supra) the legislative power to tax was exceeded. The contention was not accepted by the Supreme Court. Bachawat, J., speaking for the Court, referred to the related provisions of the Indian Sale of Goods Act and the Indian Contract Act and, analysing the position under the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act and the Rules

framed under it, he observed:—

"..... The cane-grower in the factory zone is free to make or not to make

an offer of sale of cane to the occupier of the factory. But if he makes an offer, the occupier of the factory is bound to accept it. The resulting agreement is recorded in writing and is signed by the parties. The consent of the occupier of the factory to the agreement is not caused by coercion, undue influence, fraud, misrepresentation or mistake. His consent is free as defined in Section 14 of the Indian Contract Act though he is obliged by law to enter into the agreement. The compulsion of law is not coercion as defined in Section 15 of the Act. In spite of the compulsion, the agreement is neither void nor voidable. In the eye of law, the agreement is freely made. The parties are competent to contract. The agreement is made for a lawful consideration and with a lawful object and is not void under any provisions of law. The agreements are enforceable by law and are contracts of sale of sugarcane as defined in Section 4 of the Indian Sale of Goods Act. The purchases of sugarcane under the agreement can be taxed by the State Legislature under Entry 54, List II."

It was emphasised that even though there was no freedom of bargaining between the parties the contract was still a contract of sale. The Court rejected the submission that the decision in *New India Sugar Mills Ltd.*, AIR 1963 SC 1207 (Supra) should be regarded as an authority for the proposition that there can be no contract of sale under the compulsion of a statute. It was a matter, it said, which turned upon the facts of each case and the terms of the particular statute regulating the dealings between the parties.

8. I may also refer to the recent decision of the Supreme Court in *State of Rajasthan v. Karam Chand Thapar and Bros. Ltd.*, Civil Appeal No. 1364 of 1966, D/- 27-8-1968 = (AIR 1969 SC 343). The Court held that there was an agreement of sale between the parties and although the price chargeable for the goods was fixed under the Colliery Control Order, the effect of the Control Order was only to superimpose upon the agreement between the parties the rate fixed under the order. It was a case where the contract was merely modified by statutory provisions.

9. The U. P. Wheat Procurement (Levy) Order, 1959 has been made, as its preamble states, for maintaining the supplies of wheat and for securing its equitable distribution and availability at fair prices. It is a measure designed in the interest of social security and public welfare. It requires a licensed dealer to sell a specified percentage of the wheat with him to the State Government. The Levy order necessarily contemplates a transaction of sale by the dealer to the State Government. It is significant that it speaks of a 'licensed dealer'. A 'licensed dealer' is defined by Cl. 2(d) as 'a person

holding a valid licence' under the U. P. Foodgrains Dealers' Licensing Order, 1959. The Licensing order, which has also been made under Section 3(2) of the Essential Commodities Act, 1955 and with the same objective as the Levy Order, prohibits a person from carrying on business as a foodgrains dealer without a licence issued under that Order. It is an Order which deals only with persons who carry on the business of selling foodgrains. Therefore, a licensed dealer, required by the Levy Order, to sell wheat to the State Government is a person whose business it is to sell wheat, and the levy order contemplates that in the course of, and as part of his business activity, he will sell wheat to the State Government. It is important to note that the Levy Order selects a licensed dealer, and no one else. If its purpose was the compulsory acquisition of wheat it could have, consistent with its object, cast the net wider and enclosed within it all persons, whether dealers or not, who had wheat in stock or procured or purchased it. But it confines itself to a licensed dealer. It selects a person whose business it is to sell. That I think clearly indicates that what is intended by the Levy Order is a sale transaction. Now, it is true that the Levy Order does not expressly mention that a contract of sale will be entered into between the licensed dealer and the State Government, as was the case in *Andhra Sugar Mills Ltd.*, AIR 1968 SC 599 (Supra). But here by necessary implication a contract of sale is contemplated. How else can "a licensed dealer sell?"

10. Analysing in CL 3 of the Levy order it is clear that a licensed dealer is obliged to sell to the State Government fifty per cent of the wheat held in stock by him at the commencement of the order, and thereafter fifty per cent of the wheat daily procured or purchased by him beginning with the date of commencement of the order until such time as the State Government otherwise directs. The price at which the wheat is sold is the maximum price fixed in the Wheat (Uttar Pradesh) Price Control Order, 1959 as notified by the Government of India. Delivery of the wheat has to be given by the dealer to the Regional Food Controller or a person authorised by him in that behalf. The dealer has no option but to sell the specified percentage of wheat to the State Government. The State Government has also no option but to purchase fifty per cent of the wheat held in stock by the dealer at the commencement of the Levy Order. As regards the wheat procured or purchased daily by the dealer thereafter, it is open to the State Government to say that from any particular date it will not purchase any or all of the specified percentage of wheat. Therefore, as regards that wheat the Levy Order leaves it open to one of

the parties, namely the State Government, to decide when it will stop purchasing wheat from the dealer. That in substance is Cl. 3 of the Levy Order and it embodies the total sum of obligations imposed on the dealer and the State Government. All other details of the transaction are left open to negotiation. It leaves it open to the parties to negotiate in respect of the time and mode of payment of the price, the time and the mode of delivery of wheat and other conditions of the contract.

11. Before anything further, it is necessary to be clear about one thing. And that is that the obligations imposed by Cl. 3 of the Levy order are imposed by legislation. The Levy Order is a piece of legislation made in the exercise of legislative power delegated by Section 3(2) of the Essential Commodities Act, 1965. It is a legislative measure made by the State Government, as a delegate exercising legislative power conferred upon it by Parliamentary Statute. Moreover, if the dealer is exposed to penalty for breach of the Levy Order, that is by virtue of Sec. 7 of the Essential Commodities Act, which makes a breach of the order punishable. Therefore, whatever compulsive or coercive force is used to bring about a transaction under Cl. 3 of the Levy Order, it must be traced to legislation. It cannot be attributed to the State Government as a party to the transaction. This, then is clear. There is nothing in the Levy Order which can be accused of vitiating the free consent of the parties, as defined under Section 14 of the Indian Contract Act, when entering into the contract of sale. It was a similar test which the Supreme Court applied in *Andhra Sugar Mills Ltd.*, AIR 1968 SC 599 (Supra).

12. So, we have here in the Levy order a law which imposes restrictions on the freedom to contract. But as was observed by the Supreme Court in *Indian Steel and Wire Products Ltd.*, AIR 1968 SC 478 (supra):

"It would be incorrect to contend that because law imposes some restrictions on freedom to contract, there is no contract at all."

The freedom of contract is not materially impaired merely because the legislation requires a dealer to enter into a contract of sale with another. A sale under the compulsion of a statute is still a sale. It is not unknown that legislation itself should supply some of the terms of a contract. Instances are not uncommon where the legislature has intervened to modify the customary terms of a contract or to inject new elements into it. So long as the essential contractual base is not impaired no serious violence is done to the freedom of contract. Modern jurists conceive of the law as a powerful instrument

of social engineering. They point out that in a social order where the doctrine of *laissez-faire* has yielded place to the concept of a welfare society, the movement appears to proceed once again from contract of status. The development is normal and inevitable when the absolutism of individual rights has begun to give way to the play of wider social interests. Indeed, it is too late in the day to permit the values of a rapidly withering philosophy to influence and contain the growth of socially progressive forces. So long as these considerations can operate within the basic and primary fundamentals of the law, so long as they reflect progressive social trends consistent with the principles expressed in the Constitution, the approach which the Courts must adopt today when considering them becomes increasingly clear. A too rigid approach, valid when the values of a different social order dominated society, can result in stultifying the aspirations and objectives expressed in the Constitution, which carefully balances individual right against the social good.

13. Both in *Indian Steel & Wire Products Ltd.*, AIR 1968 SC 478 (Supra) and *Andhra Sugar Mills Ltd.*, AIR 1968 SC 599 (Supra) the Supreme Court has referred with approval to what Cheshire and Fifoot 6th Edn. P. 23 have said in their 'Law of Contract.'

"As the nineteenth Century waned it became ever clearer that private enterprise predicted some degree of economic equality if it was to operate without injustice. The very freedom to contract with its corollary the freedom to compete, was merging into the freedom to combine; and in the last resort competition and combination were incompatible. Individualism was yielding to monopoly, where strange things might well be done in the name of liberty. The twentieth century has seen its progressive erosion on the one hand by opposed theory and on the other by conflicting practice. The background of the law social, political and economic, has changed. *Laissez-faire* as an ideal has been supplanted by 'social security,' and social security suggests status rather than contract....."

The Supreme Court has repeatedly stressed that in the changing social pattern of today, the area within which a prospective buyer and an intending seller can bargain has been greatly reduced, and in *Indian Steel and Wire Products Ltd.*, AIR 1968 SC 478 (supra) that consequence was considered inevitable because:

"under the existing economic compulsions all essential goods being in short supply in a welfare State like ours, social control on many of our economic activities is inevitable. That does not mean that there is no freedom to contract. The concept of freedom of contract has under-

gone a great deal of change even in those countries where it was considered as one of the basic economic requirements of a democratic life. Full freedom to contract was never there at any time. Law invariably imposed some restrictions on freedom to contract. But due to change in political outlook and as a result of economic compulsions, the freedom to contract is now being confined gradually to narrower and narrower limits."

14. This Court in *Dharam Das Vasan Mal v. Sales Tax Officer, Banda*, 1961 AIL LJ 523 considered the closely analogous provisions of the U. P. Rice Procurement (Levy) Order 1958 and held that the transactions effected there were sales taxable under the U. P. Sales Tax Act. That is a conclusion with which, upon the considerations set out above, I respectfully agree.

15. I may refer, en passant, to *M/s. Cement Ltd. v. State of Orissa*, (1961) 12 STC 205 (Orissa) and *S. K. Roy v. Additional Member, Board of Revenue, West Bengal*, AIR 1967 Cal 338. In neither of those cases do the considerations which have prevailed with me appear to have been placed before the learned Judges who decided those cases and held that the transactions there were not sales.

16. In my judgment the sales made to the Regional Food Controller under the U. P. Wheat Procurement (Levy) Order, 1959 must be held to be sales as contemplated by the Indian Sale of Goods Act, and therefore, sales within the meaning of Section 2(h) of the U. P. Sales Tax Act. That being so the assessee is liable to pay sales tax on such sales.

17. In the result I answer the questions referred in the affirmative.

18. The Commissioner of Sales Tax is entitled to his costs which I assess at Rs. 200/-. Counsels' fee is also assessed in the same figure.

19. **R. L. GULATI, J.:**— I agree.

20. **M. H. BEG, J.:** The question to be answered and the relevant facts and provisions of law which gave rise to them are fully set out by my learned brother R. S. Pathak, J. I need not, therefore, repeat them. I will only indicate briefly my reasons for respectfully concurring with my learned brother. The answer to the first question seems to me to provide the answer to the second question automatically.

21. It is apparent that only a "Sale", as it is known to law, and no other kind of transaction can be taxed under the provisions of the U. P. Sales Tax Act. The view taken by the Supreme Court in AIR 1958 SC 560 was that the word "sale", as used in Entry No. 48 of Schedule VII of List 2 of Government of India Act of 1935 as well as in Entry No. 54 of Schedule VII of List 2 of the

Constitution, has the same meaning as the term "Sale" has in the Sale of Goods Act of 1930, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement". On this ground, a building contract, the terms of which were found to be "one, entire, and indivisible," was held to be outside the purview of "sale" of goods as a *Nomen Juris*.

22. In AIR 1963 SC 1207, the Supreme Court said that the ratio decidendi of *G. Dunkerley and Co.'s case*, 1959 SCR 379 = AIR 1958 SC 560 (supra) must govern its decision here also (see p. 1212). The majority view of their Lordships of the Supreme Court in this case was that the transactions before the court, in which sugar was supplied by a sugar factory in compliance with orders of the Government, passed under the Sugar and Sugar Products Control Order, 1946, did not amount to sales. The basis of this view was that supplies made in this case in obedience to orders given excluded the process of offer and acceptance as a result of any negotiations so that free consent, which was held to provide the essence of a contract to sell, was absent.

23. The trend of subsequent decisions of the Supreme Court is to uphold the character of transactions as sales notwithstanding the existence of an element of compulsion resulting from control orders which circumscribe the area of choice within which sales can take place. In AIR 1968 SC 478 sales regulated by a war time legislative measure, *The Iron and Steel (Control of Production and Distribution), Order, 1941* came up for consideration. It was held that they were sales notwithstanding that the sales in question could only take place at prices fixed by a Controller and "in accordance with the conditions contained or incorporated in general or special order of the Controller." The ground for a unanimous decision of five of their Lordships of the Supreme Court was that the test of "sale" laid down in *G. Dunkerley & Co.'s case*, 1959 SCR 379 = AIR 1958 SC 560 (supra) was satisfied. It was pointed out that this test was satisfied if there was a concurrence of the following elements viz., (1) parties competent to contract, (2) mutual assent, (3) a thing the absolute or general property in which is transferred from the seller to the buyer, and (4) a price in money paid or promised." The earlier decision in *New India Sugar Mills case*, AIR 1963 SC 1207 (supra) was distinguished on facts as "no room for mutual assent" was left in transactions under consideration in the earlier case.

24. In AIR 1968 SC 599 at p. 606 their Lordships of the Supreme Court ruled that the majority view in *New India Sugar Mills case*, AIR 1963 SC 1207 (supra) must be confined to the facts of

that particular case. In other words, the ratio decidendi of the earlier case could not be correctly deduced from the case without reference to the context and the subject-matter to which the accepted definition of sale had been applied. It appears to me that their Lordships adopted a well-recognised method of extracting the ratio decidendi of a case, indicated in Salmond's Jurisprudence (See: 12th edition, p. 29) and applied it to distinguish the New India Sugar Mills case, AIR 1963 SC 1207 (supra) from the cases before them both in Indian Steel and Wire Products case, AIR 1968 SC 478 (supra) and in the Andhra Sugar Ltd.'s case, AIR 1968 SC 599 (supra).

25. In Andhra Sugar Ltd.'s case, AIR 1968 SC 599 (supra) their Lordships of the Supreme Court pointed out that, although, the consequence of the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act of 1961 and the rules framed thereunder was to compel factories to enter into contracts of purchase of cane offered to them by cane growers on prescribed terms and conditions, yet, the nature of the transactions between the cane growers and the sugar factories did not lose the essential ingredients of "sale" inasmuch as there was offer and acceptance, the passing of consideration between the parties concerned, and an absence of any of the features which invalidate a contract.

26. If there had been a conflict between the ratio decidendi of the earlier three-Judge decision of the Supreme Court by a majority of one and the later Supreme Court decisions given by five of their Lordships unanimously in each case, we would have been bound to follow only the later decisions. But, as the Supreme Court has itself held in both the later cases that there was a distinction between the ratio decidendi of these cases and that of the earlier case, the question before us resolves itself into determining whether the ratio decidendi of the earlier case New India Sugar Mills Case, AIR 1963 SC 1207 or that of either of the two later cases governs the case before us.

27. This brings me to the facts of the case before us. Here, no particular sale is shown to have taken place as a result of any specific direction or order of the Government to make a supply. There is however, Cl. 3 of the U. P. Wheat Procurement (Levy) Order, 1959, which the assessee had to comply with in carrying on his business. This clause has already been reproduced in the judgment of my learned brother R. S. Pathak, J. The obvious result of the provision was that a licensed dealer was obliged to offer the quantities of wheat indicated in the order to the State Government which was impliedly bound to purchase it under the terms of this order at the controlled

prices. The control order only restricts the field of choice of parties and the price at which an offer could be made by either side. Nevertheless, the process of offer and acceptance and payment of price, presumably fixed at a fair rate, was retained. The essential ingredients of "sale", as indicated above, are not destroyed. The form of the transactions before us is that of sales and not of a compulsory acquisition of goods to be supplied.

28. It appears to me to be necessary to distinguish between a restriction in the area of choice of parties and the transaction itself in order to determine the true character of the transaction. Limitation of the field of choice is a necessary concomitant of a controlled or mixed economy which ours is. Absolute freedom of contract or unregulated operation of the laws of supply and demand, which an apotheosis of the laissez-faire doctrine demanded, led really to a shrinking of the area of freedom in the economic sphere, producing gross inequalities in bargaining powers and recurrent crises. Therefore, a regulated or a socialistic economy seeks to regulate the play of forces operating on the economic arena so that economic freedom of all concerned, including employers and employees, is preserved and so that the interests of consumers are also not sacrificed by any exploitation of conditions in which there is scarcity of goods. I think that the regulation or restriction of the area of choice cannot be held to take away the legal character of the transactions which take place within the legally restricted field. It is too late in the day, when so much of the nation's social and economic activities are guided and governed by control orders, allotment orders, and statutory contracts, to contend that mere State regulation of the economic sphere of life results in the destruction of the nature of the transactions which take place within that sphere.

29. It is true that the contract of sale is as we know from the analysis of its ingredients in Roman Law, a consensual contract. The basis of a consensual contract is a "consensus ad idem" or an agreement upon the same thing in the same sense. Can we say that when a licensed dealer is compelled under the provisions of law to make an offer of wheat to the Government at a controlled price this basis is destroyed? I think not. Again, can we say that the contract is not one as a result of which property passes for payment of "price" in money? The answer is clearly in the negative. Therefore, the definition of sale given by our Sale of Goods Act is satisfied.

30. The New India Sugar Mills case, AIR 1963 SC 1207 (Supra) could apply only where the transactions before the Court are not sales in the eye of law. The plying character or the legal obligation

in such transactions is created by an order of the Government and payment of price is only an incidental product of the obligation. The legal duty to supply arises from the order. On the other hand, in the type of transactions before the Supreme Court in Indian Steel Wire Products case, AIR 1968 SC 478 (Supra) and Andhra Sugar Ltd.'s case, AIR 1968 SC 599 (Supra) and Civil Appeal No. 1364 of 1966, D/-27-8-1968 = (AIR 1969 SC 343) the legal tie (*veniculum juris*) which bound the parties to perform their obligations was contractual. A regulatory law merely adds the obligation to enter into such a tie between the parties indicated there. It may even specify the terms, such as price, on which the agreement will take place. Regulation is still found to be subsidiary in such cases when the character of the transactions is examined. The transactions may take place within the limits set by or even as a consequence of a regulatory order. They are, however, sales in ultimate analysis. The case before us is governed by the ratio decidendi of the later type of cases. The dividing line between the two types of cases may appear to be very thin sometimes, but it is there.

31. I, therefore, answer the questions before us in the affirmative.

32. **BY THE COURT:**— Upon the reasons contained in our respective judgments we answer the questions referred in the affirmative.

33. The Commissioner of Sales Tax is entitled to his costs which we assess at Rs. 200/-. Counsel's fee is also assessed in the same figure.

Reference answered in affirmative.

AIR 1970 ALLAHABAD 525 (V. 57 C 77)

FULL BENCH

GANGESHWAR PRASAD, J. S. TRIVEDI AND HARI SWARUP, JJ.

Shambhu Dayal and others, Applicants v. Pt. Basdeo Sahai, Opposite Party.

Civil Revn. No. 1200 of 1963, D/- I-I-1970.

(A) Civil P. C. (1908), S. 115 — Arbitration Act (1940), S. 39 — Revision — Order setting aside an award — It is a 'case decided' and is revisable, AIR 1936 All 686 (FB), Held overruled by 1963 All LJ 109 (FB).

An order setting aside an award amounts to a 'case decided'. Such an order marks the termination of a stage of the suit, it precludes decision of the suit in accordance with the award and opens the controversy which would be set at rest if the award is not set aside. The provision for an appeal against such an

order also indicates that the legislature intended that the question whether an award should be sustained or set aside has to be decided by a higher court prior to and independently of the appeal against the decree which may eventually be passed as a result of the setting aside of the award. Therefore, an order setting aside an award decides a case within the meaning of S. 115 C.P.C. and is revisable under that section. AIR 1949 All 771 Rel. on; AIR 1936 All 686 (FB), held overruled, by 1968 All LJ 109 (FB).

(Para 7)

(B) Arbitration Act (1940), S. 30 — Award, setting aside of — Failure of arbitrator to perform certain impossible task — Award not liable to be set aside — Failure of arbitrator to decide certain matters — Decision if given likely to be immaterial to final decision — Award not liable to be set aside.

An award is not liable to be set aside on the ground of the arbitrator's omission to perform a certain impossible task which he had undertaken to perform. An award is also not liable to be set aside on the ground of the arbitrator's omission, deliberate or by oversight, to decide a matter which could not in any manner affect the ultimate actual decision of the dispute referred to arbitration. It may be that the matter omitted from decision could in the context of a certain finding, if given by the arbitrator, may assume importance and can have a vital bearing on the ultimate decision; but that would not invalidate the award if on the findings actually given by the arbitrator the omission becomes wholly immaterial. AIR 1925 All 103, Rel. on; AIR 1947 Lah 177 & AIR 1955 NUC (Cal) 887, Ref.

(Para 9)

(C) Hindu Law — Widow — Widow executing will — Bequeathing her husband's property held by her as such — Legatee cannot base a claim under will not only against next reversioner but even against those in unlawful possession.

A person acquires no interest under a will from a Hindu widow in respect of her husband's property held by her as such and a claim based on such a will is unenforceable not only against the next reversioner but even against a person in wrongful possession of the property. A will, unlike a transfer *inter vivos*, operates only after the death of the testator and since the interest of a Hindu widow holding her husband's property as such terminates upon her death the interests possessed by her is incapable of devolving upon the legatee. AIR 1923 Mad 367 & AIR 1924 Mad 676 & AIR 1927 Pat 262 & AIR 1931 Nag 194, Rel. on.

(Para 10)

(D) Arbitration Act (1940), Ss. 14, 38 — Both sections must be construed harmoniously — Fees of arbitrator — No

provision in Act for fixation of fees prior to reference — Court however can determine fees in the event of an application under S. 38(1) — Agreement for fees — When fees can be enhanced.

Both Sections 14 and 38 being applicable to arbitrations they have to be construed harmoniously and in a manner that does not render either of them redundant or nugatory. S. 38(1) contemplates or includes both a situation in which the fees of the arbitrator have not been previously fixed and a situation in which the fee has been fixed, and in either of these situations it empowers the court to order delivery of the award to the applicant on payment into court of the fee demanded by the arbitrator and then to direct that out of the fee so deposited the arbitrator shall be paid such sum as the court considers reasonable. The arbitrator is not precluded from demanding an amount in excess of what has been fixed nor is the court precluded from ordering payment of a fee in excess of what has been fixed even though there may be nothing to expressly indicate that the fixation was only of a tentative nature. In determining what would be the reasonable fee of the arbitrator the court will take into account what fee, if any, has been previously fixed but it has the power to order payment of such higher fee as it considers reasonable. If a party making an application under Section 38(1) has agreed by means of a written agreement between himself and the arbitrator to pay the fee demanded by the arbitrator S. 38(2) bars the making of such an application. This agreement may as far as the applicant is concerned, fix the fee for the first time or even vary the fee originally fixed and in either case it will prevent the making of an application under S. 38(1). *In arbitrations the fixation of the arbitrator's remuneration prior to his entering upon the arbitration may be done in two ways viz., by an agreement between the parties or by an order of the Court. There is, no specific provision in the Act for fixation of the arbitrator's fee by the court prior to the making of reference but the court has the power to ultimately determine reasonable fee in the event of an application made under S. 38(1). If, after the fixation of fee by the court, the parties choose to proceed with the arbitration and the arbitrator enters upon it, an agreement between the parties and the arbitrator is implied in their conduct. But the fixation of the fee at this stage cannot be regarded as final and is subject to variation both by subsequent agreement and by order of the court. The agreement, if it is to operate as a bar to an application under S. 38(1), has to be in writing, but that does not mean that no other kind of agreement can either be made or taken*

into consideration by the Court. It is open to the parties to the reference to fix or enhance the fee of the arbitrator just as it is open to the court to do so. (1904) 20 TLR 241 & AIR 1934 Nag 199 & AIR 1933 Sind 300, Ref. (Para 11)

(E) Arbitration Act (1910), S. 38 — Evidence Act (1872), S. 114 — Conclusive proof — Statement of arbitrator as to amount of fees be received — Statement presumed to be correct.

Where an arbitrator candidly mentioned in his award that the parties had paid him Rs. 100/- each on account of his fee such statement of the arbitrator, like a statement of a judge as to what took place before him in relation to a proceeding should be regarded as almost conclusive and its correctness has to be presumed unless there is strong proof to the contrary. AIR 1924 Mad 274, Rel. on. (Para 12)

(F) Arbitration Act (1940), Ss. 38, 30 — Misconduct of arbitrator — Arbitration proceedings turning out complicated, protracted and requiring necessity of spot inspection — Arbitrator accepting extra amount of fees from each party is not guilty of misconduct.

Where the arbitration proceedings turn out to be complicated, protracted and required even a spot inspection, if the arbitrator accepts an extra amount of fees from both the parties he is not guilty of misconduct though it would be more advisable for an arbitrator to obtain an order for enhancement of fees from the court. (1906) ILR 29 Mad 44 & AIR 1935 Cal 359, Ref. (Paras 12, 13)

(G) Civil P. C. (1908), S. 115 — Court not considering important material on record — Failure to record finding on crucial matter — Court acts illegally at least with material irregularity — Such order is fit for revision.

If a court omits to consider a material on record having a bearing on the question to be decided by it or fails to apply its mind to or to record a finding on a crucial aspect of the case which cannot be ignored in the determination of the controversy before the court, it certainly acts illegally or at least with material irregularity in the exercise of its jurisdiction. Such order is open to revision under S. 115. 1969 All LJ 38, Ref. (Para 15)

(H) Arbitration Act (1940), Ss. 12, 17, 23, 30, 39 — Civil P. C. (1908), S. 115 — Misconduct of arbitrator — Question relates to jurisdictional fact — Distinction between jurisdiction to dispose of the suit and jurisdiction to decide matter referred to arbitrator pointed out. (Per Majority). AIR 1935 All 456, Overruled.

Per majority— (Hari Swarup J. contra) — The question whether an arbitrator has been guilty of misconduct is a question relating to a jurisdictional fact.

and Section 23 is conclusive on this point. Once a matter has been referred to arbitration under S. 23(1) the jurisdiction of the court to adjudicate upon that matter ceases, and sub-section (2) of the Section precludes the court from adjudicating upon it unless it regains the jurisdiction to do so under the provisions of the Act. That regaining of jurisdiction by the court over the subject matter of the reference can be brought about only by supersession of the reference or setting aside of the award given by the arbitrator. It is true that even after the making of a reference the court retains jurisdiction over the suit and it is the court which has to finally dispose of the suit in accordance with the award. But the distinction between the jurisdiction to dispose of the suit and the jurisdiction to decide that particular matter which had been referred to arbitration should not be lost sight of. If an award has been made and has not been set aside the court has no power to decide the matter which formed the subject-matter of reference and it has to pronounce judgment according to the award. It is manifest that in determining whether an arbitrator has been guilty of misconduct and his award has consequently to be set aside the court determines a jurisdictional fact. Where the court exercises a jurisdiction not vested in it by law, the matter is open to revision under S. 115 Civil P. C. The fact that the court had initially the jurisdiction to entertain the suit does not lead to the conclusion that no decision given by it during the progress of the suit can relate to a jurisdictional fact. If at an intermediate stage of the suit the court loses its jurisdiction over a particular matter, involved in the suit, an order having the effect of bringing back that matter within the jurisdiction of the court must be held to be dealing with a question touching its jurisdiction. AIR 1966 SC 1431 & AIR 1959 SC 492 & AIR 1962 SC 646, Rel. on; AIR 1935 All 456, Overruled. (Paras 16, 17, 18)

Per Hari Swarup, J. Contra: The jurisdiction of the trial court to decide about the misconduct of the arbitrator and the proceedings arises under S. 17 read with S. 30 of the Arbitration Act. Court has the jurisdiction to decide whether the arbitrator has or has not misconducted himself of the proceedings. This has to be on the basis of the evidence produced before the court. It had to be a decision on merits. The jurisdiction to decide the question does not depend upon the final decision of the issue. The decision can be made only after the court assumes jurisdiction and, therefore, such a decision cannot be held to be a jurisdictional fact. The reasons on which the award is to be set aside or not are given under S. 30 of the Arbitration Act and the find-

ing on those reasons is to be given under S. 17 of the Act. It cannot be said that the trial Court does not have the jurisdiction to decide whether the facts exist justifying the setting aside of the arbitration award. Similarly the appellate Court exercising the powers under Section 39 of the Arbitration Act has the jurisdiction to decide whether the circumstances exist for the setting aside of the award mentioned in Section 30 of the Arbitration Act and if the court on the basis of the evidence before it comes to the conclusion that circumstances exists to establish the misconduct of the arbitrator or the arbitration proceedings within the meaning of Section 30 it has the duty and the jurisdiction to set aside the award under Section 17 of the Arbitration Act. Section 39 of the Arbitration Act prohibits a second appeal and the High Court in exercise of the powers under Section 115 of the Civil P. C. cannot exercise the appellate powers and set aside the order of the court below passed under Section 39 of the Act.

The High Court cannot, in exercise of the powers under Section 115 reconsider the evidence on the basis of which the court below has come to the conclusion that the arbitrator had misconducted himself and the proceedings. AIR 1965 SC 1585 & AIR 1966 SC 153 & AIR 1966 SC 439, Rel. on; AIR 1966 SC 1431 & AIR 1959 SC 492 & AIR 1968 SC 1355, Dist., AIR 1935 All 456, Rel. on.

(Paras 24, 25)

(I) Arbitration Act (1940), S. 30 — Misconduct — What amounts to.

Per Trivedi J.: It is settled now that the phrase 'misconducting himself or the proceedings' does not necessarily imply moral turpitude, but includes neglect and breach of duties and responsibilities which result in miscarriage of justice. It comprehends action opposed to rational and reasonable principles. (Para 45)

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All 946, Tulsi Ram v. Binda Ban
Das
- (1935) AIR 1935 All 456 (V 22) =
1935 All WR (HC) 514, Mst.
Saraswati v. Wall
- (1935) AIR 1935 Cal 359 (V 22) =
38 Cal WN 784, Akshoy Kumar
v. S. C. Dass & Co.
- (1934) AIR 1934 Nag 199 (V 21) =
31 Nag LR '85, Girdharilal v.
Surendranath Mukarjee
- (1933) AIR 1933 Sind 300 (V 20) =
147 Ind Cas 319, Bulchand
Khimandas v. Thakurdas Udhavdas
- (1932) AIR 1932 All 452 (V 19) =
ILR 53 All 1006, Risal Singh v.
Faqira Singh
- (1931) AIR 1931 Nag 194 (V 18) =
27 Nag LR 283, Tejmal v. Sawaji
- (1927) AIR 1927 Pat 262 (V 14) =
ILR 6 Pat 788, Jagdeo Singh v.
Mt. Raja Kuar
- (1925) AIR 1925 All 103 (V 12) =
22 All LJ 919, Khub Lal v.
Bishambhar Sahai
- (1925) AIR 1925 All 458 (V 12) =
ILR 47 All 121, Muhammad Fakh-
ruddin v. Rahimullah Shah
- (1925) AIR 1925 All 566 (V 12) =
ILR 47 All 916, Rudra Prasad
Pandey v. Mathura Prasad Pandey
- (1924) AIR 1924 Mad 274 (V 11) =
75 Ind Cas 850, In the matter of
Arbitration Act
- (1924) AIR 1924 Mad 676 (V 11) =
46 Mad LJ 560, Srinivasachariar
v. Raghavachariar
- (1923) AIR 1923 Mad 367 (V 10) =
44 Mad LJ 60, Mahalashmamma
v. Vemli Reddi
- (1921) AIR 1921 All 1 (V 8) = ILR
43 All 564 (FB), Budhoo Lal v.
Mewa Ram
- (1906) ILR 29 Mad 44, Subraya
Prabhu v. Manjunath Bhakta
- (1904) 20 TLR 241 = 68 JP 242,
Llandrindod Wells Water Co. v.
Hawksley
- (1883) ILR 5 All 293 = 1883 All WN
39, Chatter Singh v. Lekhraj
Singh
- R. B. Pandey, for Applicants; D. S.
Tewari, C. P. Srivastava and Naresh
Chandra, for Opposite Party.
- GANGESHWAR PRASAD, J.:** This
application in revision has been laid be-
fore this Full Bench upon a reference
made by Dhavan, J. It is directed against
an order of the Judge Small Cause Court,
Agra (exercising the powers of a Civil
Judge) by which he reversed in appeal
an order of the Munsif Fatehabad, Agra,
refusing to set aside an award and sent
back the case to him with the direction
to hear and decide the suit in which the
award was given.
2. The relevant facts are these. Bas-
deo Sahai, plaintiff, filed Suit No. 121 of
1949 in the court of the Civil Judge, Agra,
against Gauri Shanker, Basant Lal and
Sukh Ram for a declaration that he was
in possession of the property in suit
which is a house situate in Qasba Fiza-
bad, district Agra as its exclusive owner
and that the defendants had no right to
disturb his possession over it in any man-
ner. The suit was transferred to the
court of the Munsif Fatehabad, Agra, by
an order of the District Judge. During
the pendency of the suit Gauri Shanker
and Basant Lal defendants died and their
heirs were brought on record. The case
of the plaintiff was that the house in suit
was the self-acquired and exclusive prop-
erty of Saktoo who was an adopted son
of Mukund and his wife and who suc-
ceeded to the entire property left by
them as such. It was alleged that after
the death of Saktoo his property devolved
upon his son Gur Dayal and that the
plaintiff was the son of Gur Dayal's sister,
Smt. Jamuna Devi. It was further
alleged that Gur Dayal executed a will
dated January 16, 1916 providing that
after his death his entire property would
go to his wife Smt. Gulab Kuar and that
the plaintiff would become the owner
thereof after the death of Smt. Gulab
Kuar. In accordance with the provisions
of the aforesaid will Smt. Gulab Kuar
got the property left by her husband and
she too executed a will dated May 4, 1947,

bequeathing all her property to the plaintiff. The plaintiff laid claim to the house in dispute under the two wills mentioned above and, alternatively, as an heir of Gur Dayal by virtue of being his sister's son. The plaintiff asserted that he had been exercising rights of ownership in the disputed house but as the defendants had recently put forward a claim in respect of it by filing an objection under Order XXI, Rule 100, C.P.C. in proceedings for execution of a decree for ejectment obtained by him against a tenant of the house and as their objection had been allowed he was compelled to institute the suit. The defendants resisted the suit and repudiated the title of the plaintiff. They denied that the plaintiff was Gur Dayal's sister's son or related to Gur Dayal in any manner and stated that neither Gur Dayal nor his widow Smt. Gulab Kuar had executed any will. They further contended that the house in dispute had been acquired by Saktoo from joint family funds, that his son Gurdoyal was the owner thereof by right of survivorship after the death of Saktoo, that Gur Dayal had adopted as his son one Raghubir Prasad who died six months after the death of Gur Dayal and that Smt. Gulab Kuar inherited the house thereafter as a limited owner. According to the defendants, neither Gur Dayal nor his widow Smt. Gulab Kuar was competent to execute any will in respect of the house and the wills, if executed, were totally ineffective.

3. During the pendency of the suit the parties agreed that the whole matter in difference between them in the suit be referred to the arbitration of Sri Mathura Prasad Kacker, an Advocate of Agra, and the learned Munsif, accordingly, made a reference on September 21, 1951. Sri Mathura Prasad Kacker entered upon the arbitration and after hearing the parties, taking the evidence produced by them and making a local inspection gave an award on January 5, 1953. According to the award the plaintiff was not entitled to any relief and his suit was to be dismissed with costs. The plaintiff preferred objections to the award but they were rejected by the Munsif who pronounced judgment in terms of the award and dismissed the suit with costs on April 13, 1953. On an appeal filed by the plaintiff, the predecessor-in-office of the learned Judge who passed the order under revision set aside the order of the Munsif and sent back the case to him with the direction that he should remit the award to the arbitrator and then dispose of the case according to law. Against the said appellate order the plaintiff came up in revision to this court. On April 14, 1961, that revision was allowed, the order passed in appeal was set aside and the case was sent back to the appellate court

for being decided afresh. The case was, accordingly, reheard and the order against which this application in revision is directed was passed on July 18, 1963.

4. The legality of the award was assailed before the appellate Judge on three grounds viz., that the omission of the arbitrator to decide the question of adoption of Saktoo amounted to misconduct on his part, that the award was given beyond time and that the arbitrator accepted as his remuneration an amount in excess of what had been fixed by the court and he also accepted from the plaintiff a fee for inspecting the house in dispute. The learned Judge found no force in the second ground mentioned above but the remaining two grounds commended themselves to him and he set aside the award as being vitiated by misconduct of the arbitrator.

5. The first question that arose for consideration before Dhavan, J. was whether by means of the order of the appellate Judge setting aside the award any case can be said to have been decided within the meaning of Section 115 of the Code of Civil Procedure, and it was on account of the conflict that the learned Judge found in the decisions bearing on the question that he made the reference as a result of which this application in revision came up before this Bench. At the hearing before us, Sri N. C. Upadhyaya, learned counsel for the plaintiff, conceded that the order under revision amounts to a case decided and my brother Hari Swarup, J. has, therefore, not thought it necessary to discuss this question in his judgment which I have had the advantage of reading. I, however, think it proper to examine the question and not to rest my decision thereon on the concession of the learned counsel, particularly because in some cases of this court it has been clearly held that an order setting aside an award is not a decision of a case within the meaning of Section 115 of the Code of Civil Procedure.

6. The most important case of this court dealing specifically with this question is the Full Bench case of Govind Das v. Mst. Indrawati, AIR 1938 All 557 (FB) where all the earlier cases of this court were reviewed and some cases of other High Courts were also referred to. It would, however, appear that Bennet Ag. C. J. who delivered the judgment of the Full Bench really based it on some earlier cases of this court in which it was held that the order superseding an arbitration and setting aside an award would not amount to a case decided, and the only reason which he himself gave in support of the above view was that since Sec. 104 of the Code of Civil Procedure did not provide for an appeal against an order

under Para 15 of the Second Schedule to the Code it appeared that the Code did not intend that such an order should be the subject of reference to the higher courts.

The earliest case of this court referred to in the judgment of the Full Bench is *Chattar Singh v. Lekhraj Singh*, (1863) ILR 5 All 293 in which the termination of a proceeding for arbitration was held not to be a decided case for the purpose of a revision under Section 622 of the former Code of Civil Procedure on the ground that the proceeding was of an interlocutory character only. The next case to which reference was made is *Budhoo Lal v. Mewa Ram*, AIR 1921 All 1 (FB) decided by a Full Bench of five Judges. The question involved in that case was whether the decision of an issue relating to the jurisdiction of a court to try a case amounted to a decision of a case for the purpose of Section 115 of the Code of Civil Procedure, and the majority view was that it did not amount to such a decision. It would be seen that all the cases of this court in which it was held that an order superseding an arbitration and setting aside an award does not amount to a case decided were founded on *Budhoo Lal's* case. *Muhammad Fakhruddin v. Rahmullah Shah*, AIR 1925 All 458; *Rudra Prasad Pandey v. Mathura Prasad Pandey*, AIR 1925 All 566; *Risal Singh v. Faqira Singh*, (AIR 1932 All 452) and *Tulsi Ram v. Bindaban Das*, 1936 All LJ 547 which took the view that was accepted by the Full Bench in AIR 1938 All 557 based themselves entirely on *Budhoo Lal's* case, AIR 1921 All 1 (FB) and indeed, they proceeded on the footing that *Budhoo Lal's* case, AIR 1921 All 1 (FB) left no scope for a different view.

The decision in AIR 1921 All 1 (FB) has, however, been expressly overruled by the Supreme Court in *S S Khanna v. F. J. Dillon*, (AIR 1964 SC 497) and the very foundation of the Full Bench decision in AIR 1938 All 557 and all other decisions referred to above has, therefore, been completely destroyed and they must be regarded as having altogether lost their authority. The consideration from which *Bennet Ag. C. J.* derived support for the opinion expressed by him in the case of *Govind Das* is also out of question now in view of the fact that Section 39 of the Arbitration Act of 1940 specifically provides for an appeal against an order setting aside an award and it can no longer be urged that such an order is not intended to be challenged before a higher court separately from and independently of the decree that may ultimately be passed in the suit in which the award has been made.

7. In AIR 1964 SC 497 (supra) it was observed that the view taken in *Budhoo*

Lal's case proceeded upon the fallacy that because the expression "case" includes a suit in defining the limits of the jurisdiction conferred upon the High Court the expression "suit" should be substituted in the section when the order sought to be revised is an order passed in a suit, and their Lordships held that the expression "case" is one of comprehensive import and it includes civil proceedings other than suits and is not restricted by anything contained in the section to the entirety of the proceedings in a Civil Court. On the authority of the above decision of the Supreme Court it has been recently held by a Full Bench of five Judges in *Rama Shanker Tewari v. Maha Deo*, 1968 All LJ 109 that even an order allowing or refusing an amendment of a pleading under Order VI, Rule 17 C.P.C. is a case decided within the meaning of that expression in Section 115 C.P.C. and the Full Bench case of *Ms. Suraj Pal v. Ariya Pratinidhi Sabha*, AIR 1936 All 686 (FB) in which a contrary view was expressed has been overruled. An order setting aside an award stands on a much higher footing than an order allowing or refusing amendment of a pleading and the reasons for holding that it amounts to a case decided are much weightier. Such an order does not merely dispose of a branch of the suit or mark the termination of a stage of the suit; it precludes decision of the suit in accordance with the award and opens the controversy which would be set at rest if the award is not set aside. The provision for an appeal against such an order also indicates that the legislature intended that the question whether an award should be sustained or set aside has to be decided by a higher court prior to and independently of the appeal against the decree which may eventually be passed as a result of the setting aside of the award. It seems, therefore, clear that an order setting aside an award decides a case within the meaning of Section 115 C.P.C. and is revisable under that section.

I may here call attention to the Division Bench decision of this Court in *Mohd. Yakub Khan v. Sirajul Haq*, AIR 1949 All 771. In that case an appellate Court had disposed of the appeal before it by setting aside an award and a decree passed thereon by the trial Court and had ordered that the suit in which the award was made be heard on merits. On a revision filed against the appellate order it was held that there was a case decided within the meaning of Section 115 C.P.C. and the order was open to revision. The Full Bench case of AIR 1938 All 557 (FB) was distinguished by the Division Bench on the basis that in the aforesaid case the trial Court had itself decided that the award in question was invalid and the order setting aside the award was thus

an interlocutory order but in the case before the Division Bench the award had been set aside by the appellate Court and the appeal had been completely disposed of.

It was also pointed out by the Division Bench that AIR 1938 All 557 (FB) was decided before the coming into force of the Arbitration Act of 1940 which provides for an appeal against an order setting aside an award. In view of the pronouncement of the Supreme Court in S. S. Khanna's case it would not be correct to say that no interlocutory order is open to revision and the decision in AIR 1938 All 557 (FB) cannot, therefore, be now regarded as good law. In the instant case too, as in the case of AIR 1949 All 771 the order setting aside an award was passed by the appellate Court and it can consequently be said that the appeal has been completely disposed of by the appellate Court. This would be a sufficient answer to an objection against the maintainability of an application in revision against the appellate order; but I would base my decision on the broader ground that a revision would lie against an order setting aside an award no matter whether such an order passed by the trial Court has been confirmed in appeal or whether it has been passed in appeal by reversing a contrary order passed by the trial Court. By means of the order under a revision a case has, in my opinion, been decided within the meaning of Sec. 115, Civil P. C. and the revision is clearly entertainable.

8. What has then to be considered is whether in holding that the arbitrator was guilty of misconduct in the arbitration proceedings the learned Civil Judge can be said to have exercised a jurisdiction not vested in him by law or to have acted in the exercise of his jurisdiction illegally or with material irregularity. In the circumstances of the case it, however, appears to me necessary that I should first examine the finding of the learned Civil Judge as to misconduct of the arbitrator and the reasons on which it is founded and then proceed to a consideration of the above question. As noted above, the learned Civil Judge held that the omission on the part of the arbitrator to decide the question of adoption of Saktoo and the acceptance by the arbitrator of a remuneration in excess of the amount fixed by the Court and of a fee for local inspection constituted acts of misconduct. I will deal with these items in the order in which they have been stated.

9. In paragraph 3 of the plaint it was stated by the plaintiff that the property in suit was a self-acquired and exclusive property of Saktoo. In paragraph 3 of the written statement filed by the defendants it was admitted that the disputed

property had been purchased by Saktoo but in paragraph 24 it was alleged that the property had been acquired by Saktoo out of joint family funds. On the plaintiff's case his claim did not at all depend upon the fact of adoption, although he did state in paragraph 2 of the plaint that Saktoo was an adopted son of Mukund and his wife Smt. Bhawani. The plaintiff based his title to the property on the two deeds of will mentioned above and on his being related to Saktoo's son, Gurdayal, as his sister's son. If these bases of his alleged title failed it was a matter of no consequence whatsoever the family in which he was born or was adopted by Mukund and Smt. Bhawani. The arbitrator found that the wills had not been proved and they were, at any rate, ineffective for the purpose of creating any title in the plaintiff. He further found that Saktoo had no daughter and the plaintiff was, therefore, not related to Gurdayal as his sister's son. In view of those findings the question whether Saktoo had been adopted by Mukund and Smt. Bhawani became devoid of all significance and the finding thereon could in no manner affect the findings actually recorded by the arbitrator or his ultimate decision regarding the title of the plaintiff.

It will be noticed that apart from saying that the contents of paragraph 2 of the plaint were not admitted the defendants did not in the written statement, say anything about the alleged adoption and no issue on the question of adoption was framed by the trial Court. The only bearing that the question of adoption could have on the controversy between the parties was that in the event of an adoption Raghubir (who was found by the arbitrator to have been adopted as a son by Gurdayal) could be the only coparcener of Gurdayal and the members of the family of Gurdayal's natural father could not have remained his coparceners, with the result that the existence of Raghubir alone could render Gurdayal incompetent to execute the will which he was alleged to have executed in case the property in dispute was a coparcenary property. If, however, the will alleged to have been executed by Gur Dayal was not really executed by him or the plaintiff failed to satisfy the arbitrator of its execution no question as to the competency of Gurdayal to execute it could arise. It is true that after unhesitatingly discarding the will and expressing the definite opinion that the plaintiff had failed to prove the will said to have been executed by Gurdayal the arbitrator also held it to be unenforceable and observed: "As such I am inclined to hold that this property was not his self-acquired property and as such he was not competent to dispose of it by will especially as Raghubir had been adopted by him as I am holding under Issue No. 4." In

view of the finding on the factum of the execution of the will, however, the additional finding as to the incompetency of Gurdalal to execute a will was entirely unnecessary.

Moreover, the existence of Raghubir could by itself create the incompetency if the house in suit was a coparcenary property and it cannot, therefore, be urged that the omission of the arbitrator to consider the question of adoption led to any error in the finding as to the ineffectiveness of the will. In any case, the acceptance of the plaintiff's case regarding adoption could in any manner either establish or improve his claim to the property in dispute in view of the clear finding of the arbitrator that the plaintiff had failed to establish that Gurdalal had made any will. The learned Civil Judge observed in his judgment that the question of adoption had an important bearing on the rights of the parties to the property in dispute but he did not give the least indication as to how it could have any bearing in face of the finding that Gurdalal had not executed the will set up by the plaintiff. Reference was made by the learned Civil Judge to *Khulal v. Bishanbhar Sahai*, AIR 1925 All 103 where it was observed by a Division Bench of this Court that if an arbitrator chooses to undertake the decision of a variety of matters with the consent of the parties, and he deliberately or by an oversight without the consent of the parties omits from his decision anything really material it is sufficient to destroy the award. I have already pointed out that a decision on the question of adoption became wholly immaterial after a finding that the will which Gurdalal was said to have executed had not been executed by him. The observations relied upon by the learned Civil Judge really support the award in question inasmuch as they necessarily imply that if the decision of a matter is not material for the decision of the dispute before the arbitrator his omission to decide that matter does not vitiate the award. I may further note that in above case the award was actually upheld because the Court found that the task which the arbitrator had omitted to perform by means of the award, was in the circumstances, impossible for him to perform.

And just as an award is not liable to be set aside on the ground of the arbitrator's omission to perform a certain task which he had undertaken to perform, if the omission is due to the fact that it is not possible for him to perform it, an award is not liable to be set aside on the ground of the arbitrator's omission, deliberate or by oversight to decide a matter which could not in any manner affect the ultimate actual decision of the dispute referred to arbitration. It may be that the matter

omitted from decision could in the context of a certain finding, if given by the arbitrator, have assumed importance and could have a vital bearing on the ultimate decision; but that would not invalidate the award if on the findings actually given by the arbitrator the omission becomes wholly immaterial and no finding on the said matter could have altered the final conclusion reached by the arbitrator respecting the subject-matter of the dispute referred to him. In *Madanlal v. Nabl Buksh*, AIR 1947 Lah 177 it was held that there is no rule of law that an arbitrator must decide all the issues framed in the suit expressly as long as the whole suit is decided by him. To the same effect is the decision in *S. K. Roy and Co. Ltd. v. Union of India*, AIR 1955 NUC (Cal) 887 where it was observed that an arbitrator is not bound to give an award on each point raised and that if he gives an award on the whole case he would not be guilty of misconduct merely because he does not decide a specific issue.

It would be recalled that no issue on the question of adoption was framed by the trial Court and I may repeat that the necessity of a decision on that question did not arise in view of the other findings arrived at by the arbitrator. The arbitrator had to adjudicate upon the respective claims of the parties to the property in dispute and he was under no obligation to disclose the mental process by which he arrived at the adjudication. However, he did disclose in his award his method of approach to the matter in controversy and his line of reasoning and they do not suffer from any error of law either by reason of omission to decide any matter or by reason of the nature of the decision actually given.

10. It was contended on behalf of the plaintiff opposite party that even if the alleged will of Gurdalal is ignored and his widow Smt. Gulab Kuar is regarded as having been in possession of the house in dispute as a life estate holder under the Hindu Law a will executed by her was not wholly ineffective, as the arbitrator thought, and it created in favour of the plaintiff a title which could be defeated or challenged only by the next reversioner. The contention does not appear to me to be acceptable. In *Mahalakshamma v. Vem Reddi*, AIR 1923 Mad 367 a Division Bench of the Madras High Court held that a person who claimed to be the legal representative of a woman under a will in respect of property possessed by her as a widow of her deceased husband was not entitled to be brought on record in her place. This decision was followed in *A. R. Shrinivasachariar v. A. Raghavachariar*, AIR 1924 Mad 676 where a legatee under the will of a Hindu widow by which she bequeathed her husband's property was held to have derived no title

under the will and to have been incompetent to maintain a suit for ejectment even against a trespasser.

Relying on the above case and on some other cases, a Division Bench of the Patna High Court ruled in Jagdeo Singh v. Mst. Raja Kuar, AIR 1927 Pat 262 that a legatee under a will made by a Hindu widow in respect of her husband's property takes no interest whatsoever in that property because the widow is incapable of creating any interest beyond her life time. Reference may also be made to Tejmal v. Sawaji, AIR 1931 Nag 394 where it was held that a Hindu widow is incompetent to make a testamentary disposition of the property which devolves on her from her husband. I am in respectful agreement with the view taken in the above cases and it seems to me obvious that a person acquires no interest at all under a will from a Hindu widow in respect of her husband's property held by her as such and that a claim based on a will of that kind is unenforceable not only against the next reversioner but even against a person in wrongful possession of the property. A will, unlike a transfer inter vivos operates only after the death of the testator and since the interest of a Hindu widow holding her husband's property as such terminates upon her death the interest possessed by her is incapable of devolving upon the legatee. The view of law taken by the arbitrator cannot, therefore, be said to be erroneous and in fact it has abundant authority in support of it. But I may again point out that the arbitrator did not find that even the execution of the will alleged to have been executed by Smt. Gulab Kuar had not been satisfactorily established.

11. I may now pass on to the charge of misconduct based on the arbitrator's acceptance of a remuneration in excess of the amount fixed by the Court. It cannot be disputed that the arbitrator, who was an advocate, was entitled to reasonable remuneration for acting as such. Even if the fee of arbitrator had not been fixed by the Court before making a reference, the arbitrator could have claimed a fair and reasonable amount of fee for the performance of the task entrusted to him. In *Llandrindad Wells Water Co. v. Hawksley*, (1904) 20 TCR 241 it was observed that where the parties have chosen their own arbitrator they must be taken to have intended to pay him at the rate ordinarily charged by reason of his experience and they must pay his fees unless it is proved that the charges are extortionate. This case was cited in *Girdharilal v. Surendranath Mukerjee*, AIR 1934 Nag 199 and followed in *Bulchand Khimandas v. Thakurdas Udhavdas*, AIR 1933 Sind 300. It will be noticed that the Arbitration Act, 1940 does not provide for the fixation of

the fee of the arbitrator by the Court at the time of making reference to arbitration nor at any time prior to the award, presumably because it is not possible for the Court to have a correct idea of the magnitude of the task which the arbitrator is called upon to perform or the quantity of work which he would be required to do. The arbitrator too is not in a position to know before hand the time and the labour which the arbitration proceedings would demand and his fair and proper remuneration for conducting them. It is only when the proceedings are over and the award has been made that a proper assessment of the remuneration of the arbitrator can be made and that seems the reason why the Act makes provision for assessment of the fee of the arbitrator by the Court after the making of the award. Section 14(1) of the Act provides that when the arbitrator has made his award he shall sign it and shall give notice to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and the award.

Under Sec. 14(2) the duty of the arbitrator to cause the award or a signed copy of it to be filed arises only upon payment of the fees and charges due in respect of the arbitration of the award. These provisions are in Chapter II which deals with arbitration without the intervention of a Court, but by virtue of Section 25 they apply, as far as they can be made applicable, to arbitration in suits as well. Then there is Sec. 38 in Chapter V which applies to all arbitrations. That section runs as follows:—

"Section 38(1):— If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitrator or umpire by way of fees such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(2) An application under sub-section (1) may be made by any party to the reference unless the fees demanded have been fixed by written agreement between him and the arbitrator or umpire, and the arbitrator or umpire shall be entitled to appear and be heard on any such application.

(3) The Court may make such orders as it thinks fit respecting the costs of an arbitration where any question arises respect-

ing such costs and the award contains no sufficient provision concerning them."

Both these sections viz. 14 and 38 being applicable to arbitrations they have to be construed harmoniously and in a manner that gives effect to both of them and does not render either of them redundant or nugatory. Now Section 39(1) contemplates or includes both a situation in which the fee of the arbitrator has not been previously fixed and a situation in which the fee has been fixed, and in either of these situations it empowers the Court to order delivery of the award to the applicant on payment into Court of the fee demanded by the arbitrator and then to direct that out of the fee so deposited the arbitrator shall be paid such sum as the Court considers reasonable. The obvious implication and effect of Section 32(1), therefore, is that the mere fact that the fee of the arbitrator has been fixed does not preclude the arbitrator from demanding an amount in excess of what has been fixed nor does it preclude the Court from ordering payment of a fee in excess of what has been fixed even though there may be nothing to expressly indicate that the fixation was only of a tentative nature. In determining what would be the reasonable fee of the arbitrator the Court will certainly take into account what fee, if any, has been previously fixed but it has the power to order payment of such higher fee as it considers reasonable. It will also be seen that if a party making an application under Sec. 38(1) has agreed by means of a written agreement between himself and the arbitrator to pay the fee demanded by the arbitrator, Section 38(2) bars the making of such an application. This agreement may as far as the applicant is concerned, fix the fee for the first time or even vary the fee originally fixed and in either case it will prevent the making of an application under Section 38(1).

In arbitrations in suits the fixation of the arbitrator's remuneration prior to his entering upon the arbitration may be done in two ways viz. by an agreement between the parties or by an order of the Court. There is, as I have already said, no specific provision in the Act for fixation of the arbitrator's fee by the Court prior to the making of reference but an order to that effect cannot be said to be incompetent because the Court has the power to ultimately determine in the event of an application made under Section 39(1), what would be the reasonable fee of the arbitrator. If, after the fixation of fee by the Court, the parties choose to proceed with the arbitration and the arbitrator enters upon it, an agreement between the parties and the arbitrator is implied in their conduct. But, whether the fixation of the fee of this stage rests on the basis of an

agreement or an order of the Court it cannot be regarded as final and is subject to variation both by subsequent agreement and by order of the Court. The agreement, if it is to operate as a bar to an application under Section 38(1), has to be in writing, but that does not mean that no other kind of agreement can either be made or taken into consideration by the Court. It is open to the parties to the reference to fix or enhance the fee of the arbitrator just as it is open to the Court to do so. Section 14(2) empowers the Court to direct the arbitrator, upon payment of the fees and charges due in respect of the arbitration and of the costs and charges of filing the award, to cause the award or a signed copy of it to be filed in Court.

What meaning is to be attached to the word "due" may be a question of some controversy because if there has been no agreement between the parties or, in the case of an arbitration in a suit, there has been neither an agreement between the parties nor an order of the Court the amount "due" as fee can mean either an amount regarded as due by the arbitrator or determined as payable to the arbitrator by the Court. But whatever meaning may be ascribed to the expression "due" occurring in Section 14(2) or to the word payable in Section 14(1) there seems to be no doubt about the fact that an enhancement in the arbitrator's fee whether fixed by an agreement or by an order of the Court can be made by means of an agreement, express or implied, between the parties or by an order of the Court, and such an enhancement is permissible and is not outside the contemplation of the Act.

12. Where the enhancement in the fee of the arbitrator has been brought about by an agreement the propriety of the manner in which that has been done is, of course, a matter of utmost importance. The arbitrator has to act throughout with complete fairness, candour and probity and there should be no element whatsoever of pressure, persuasion, importunity, manipulation or secrecy in the conduct of the arbitrator in relation even to the fixation or enhancement of his fee nor should there be any attempt on his part to charge a fee disproportionate to the work done by him or to take advantage of his position as an arbitrator. Further, if the fee of the arbitrator has originally been fixed by an order of the court it is undeniably proper and desirable that an order of enhancement of the fee be obtained from the Court and the enhancement should receive its sanction. But, if it is clear that the parties to the reference had agreed to an enhancement in the fee and it is also clear that the conduct of the arbitrator in relation to enhancement was not tainted by any of the vices indicated above, the ac-

ceptance of the enhanced fee would not amount to misconduct and would not vitiate the award.

Let me now examine the circumstances relating to the remuneration of the arbitrator in the present case. The case was referred to arbitration on September 21, 1951 by an order of the Court providing that the arbitrator would get Rs. 100/- as fee in half and half from both the parties. The proceedings before the arbitrator continued for a long period of time and the award came to be made on the January 5, 1953. An idea of the protracted nature of the proceedings and the arduousness of the task performed by the arbitrator may be had from the order-sheet which the arbitrator maintained and which is on record. The order-sheet makes it evident that the proceedings must have consumed considerable time and energy of the arbitrator. The fee of Rs. 100/- fixed by the Court was obviously very inadequate and there can be no doubt that if the Court had foreseen the time and the labour that the arbitration would require it would have fixed a much larger amount and it would, in any case, have appreciably enhanced the fee under Section 38(1) of the Arbitration Act if an order under that provision had become necessary.

The arbitrator candidly mentioned in his award that the parties had paid him Rs. 100 each on account of his fee. This statement of the arbitrator, like a statement of a judge as to what took place before him in relation to a proceeding should be regarded as almost conclusive and at any rate its correctness has to be presumed unless there is strong proof to the contrary vide, In the Matter of the Arbitration Act and In the Matter of the Reference to Arbitration by M/s. M. Nar-simhalu Chetty & Co. and P. S. Subraminia Ayer, 75 Ind Cas 850 = (AIR 1924 Mad 274). In his objection dated January 4, 1953 filed against the award, the plaintiff stated that during the proceedings the arbitrator "always impressed upon the parties that the case was very complicated and the fee awarded is very small and he would dismiss the case if further fee is not paid." No allegation of any threat of the above kind or of any protest against the demand of a larger fee was, however, made in the application filed by the plaintiff in Court on January 3, 1953 i.e. just two days before the making of the award, although according to the evidence led by the plaintiff the demand was made long before the making of the award.

Indeed there was nothing in that application about the demand of an extra remuneration and all that was stated was that under some influence the arbitrator wanted to decide the case against the plaintiff and the arbitrator be, therefore, directed not to make an award and the

arbitration proceedings before him be superseded. Having regard to this application the learned Munsif did not accept the allegation of the plaintiff regarding the threat of dismissal of his suit and, in my opinion, quite correctly and properly. It was not alleged by the plaintiff either in his objection or in his deposition before the Court that the additional sum was paid to the arbitrator entirely by the defendant. Even in his deposition he stated that he had refused to pay the extra fee of Rs. 50 demanded by the arbitrator from him and that the arbitrator had told him of having received Rs. 50/- from the opposite party. If there was anything which must have found a mention in the application for superseding the arbitration made by the plaintiff on January 3, 1953 it was the fact of his refusal to the demand of extra fee of Rs. 50/-. The manifest conclusion is that the story that the plaintiff had not paid the extra amount of Rs. 50/- was an afterthought and was altogether untrue. The plaintiff, besides examining himself, examined one Mavasi Lal in support of the above allegation but the statement of the said witness too deserves to be totally rejected on the same ground.

Further, according to the statement of Mavasi Lal the demand was made prior to his being examined as a witness for the plaintiff before the arbitrator and the reply that the plaintiff opposite party gave to the demand was that he could not pay the amount unless ordered by the Court. If the allegation of the plaintiff opposite party had been true, it is inconceivable that the arbitrator should not have made an application to the Court for enhancement of his fee, that he should have proceeded or been allowed by the plaintiff to proceed with the arbitration, and that the plaintiff should have, without the least indication of any protest or dissatisfaction, taken part in the arbitration proceedings and later paid Rs. 30/- to the arbitrator for local inspection as he admits to have done. The irresistible conclusion from the fact and circumstances to the case is that regard being had to the time and labour involved in the arbitration proceedings and the gross inadequacy of the remuneration fixed by the Court the parties willingly agreed to pay and actually paid an extra fee of Rs. 50/- each to the arbitrator. The learned counsel for the plaintiff has urged that since the arbitrator was not examined as a witness in the case the allegation of the plaintiff stood uncontroverted and it should not be rejected. In regard to this argument I need only say that it was for the plaintiff to substantiate his objection to the award and this he altogether failed to do. The evidence adduced by a party may be rejected as untrue on account of its intrinsic defect and improbability without being

controverted, but here the evidence of the plaintiff is also effectively controverted by his own application dated January 3, 1953. The result is that although the advisable course for the arbitrator was to obtain an order for enhancement of his fee from the Court he was not guilty of misconduct in accepting an extra amount of Rs. 50/- from each of the two parties as his remuneration for arbitration.

13. I have not been able to lay my hand on any reported decision dealing with the situation resembling the one in the present case. There are, however, some authorities which may be taken as illustrating the proper view to be taken in the matter of acceptance of remuneration by an arbitrator from the parties to the reference to arbitration. In *Subrava Prabhu v. Manjunath Bhakta*, (1906) ILR 29 Mad 44 a Division Bench of the Madras High Court made the following observations:—

"Passing to the remaining contention on behalf of the respondent, we are unable to agree that in the circumstances of the case the acceptance by the arbitrators of the offer of a fee for their services involved any misconduct. The evidence shows beyond doubt that the offer proceeded from the parties themselves, and was made under meeting of the arbitrators at which both the parties were present, and that it was accepted formal record thereof being made in the proceedings of the arbitrators. We must, therefore, reverse the decree of the District Judge and direct that the award be filed."

The facts of the above case have not been stated in the judgment in detail but the observations quoted above seem to lend some support to the view that I have taken. The case of *Akshoy Kumar Nandi v. S. C. Dass and Co.*, AIR 1935 Cal 359 is more to the point. I do not, however, think it necessary to set out the facts of the case and would only quote the following portion of the headnote which accurately sums up the position in that case and the decision given by the Court:—

"Where the arbitrators took money as fees from one of the parties and it was done by way of mutual arrangement between the contending parties the award is not vitiated by reason of any misconduct on the part of the arbitrators."

Upon an examination of the circumstances of the case I am clearly of the view that the objection of the plaintiff to the validity of the award on the ground of acceptance by the arbitrator of a remuneration in excess of the amount fixed by the Court was not entertainable and the award was not vitiated on that account.

14. As to the sum of Rs. 30/- paid to the arbitrator as his fee for local inspection much need not be said. It was on the application of the plaintiff himself

that the arbitrator decided to make an inspection of the house in dispute. The application for local inspection was allowed subject to payment of Rs. 30/- as additional fee. The amount was paid by the plaintiff and the local inspection was then made by the arbitrator on the November 5, 1952. The amount charged by the arbitrator was not at all excessive and the plaintiff never objected to the demand. In these circumstances the acceptance of Rs. 30/- as fee for local inspection did not constitute a misconduct on the part of the arbitrator.

15. Now the finding of the learned Judge totally ignores the facts admitted and proved in this case and has been arrived at without considering the effect of those facts on the question of misconduct. The learned Civil Judge failed to notice that the fact whether Saktoo had been adopted by Mukund and his wife as their son had totally lost its importance in view of the findings of the arbitrator that the two wills set up by the plaintiff had not been proved and that the plaintiff was not Gurdaval's sister's son as claimed by him. On the conclusion reached by the arbitrator regarding the genuineness and the execution of the wills and the plaintiff's alleged relationship with Gurdaval the plaintiff could have no title to the property in dispute even if it was assumed that Saktoo had been taken in adoption by Mukund and his wife. The arbitrator also found that the two wills were ineffective in law and the fact of adoption could not have affected this finding. As to the misconduct attributed to the arbitrator on the ground of his having accepted as his fee a sum in excess of what had been fixed by the court, it would be seen that the learned Civil Judge has observed that "there was no dispute that the arbitrator was awarded Rs. 100/- by way of fee of the parties and that in fact he accepted Rs. 100/- from each party."

Naturally, the Civil Judge did not hold that the plaintiff had not paid his share of the extra amount of Rs. 100/- and proceeded on the footing that both the parties had paid Rs. 100/- each and the case of the plaintiff that he had paid Rs. 50/- only as directed by the Court was incorrect. The learned Judge also appears to have thought that the parties had willingly agreed to pay the extra sum of Rs. 100/- and, at any rate, he did not find that there was any element of force, compulsion or unfairness in the demand or the payment. The circumstances also clearly indicate that the payment made by the parties was a willing payment made in a lawful manner and no undue advantage of his position was taken by the arbitrator. The learned Civil Judge was evidently called upon to consider the effect of the willingness and agreement of the parties, to make the extra payment and their continued

participation and acquiescence in the arbitration proceedings. This aspect of the matter, however, the learned Judge completely omitted to consider and his finding on this part of the alleged misconduct is, therefore, obviously vitiated. Similar is the case with regard to the finding of the learned Judge as to the alleged misconduct in the acceptance by the arbitrator of Rs. 30/- as fee for local inspection.

The learned Judge did not notice the facts that the plaintiff had himself made an application before the arbitrator for local inspection, that the application had been allowed subject to the payment of Rs. 30/- as fee for the local inspection and that the fee had been willingly paid by the plaintiff. For the reasons stated above I think that under such circumstances a case for revision under Section 115 of the Civil P. C. has been clearly made out. If a Court omits to consider a material on record having a bearing (in this case the material had a vital bearing) on the question to be decided by it or fails to apply its mind to or to record a finding on a crucial aspect of the case which cannot be ignored in the determination of the controversy before the Court, it certainly acts illegally or at least with material irregularity in the exercise of its jurisdiction. I may refer in this connection to *Sher Singh v. Joint Director of Consolidation*, 1969 All LJ 38.

16. Further, the question whether an arbitrator has been guilty of misconduct is, in my opinion, clearly a question relating to a jurisdictional fact, and Sec. 23 of the Arbitration Act, 1940, seems to be conclusive on this point. It runs as follows:

"Section 23(1). The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall in the order specify such time as it thinks reasonable for the making of the award.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Act, deal with such matter in the suit."

Once a matter has been referred to arbitration under sub-section (1) of S. 23 the jurisdiction of the Court to adjudicate upon that matter ceases, and sub-section (2) of the section precludes the Court from adjudicating upon it unless it regains the jurisdiction to do so under the provisions of the Act. That regaining of jurisdiction by the Court over the subject-matter of the reference can be brought about only by supersession of the reference or setting aside of the award given by the arbitrator. An order setting aside an award is, therefore, an order which has the effect of revesting jurisdiction in the Court in regard to the subject-matter of the reference, a jurisdiction of which the Court

had been divested on account of the reference and which it cannot again acquire except as a result of supersession of the reference or setting aside of the award. It is true that even after the making of a reference the Court retains jurisdiction over the suit and it is the Court which has to finally dispose of the suit in accordance with the award. But the distinction between the jurisdiction to dispose of the suit and the jurisdiction to decide that particular matter which had been referred to arbitration should not be lost sight of. While the Court retains jurisdiction over the suit even after a reference has been made under Section 23(1), the jurisdiction to decide the matter of reference is transferred to the arbitrator and the Court cannot get seized of the latter jurisdiction unless the reference is superseded or the award is set aside. If an award has been made and has not been set aside the Court has no power to decide the matter which formed the subject-matter of reference and it has to pronounce judgment according to the award. It is, therefore, manifest that in determining whether an arbitrator has been guilty of misconduct and his award has consequently to be set aside the Court determines a jurisdictional fact. The Court certainly possesses jurisdiction to decide whether or not an arbitrator has committed a misconduct but the decision that he has committed a misconduct and the award should on that account be set aside has the effect of reconferring upon the Court the jurisdiction to decide a matter which but for the setting aside of the award, it could not have been competent to decide. That being so, the Court exercises a jurisdiction not vested in it by law if it decides wrongly the question whether an arbitrator has been guilty of misconduct and his award should on that account be set aside.

17. My learned brother Hari Swarup, J. has expressed the opinion that in holding that the award in question was vitiated by misconduct of the arbitrator the Civil Judge did not decide any jurisdictional fact, but for the reasons stated above. I find myself unable to agree with him. The fact that the Court had initially the jurisdiction to entertain the suit, does not lead to the conclusion that no decision given by it during the progress of the suit can relate to a jurisdictional fact. If at an intermediate stage of the suit the Court loses its jurisdiction over a particular matter, involved in the suit, an order having the effect of bringing back that matter within the jurisdiction of the Court must be held to be dealing with a question touching its jurisdiction. In *S. Ramaiyer v. Sundaresa Ponnappaondar*, AIR 1966 SC 1431 their Lordships of the Supreme Court observed:

"In the present case, no question of revision under sub-section (c) of S. 115 arises,

and we are concerned only with the power of revision under sub-sections (a) and (b) of Section 115. Sub-section (a) empowers the High Court to correct an erroneous assumption of jurisdiction; sub-section (b) empowers it to correct an erroneous refusal of jurisdiction. The decision of the subordinate Court on all questions of law and fact not touching its jurisdiction is final and, however, erroneous such a decision may be, it is not revisable under sub-sections (a) and (b) of S 115. On the other hand, if by an erroneous decision on a question of fact or law touching its jurisdiction e.g. on a preliminary fact upon the existence on which its jurisdiction depends, the subordinate Court assumes a jurisdiction not vested in it by law or fails to exercise a jurisdiction so vested, its decision is not final, and is subject to review by the High Court in its revisional jurisdiction under sub-sections (a) and (b) of S 115."

These observations which have been quoted by my learned brother Hari Swarup J also in his judgment seem to me to support the view that in making the order under revision the learned Civil Judge exercised a jurisdiction not vested in him by law. I am also fortified in this view by the decisions of the Supreme Court in *Chaube Jodish Prasad v. Ganga Prasad Chaturvedi*, AIR 1959 SC 492 and *Roshan Lal Mehra v. Ishwor Dass*, AIR 1962 SC 646.

18. The learned counsel for the plaintiff placed reliance on *Mst. Sworswati v. Wali*, AIR 1935 All 456 where it was held by Niamatullah, J that the question whether a certain act amounts to misconduct on the part of the arbitrator is one arising in the case which the Court has every jurisdiction to decide and that it in deciding that question the Court took an erroneous view of law or made an incorrect inference from the facts, provided all that can be attributed to the Court is an error of judgment, it cannot be said that there was an illegality or irregularity in the exercise of jurisdiction. Attention of the learned Judge does not appear to have been invited in that case to para 3 of the Second Schedule of the Code of Civil Procedure which corresponded to Section 23 of the Arbitration Act, 1940, and, in any case, the bearing of that section was not considered. The view taken in that case is also opposed to what has been laid down in the decisions of the Supreme Court mentioned above. With great respect to the learned Judge, therefore, I think that the opinion expressed by him in the above case cannot be said to have been correct.

19. As a result of the foregoing discussion I am of the opinion that this revision should be allowed, the order of the learned Civil Judge dated 18-7-1963 should

be set aside and the order of the learned Munsif dated 18-4-1953 should be restored. The opposite party should also be made to bear the costs of the applicant in this Court.

20. II. SWARUP, J.:— Two points arise in this revision. The first is whether the decision of the Court below under Section 39 of the Arbitration Act amounts to a "case decided" within the meaning of Section 115, Civil P. C. and the second is whether assuming that the order amounts to a "case decided" this Court can interfere with the order on one of the grounds mentioned in Section 115, Civil P. C.

21. In a regular civil suit the parties made an application for reference of the dispute to an arbitrator. The Court referred the dispute under Section 23 of the Arbitration Act to the arbitrator. The arbitrator gave an award. The plaintiff filed objections to the award and, *inter alia*, took the plea that the arbitrator had misconducted himself and the proceedings and urged that the award be set aside. The trial Court did not accept this objection and passed a decree in terms of the award dismissing the suit. The plaintiff went up in appeal and the lower appellate Court held that the award was liable to be set aside on the ground that the arbitrator had misconducted himself in accepting from the parties a fee in excess of that which was payable to him by the parties to the reference under the order of reference made by the Court by which the dispute was referred to Sri Mathura Prasad Kakkar. The lower appellate Court also held that the arbitrator had not decided the question about the adoption of Sattu by Makund and it went to the root of the matter and amounted to misconduct of proceedings by the arbitrator. On these findings the appellate Court allowed the appeal and set aside the award and remanded the case to the trial Court for decision according to law. The defendant has filed a revision against the appellate order passed under Section 39 of the Arbitration Act. The revision was referred to the Full Bench for decision.

22. The learned counsel for the plaintiff-opposite party has rightly conceded before us that the order passed in appeal under Section 39 of the Arbitration Act amounts to a "case decided" within the meaning of Section 115, Civil P. C. He has, however, contended that the order passed by the Court below was within its jurisdiction and it suffers from no error so as to make it liable to be interfered with this Court in exercise of its powers under Section 115, Civil P. C.

23. The learned counsel for the petitioner has, however, contended that the decision by the lower appellate Court that the arbitrator had misconducted himself and the proceedings amount to the decision of a jurisdictional fact and by a wrong

decision of the same the learned Judge assumed jurisdiction to set aside the award and hence this Court had jurisdiction under Section 115, Civil P. C. to revise the decision of the Court below on merits.

24. The jurisdiction of the trial Court to decide about the misconduct of the arbitrator and the proceedings arose under Section 17 read with Section 30 of the Arbitration Act. He had the jurisdiction to decide whether the arbitrator had or had not misconducted himself or the proceedings. This had to be on the basis of the evidence produced before the court. It had to be a decision on merits. The jurisdiction to decide the question did not depend upon the final decision of the issue. The decision could be made only after the court assumed jurisdiction and, therefore, such a decision cannot be held to be a jurisdictional fact. The jurisdiction of the court had already arisen by the making of the reference under Section 23 of the Arbitration Act and the subsequent filing of the award under Section 14 of the Arbitration Act. Section 17 of the Arbitration Act gave the Court the jurisdiction to decide whether the award was to be set aside or confirmed. The reasons on which the award was to be set aside or not are given under Section 30 of the Arbitration Act and the finding of those reasons has to be given under Section 17 of the Act. It cannot, therefore, be said that the trial Court did not have the jurisdiction to decide whether the facts existed justifying the setting aside of the arbitration award. Similarly the appellate Court exercising the powers under Section 39 of the Arbitration Act had the jurisdiction to decide whether the circumstances existed for the setting aside of the award. The circumstances have been mentioned in Section 30 of the Arbitration Act and if the court on the basis of the evidence before it came to the conclusion that circumstances existed to establish the misconduct of the arbitrator or the arbitration proceedings within the meaning of Section 30 it had the duty and the jurisdiction to set aside the award under Section 17 of the Arbitration Act.

25. Section 39 of the Arbitration Act prohibits a second appeal and the High Court in exercise of the powers under Section 115 of the Arbitration Act cannot exercise the appellate powers and set aside the order of the court below passed under Section 39 of the Act. It was pointed out in the case of *State of Kerala v. K. M. Charia Abdullah & Co.*, AIR 1965 SC 1585 by Subba Rao J. that "there is an essential distinction between an appeal and a revision. The distinction is based on differences implicit in the said two expressions. An appeal is a continuation of the proceedings; in effect the

entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitations prescribed. But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to review the evidence unless the statute expressly confers on it that power. That limitation is implicit in the concept of revision". The High Court cannot, therefore, in exercise of the powers under Section 115 reconsider the evidence on the basis of which the court below has come to the conclusion that the arbitrator had misconducted himself and the proceedings.

26. It has been pointed out in *Pandurang v. Maruti*, AIR 1966 SC 153 and in *Ratilal v. Ranchhodhai*, AIR 1966 SC 439 that points of law which do not relate to the questions of jurisdiction cannot be redecided by the High Court under Section 115 C.P.C. and that an erroneous decision on a question of law having no relation to questions of jurisdiction will not be corrected by the High Court under Section 115 C.P.C.

27. In the case of AIR 1966 SC 1431 it was said that:

"Sub-section (a) empowers the High Court to correct an erroneous assumption of jurisdiction; sub-s. (b) empowers it to correct an erroneous refusal of jurisdiction. The decision of the subordinate Court on all questions of law and fact not touching its jurisdiction is final and, however, erroneous such a decision may be, it is not revisable under sub-ss. (a) and (b) of S. 115. On the other hand, if by an erroneous decision on a question of fact or law touching its jurisdiction, e.g., on a preliminary fact upon the existence on which its jurisdiction depends, the subordinate Court assumes a jurisdiction not vested in it by law or fails to exercise a jurisdiction so vested, its decision is not final, and is subject to review by the High Court in its revisional jurisdiction under sub-ss. (a) and (b) of S. 115."

28. In the present case the court has not decided any preliminary fact upon the existence of which its jurisdiction depended. The reference to the arbitrator had been made within jurisdiction in the proper exercise of jurisdiction and on the award being filed the Court's jurisdiction to give a decision under Section 17 of the Arbitration Act came into being automatically. The subsequent decision of the matter on merits was not the decision of a preliminary fact on the existence of which depended the jurisdiction of the court.

29. Learned counsel for the defendant-petitioner relied on the case of AIR 1959 SC 492 and on the decision in the case of *Prem Raj v. The D. L. F. Housing and Construction (Private) Ltd.*, AIR

1968 SC 1355 in support of his contention. In the case of Chaube Jagdish Prasad, AIR 1959 SC 492 (supra) the order under revision was passed under Section 5(4) of the U. P. (Temporary) Control of Rent and Eviction Act. The jurisdiction to entertain such a suit depended on the decision whether the construction in dispute had been made before or after June 30, 1946. The decision of the fact whether the property had been constructed was necessary for the determination of the jurisdiction of the court. It was not a fact on which depended the decision on merit under Section 5(4) of the Act. It was, therefore, held by the Supreme Court to be a jurisdictional fact subject to review by the High Court under Section 115 C.P.C. In the present case the jurisdiction of the Court depended on the reference to the arbitrator and the filing of the award and the decision of the question of misconduct was not a preliminary fact which gave rise to the jurisdiction of the Court to deal with the matter. In the case of Prem Raj, AIR 1968 SC 1335 (Supra) the plaintiff had filed a suit for a declaration that a certain contract against him was void and inoperative having been obtained by undue influence and in the alternative had asked for the relief of specific performance of the same contract. The trial court had decided that it had the jurisdiction to entertain such a suit. It was held by the Supreme Court "that in holding that the appellant (plaintiff) was entitled in the alternative to ask for the relief of specific performance the trial Court had committed an error of law and so had acted with material irregularity or illegality in the exercise of its jurisdiction within the meaning of Section 115(c) of the Civil Procedure Code. It was, therefore, competent to the High Court to interfere, in revision, with the order of the trial Court on this point. To put it differently the decision of the trial Court on this question was not a decision on a mere question of law, but it was a decision on a question of law upon which the jurisdiction of the High Court on the ground of a particular relief depended. The question was, therefore, one which involved the jurisdiction of the High Court; the trial Court could not, by an erroneous finding upon that question confer upon itself a jurisdiction which it did not possess and its order, therefore, was liable to be set aside by the High Court in revision."

30. In the case before the Supreme Court the decision of the question of law affected the jurisdiction of the trial Court to entertain the suit itself. It did not deal with any question of law which arose for decision on merits in the case. According to their decision the trial Court had no jurisdiction to entertain a

suit for such a relief. In the present case the granting of the relief which the Court had granted is within the jurisdiction of the courts below and the right to decide the issue arose not because of the decision of that issue but because the award had been filed by the arbitrator. This case, therefore, does not help the petitioner in the present case as the court below has not decided any matter which deals with its jurisdiction to decide the case on merits and to grant the relief.

31. In the case of Abbas Bhai v. Gulamnabi, AIR 1964 SC 1341 it was held that the decision of the District Court that the tenant established or failed to establish his readiness and willingness to pay the standard rent did not affect the jurisdiction of the Court conferred by law upon it and by wrongly deciding that a tenant was or was not entitled to protection under law the Court did not assume to itself jurisdiction which was not vested in it by law or refused to exercise the jurisdiction which vested in it by law.

32. The decision of the trial Court was based on interpretation of the various sections of the Rent Act. The Supreme Court observed that the High Court was in error in setting aside the decree of the District Court in exercise of the powers under Section 115 C.P.C. as the trial Court by arriving at an erroneous conclusion on the plea of the tenant as to his readiness and willingness did not act illegally or with material irregularity in the exercise of its jurisdiction. Again in the case of R. P. Mehta v. I. A. Chethi, AIR 1964 SC 1676 it was observed as below:—

"The question raised was whether a decree in ejectment should be passed on the ground of personal requirement under Section 13(1) (g) of the Act where it was proved that the landlord wanted to pull down the premises and build another and then occupy it. It was said that in such a case he had to proceed under cl. (hh) of S. 13(1). It is clear that the question so raised is one of interpretation of these two clauses. Section 28 of the Act gives jurisdiction to the Court specified in it to try a suit or proceeding between a landlord and tenant relating to possession of the premises. That section expressly provides that no other Court, subject to the provisions of sub-s. (2) which do not apply to this case, has jurisdiction to entertain such suits. It is clear from this section that the trial Court had full jurisdiction to entertain the suit for ejectment. That being so, it had jurisdiction to interpret whether cl. (g) of S. 13(1) would apply to the present case. The appellate Court had jurisdiction to hear the appeal. The High Court could not, therefore, interfere in revision with the decision of the appellate Court, even

If it had gone wrong, on facts or law, in the exercise of the jurisdiction. It follows that the revision application had to be dismissed by the High Court and that this appeal too must fail.

33. In the present case the trial Court had the jurisdiction to decide whether the conditions mentioned in Section 30 of the Arbitration Act existed and whether on the basis thereof the award was liable to be set aside or not. The appellate Court had jurisdiction to hear the appeal and thus had the jurisdiction to decide whether the arbitrator had misconducted himself of the proceedings within the meaning of Section 30 of the Arbitration Act and whether on the basis of those findings the award was liable to be set aside. The court below has done nothing else but to decide the appeal after arriving at certain findings of fact and applying the law thereto. Whether the judgment of the court below is erroneous as regards its findings of fact or erroneous in law cannot be enough to give this Court jurisdiction under Section 115 C. P. C. to interfere with that judgment.

34. It was held by this Court in the case of AIR 1935 All 546: "It cannot be disputed that the lower Court had jurisdiction to set aside the award on proof of misconduct. The question whether a certain act amounts to misconduct on the part of the arbitrator is one arising in the case which the Court has every jurisdiction to decide. If in deciding that question the Court took an erroneous view of law, or made an incorrect inference from the facts proved, all that can be attributed to the Court is an error of judgment. It cannot be said that there was any illegality or irregularity in the exercise of jurisdiction." In my opinion this is the correct view.

35. In the view that I am taking it is not necessary to express any opinion as regards the merits of the findings arrived at by the court below.

36. In the present case the court below has not decided any fact the decision of which was necessary for the assumption of jurisdiction by the court below to decide the appeal or to decide whether the award was liable to be set aside. The proceedings had been initiated by the reference made by the court to the arbitrator and by the filing of the award and objections thereto and the court below was only exercising the jurisdiction which arose on the proceedings going on before it. The order of the court below is thus not liable to be interfered with by this Court under Section 115 C.P.C. and the revision is liable to be dismissed.

37. In the result the revision is dismissed.

38. TRIVEDI, J.: The detailed facts giving rise to this revision have been given in the judgment of brother Gange-

shwar Prasad, J. The relevant pedigree set up by the plaintiffs is as under:

SAKTU (ADOPTED SON OF MAKUND)

Jamuni Del	Gurdayal Gulab Kunwar
Basdeo Sahai (Plaintiff)	

39. The plaintiff claimed the property on the basis of wills executed by Gurdayal and Gulab Kunwar and in the alternative by succession as the sister's son of Gurdayal. Defendant denied the wills and also the relationship. According to the finding of the arbitrator the execution of the wills was not proved.

40. The next plea of the plaintiff that he was the daughter's son of Saktu was also negated by the arbitrator. The arbitrator further found that Raghubir was the adopted son of Gurdayal and defendants are the nearest reversioners of Raghubir.

41. The objection of the plaintiff appellant against the award was dismissed by the learned Munsif. In appeal the lower appellate court formulated three points out of which the following two are relevant:

"(1) That the omission of the arbitrator in not deciding the question of adoption of Saktu amounted to misconduct on his (arbitrator's) part.

(2) That the arbitrator had accepted the fee more than what was actually awarded by the court and further that he also accepted fee for inspecting the house in dispute from the plaintiff." The lower appellate Court held that the question that Saktu was the adopted son was an important point to be decided by the arbitrator and had material bearing on the rights of the parties and the omission on the part of the arbitrator amounted to misconduct. On the second point also the lower appellate Court remarked that the acceptance of additional fee amounted to misconduct. The award was thereafter set aside by the court below.

42. The findings of fact of the lower appellate Court are not challenged and cannot be challenged in revision. All that is contended is that the facts proved did not amount to any misconduct and the arbitrator could not be disqualified on proof of the above facts.

43. Under the Indian Arbitration Act the court is bound to refer a dispute to the arbitrator on a valid agreement. An award by an arbitrator can be set aside on the ground enumerated in S. 30 of the said Act. The ground relevant for the purposes of this case is that the arbitrator or umpire has misconducted himself or the proceeding.

44. An award can also be challenged under S. 15 which provides for its correction and modification and also under

S. 16 which provides reconsideration by remission.

45. It is settled now that the phrase 'misconducted himself or the proceedings' does not necessarily imply moral turpitude, but includes neglect and breach of duties and responsibilities which result in miscarriage of justice. It comprehends action opposed to rational and reasonable principles. The lower appellate Court has not shown how the question about the adoption of Saktu was material, relevant and essential after the alleged will of Gurdalay was held not proved. According to the plaintiff the property in suit was the self-acquired property of Saktu and was inherited by his son Gurdalay. On the other hand the defendant's case was that Gurdalay succeeded by survivorship, and was incompetent to bequeath the property by will. Both parties were claiming from Saktu. The question about the nature of succession would have been material if the will propounded by the plaintiff was found genuine. Saktu's adoption was never in issue either before the arbitrator or before the learned Munsif on the basis of objections raised by the plaintiff. If no issue was framed and no finding was given in respect of an irrelevant plea raised by the defendant, the grievance for the same could be of the defendant and not of the plaintiff. The court below obviously acted illegally in exercise of its jurisdiction by holding that Saktu's adoption had material bearing on the rights of the parties. If the facts proved do not exclude the jurisdiction of the arbitrator the finding of the court below in disqualifying the arbitrator is a jurisdictional error, and a revision under S. 115 C.P.C. is maintainable.

46. The next irregularity of the arbitrator, according to the lower appellate Court was acceptance of fee in excess of that what was awarded by the court. The objection was in respect of two items. One of Rs. 30 and the other of Rs. 100. The nature of allegations and the evidence adduced by the plaintiff was in the nature of moral turpitude and was not found correct. The question therefore remained if the aforesaid payments which were in the nature of irregularities amounted to legal misconduct and the arbitrator could be said to have misconducted the proceedings. It is not disputed that the plaintiff himself had applied for local inspection and his prayer was accepted. A sum of Rs. 30 was charged from him towards the fee or charges for local inspection. The fee demanded was paid without any protest. Likewise, the additional fee of Rs. 100 was paid to the arbitrator by the parties without any protest. The Arbitration Act does not bar the demand of additional fee. Payment of additional fee, coupled with certain

facts, i.e. when the same is paid by one party alone which is likely to give an impression on the impartiality of the arbitrator can amount to misconduct.

47. Section 38 of the Arbitration Act is indicative of the fact that the mere demand by the arbitrator of additional fee is neither illegal nor improper. The demand will become improper and illegal if other facts coupled with the fact of payment go to establish the bad motive of the arbitrator, or neglect of any duty which had resulted in miscarriage of duty. A party cannot be allowed to lie by and join in the submission and then if and when it suits his purpose attack the award on that ground. If the finding of misconduct of the arbitrator is not borne out from the facts proved the finding is an error affecting the jurisdiction of the arbitrator and will amount to illegal exercise of the jurisdiction vested in the lower appellate Court.

48. On the question whether the order setting aside the award is 'case decided' under S. 115 C.P.C., I agree with brother Gangeshwar Prasad, J. and have nothing more to add.

49. For the reasons given above, I agree with brother Gangeshwar Prasad, J. and am of the opinion that the revision should be allowed with costs.

50. GANGESHWAR PRASAD, J.:— In accordance with the majority opinion, the revision is allowed, the order of the Civil Judge dated July 18, 1963 is set aside and the order of the Munsif dated April 18, 1953 is restored. The opposite party shall pay the costs of the applicant in the proceedings before this court.

Revision allowed.

AIR 1970 ALLAHABAD 542 (V 57 C 78)
G. C. MATHUR, J.

Mahant Rama Kant Das, Petitioner v. Deputy Director of Consolidation and others, Respondents.

Civil Misc. Writ Petns. Nos. 517, 2657, 2659, 2660, 2661 and 2663 of 1960. D/- 17-4-1970.

Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1951), S. 9(2) — Consolidation authorities — Jurisdiction — Dispute as to who is mahant of a math — Consolidation Authorities have no jurisdiction to decide.

The consolidation authorities have jurisdiction only to decide questions relating to the rights of tenure-holders. A dispute as to who is the Mahant or Sarbarkar of a Math is a dispute of a civil nature cognizable by a Civil Court. And it cannot be decided by the Consolidation authorities and is totally beyond their jurisdiction. 1987 All LJ 335, Rel. on. (Para 3)

FN/FN/C502/70/BNP/B

Cases Referred: Chronological Paras
(1967) 1967 All LJ 336 = ILR
(1967) 2 All 212, Syed Ashfaq,
Husain v. Waqf Alal Nafs 2

R. S. Misra and Radhey Shyam, for
Petitioner; A. P. Pandey, S. D. Pandey,
K. C. Agarwal and Kamini Mohan, for
Respondents.

G. C. MATHUR, J.:— The land in dispute in these writ petitions appertains to the Basudha Math and the Math is the tenure holder of all the plots. This fact is admitted by all parties. Formerly one Mahant Ajodhya Das was the Mahant of this Math. After his death there was a dispute between Ram Sunder Das respondent No. 3 and Dwarka Das regarding the Mahantship of this Math. It was held in the litigation that followed the respondent No. 3 was not the Chela of Ajodhya Das and that Dwarka Das was the successor of Ajodhya Das. Dwarka Das died on October 18, 1963. When the villages in which the plots in dispute are situated were brought under consolidation respondent No. 3 filed objections under Section 9(2) of the Consolidation of Holdings Act claiming himself to be the Mahant of the Math after the death of Mahant Dwarka Das and prayed that his name be substituted in place of Mahant Dwarka Das as the Mahant of the Math. The petitioner Rama Kant Das who also claims to be the Mahant of the Math as successor of Mahant Dwarka Das filed objections to the objections of respondent No. 3. The Consolidation Officer held that respondent No. 3 and not the petitioner was the successor to Mahant Dwarka Das and consequently directed that the name of respondent No. 3 be recorded as Sarbarkar of the Math in place of Mahant Dwarka Das. Against the orders of the Consolidation Officer the petitioner filed appeals before the Settlement Officer (Consolidation). The Settlement Officer (Consolidation) held that the Consolidation authorities were not competent to decide the question as to who was the Mahant or Manager of the Math. He accordingly allowed the appeals and set aside the orders of the Consolidation Officer. The respondent No. 3 thereupon filed applications in revision before the Deputy Director. The Deputy Director has taken the view that the Consolidation Authorities had the jurisdiction to decide the question of Mahantship. On merits he confirmed the finding of the Consolidation Officer. Accordingly he allowed all the revisions, set aside the order of the Settlement Officer and restored that of the Consolidation Officer. It is against these orders of the Deputy Director of Consolidation that these writ petitions are being filed.

2. The only question which arises for determination in these writ petitions is whether the Consolidation Authorities are

competent or not to decide the question as to who is the Mahant or Sarbarkar of a Math when admittedly the Math is the tenure-holder and there is no dispute regarding the rights of tenure-holders. Learned counsel for the petitioners has relied upon the decision of a Division Bench of this Court in Syed Ashfaq Husain v. Waqf Alal Nafs, 1967 All LJ 336. In this case the question which arose for consideration was whether a suit filed in respect of the compensation and rehabilitation bonds payable on the abolition of zamindari could be abated under Section 5 of the Consolidation of Holdings Act. In this connection the Bench examined the scope of the Consolidation of Holdings Act with a view to determine the extent to which the jurisdiction of the Civil Courts was ousted by the Act. The Bench observed:

"We have analysed all the relevant provisions of the Act including the long title and the preamble. The result of the analysis is that it becomes clear that it is only in respect of agricultural land the rights of Bhumidhars, sirdars and Assamis that the consolidation authorities adjudicate. They are not concerned with any other rights or any other land or any other property"

A little earlier the Bench observed:

"From these provisions also it clearly follows that it is only the tenure-holder's right in respect of the agricultural land which are the subject-matter of decision before the Consolidation authorities." In view of this finding the Bench held that the Consolidation authorities had no jurisdiction to decide the question relating to compensation and rehabilitation bonds and that, therefore, the jurisdiction of the Civil Court was not ousted. It observed:

"It is well settled that powers of a tribunal of limited jurisdiction must strictly be called out from the statute. That the Consolidation authorities are tribunals of limited jurisdiction cannot be doubted. We have already said earlier that they are not Courts or Civil or revenue courts with the result that they cannot adjudicate upon any matter in respect of which there is no express provision permitting them to adjudicate upon. It is well settled that the bar to the jurisdiction of Civil courts cannot be readily inferred and that their jurisdiction can be barred only by an express provision, or one from which such a bar can be inferred by necessary implication."

3. An objection under Section 9(2) of the Consolidation of Holdings Act can be filed against the records prepared under Sections 8 and 8-A of the Act. Under Section 8, after revision of the maps under Section 7, the following four things have to be done:

(1) a revision of the field book,

- (2) the valuation of each plot and all trees, wells and other improvements existing on the plots have to be determined.
- (3) the share of each owner, if there are more owners than one out of the valuation has to be ascertained, and
- (4) the share of each individual tenure holder in a joint holding has to be determined.

Sub-section (2) of Section 8 requires a Khasra Chakbandi to be prepared. Section 8-A requires the preparation of the statement of principles. Under Section 9(2) objections are to be filed to the records prepared under Ss. 8 and 8-A. Section 9-A provides for disposal of cases relating to claims to land or partition of joint holdings. Section 9-B provides for the disposal of objections to the statement of principles. Section 9-C deals with the partition of joint holdings. These provisions were examined by the Division Bench in the above mentioned case and it observed:

"There is no provision in the Act under which Civil rights of a party can be determined. The Consolidation authorities are not competent to decide questions of proprietorship and are confined only to deciding questions relating to land tenure, that is to say relating to rights of tenure holders which means those of Bhumi-dhars or sirdars or Assamis. What we are saying finds support from the provisions of Sections 9, 9-A, 9-B, 9-C and 10 of the Act also. It would be noticed that Section 8 provides for the revision of field book and current annual register and Section 8-A for the preparation of statement of principles. Section 9 clearly provides that when the records and statements mentioned in Sections 8 and 8-A have been prepared and published, notices shall issue "to the tenure holders concerned and other persons interested." It would be noticed that the records that are sought to be revised under Section 8 of the Act are those relating to tenure holder plots and the statement of principles prepared under Section 8-A also relates to agricultural plots of tenure holders. Section 9 of the Act also requires that notices shall be sent "to the tenure holders or persons interested," i.e. those who claim to be tenure holders. Section 9-A of the Act provides that the objections in respect of land (agricultural land) and partition of joint holdings, shall be decided. Section 9-C (2) of the Act provides that "the partition of joint holdings shall be effected on the basis of shares, provided that where the tenure holders concerned agree, it may be effected on the basis of specific plots." Section 10 of the Act provides for preparation and maintenance of revised annual registers on the basis of the orders passed

under Section 9-A (1) and (2) of the Act. All these provisions clearly show that the dispute contemplated is only in respect of tenure holders' rights in agricultural land and it is only those rights that are adjudicated upon by the Consolidation authorities."

It is, therefore, clear that the Consolidation authorities had jurisdiction only to decide questions relating to the rights of tenure holders. A dispute as to who is the Mahant or Sarbarkar of a Math is a dispute of a civil nature cognizable by a Civil Court. It cannot be said to be a dispute relating to the rights of tenure holders. Upon the death of a Mahant or Sarbarkar no question of mutation or succession to the right of the tenure holder arise. In my opinion, therefore, the dispute as to who is the Mahant or Sarbarkar of a Math cannot be decided by the Consolidation authorities and is totally beyond their jurisdiction.

4. Learned counsel for respondent No. 3 raised a preliminary objection that though writ petition No. 517 of 1969 was filed within time the other writ petitions Nos. 2657, 2659, 2660, 2661 and 2663 are belated and the belated writ petitions should be dismissed. In the view which I am taking that the Consolidation authorities have no jurisdiction to decide the question as to who is the Mahant or Sarbarkar of the Math even if the orders are not expressly quashed they will be void orders. That being so the preliminary objection cannot be accepted.

5. The writ petitions are accordingly allowed and the orders of the Deputy Director of Consolidation dated January 9, 1959 are quashed. Parties will bear their own costs of this petition.

Petition allowed.

AIR 1970 ALLAHABAD 544 (V 57 C 79)

FULL BENCH

S. D. KHARE, R. B. MISRA AND
JAGMOHAN LAL SINHA, JJ.

Ram Lochan, Appellant v. Mahadeo Prasad Singh and others, Respondents.

Special Appeal No. 453 of 1969, D/-4-5-1970, from judgment and decree of Satish Chandra, J., D/-23-4-1969.

(A) Civil P. C. (1908), S. 42 — Powers of transferee Court executing Decree — Effect of amendment of S. 42 by U. P. Act 24 of 1951 — Powers of the transferee Court have been made continuous with the powers of the transferor Court. (Para 10)

(B) Civil P. C. (1908), Ss. 42, (U. P.) 51 and O. 21, R. 82 — Money decree by Small Cause Court prior to 1954 — Transfer for execution to Munsiff's Court —

FN/FN/C509/70/KSB/M

Transferee Court has no power to order attachment and sale of J. D's property in view of S. 42 (U. P.) read with O. 21, R. 82 — Execution sale is null and void — Modes of execution prescribed in Section 51 are subject to other sections including S. 42 in Code — Civil Misc. Writ No. 350 of 1968, D/-23-4-1969 (All), Reversed; AIR 1968 All 153 & AIR 1968 All 312, Overruled — U. P. Civil Laws (Reforms and Amendment) Act (24 of 1954), S. 3.

Per Misra and Khare, JJ., (Sinha J., Dissenting).

Where a money decree passed by a Small Cause Court in 1953 i.e. prior to amendment of Sec. 42 by U. P. Act 24 of 1954 is transferred to Munsiff's Court for execution by attachment and sale of immovable property, the transferee Court would have no power, after the amendment of Section 42, to execute the decree by attachment and sale of the property as a result of the combined operation of Section 42 (U. P.), O. 21, R. 82 and S. 3 of the Civil Laws' (Reforms and Amendment) Act (24 of 1954). Any sale effected by the transferee Court would be without jurisdiction and the entire execution proceedings would be null and void. AIR 1963 All 587, Ref to. Civil Misc. Writ No. 350 of 1968, D/-23-4-1969 (All), Reversed; AIR 1968 All 153 & AIR 1968 All 312 (Judgment reported in two instalments), Overruled. (Para 23)

The principle enunciated in 1905 A. C. 369 as to vesting of right of appeal and accepted in AIR 1957 SC 540 cannot be extended to execution proceedings. The decree-holder no doubt has got a right to execute his decree and realize his decretal amount, but he can exercise the right of executing the decree only in accordance with the procedure as it obtains on the date when he puts his decree in execution. (Para 20)

Though the modes provided by S. 51, Civil P. C. which relates to procedure only are subject to such conditions and limitations as may be prescribed, the section has got to be read along not only with the rules in the Schedule but also with the other sections of the Code, otherwise certain sections of the Code would become altogether redundant. Therefore, the modes prescribed by Section 51, are always subject to other provisions of the Code, and Section 42 is one of such provisions. (Paras 20, 21)

Section 51 relates to procedure, and no person can have a vested right in a course of procedure. If an Act alters the mode of procedure, he has no other right than to proceed according to the altered mode. The general principle certainly is that alteration in a procedure is retrospective unless there be good reason against it. There is no question of saving any right when

the decree-holder had no vested right in the course of procedure. The amendment brought in Section 42, has only changed the power of the transferee Court.

(Para 22)

(C) Civil P. C. (1908), Ss. 11 and 47 — Executing Court — Lack of inherent jurisdiction to execute decree by attachment and sale of immovable property — Execution sale is null and void and J. D. can ignore it — Separate suit to declare it as void is not barred by S. 47 or by constructive res judicata.

Per Misra and Khare, JJ. (Sinha J. dissenting):

Where the executing Court lacks inherent jurisdiction to execute the decree by attachment and sale of judgment-debtor's immovable property in view of Section 42, Civil P. C. as amended in U. P. by Act 24 of 1954, the execution proceedings along with the sale even though confirmed are null and void and it is not necessary for the J. D. to raise any objection in execution under Section 47 and the J. D. is entitled to ignore it. In such a case only a declaration is needed if at all. A separate suit for the purpose would not, therefore, be barred by the principle of constructive res judicata or by the provisions of Section 47, Civil P. C., where the judgment debtor had absolutely no knowledge of the execution proceedings due to fraud perpetrated by the decree-holder. AIR 1944 Lah 294 (FB), Foll.; 1969 All 222 & AIR 1954 SC 340 & AIR 1963 All 319, Rel. on; AIR 1953 SC 65 & AIR 1956 SC 87, Distinguished. (Para 33)

Per Sinha, J.: The suit in the case was barred under Chapter XL, U. P. Revenue Manual and failing that by S. 47, C. P. C. (Para 83)

(D) Constitution of India, Art. 226 — Jurisdiction of High Court to issue writs — Court will not interfere unless there is an apparent error of law or fact resulting in injustice to either party — Wrong decision of Board of Revenue on a substantial point of law resulting in injustice to one party — It is a fit case for interference. (Per Sinha, J. Dissenting)). (Para 85)

Cases Referred: Chronological Paras

(1969) 1969 All LJ 222 = 1966 All WR (HC) 278, Jangi Misra v. Muneshar 25

(1968) AIR 1968 All 153 (V 55), Suraj Bux Singh v. Badri Prasad 47, 49

(1968) AIR 1968 All 312 (V 55), Suraj Bux Singh v. Badri Prasad 6, 15, 17, 18, 19, 20

(1967) AIR 1967 SC 1193 (V 54) = (1967) 1 SCR 157, M. P. Shreevastava v. Mrs. Veena 82

(1967) AIR 1967 SC 1344 (V 54) = (1967) 2 SCR 301, Ram. Chand Spg. and Wvg. Mills v. Bijli Cotton Mills (P) Ltd. Hathras 72

- (1967) AIR 1967 All 263 (V 54) =
 1966 All LJ 356, Ram Anjore
 Pande v. Sadanand 16, 21
- (1967) AIR 1967 Ker 163 (V 54) =
 ILR (1967) 1 Ker 86, Narayanan
 Nambudiripad v. Thomakutty 74
- (1964) AIR 1964 Ker 68 (V 51) =
 ILR (1963) 2 Ker 255 (FB),
 Malathy Amma v. Jos 73
- (1963) AIR 1963 SC 884 (V 50) =
 (1963) 2 SCR 208, Kameswar-
 amma v. Subba Rao 35
- (1963) AIR 1963 All 319 (V 50) =
 1961 All LJ 951, Kishan Lal v.
 Har Prasad 52
- (1963) AIR 1963 All 587 (V 50) =
 1963 All LJ 220, Bhukan Lal v.
 Ishwar Dayal Singh 14, 15, 49
- (1961) AIR 1961 SC 272 (V 48) =
 (1961) 1 SCR 591, B. V. Patankar
 v. C. G. Sastry 6, 70
- (1957) AIR 1957 SC 540 (V 44) =
 1957 SCR 488, Garikapati Veeraya
 v. Subbiah Choudhry 18, 20
- (1956) AIR 1956 SC 87 (V 43) =
 1955-2 SCR 938, Merla Ramanna
 v. Nallapara ju 30, 69, 83
- (1954) AIR 1954 SC 340 (V 41) =
 1955 SCR 117, Kiran Singh v.
 Chaman Paswan 31
- (1953) AIR 1953 SC 65 (V 40) =
 1953 SCR 377, Mohanlal v. Benoy
 Krishna 28
- (1949) AIR 1949 Mad 809 (V 36) =
 1949-1 Mad LJ 376, Mahomed
 Sikri Sahib v. Madhava Kurup 71
- (1947) AIR 1947 Pat 461 (V 34) =
 ILR 26 Pat 201 (SB), Baleshwar
 Chaubey v. Ram Ranavijaya
 Pratap Singh 27
- (1944) AIR 1944 Lah 294 (V 31) =
 ILR (1944) Lah 479 (FB), Surindar
 Nath v. Ram Sarup 34
- (1934) AIR 1934 All 314 (V 21) =
 1934 All LJ 859, Narotam Das
 v. Bhagwan Das 80
- (1925) AIR 1925 All 146 (V 12) =
 ILR 47 All 217, Bhagwan Das v.
 Suraj Prasad 34, 76 to 79
- (1923) AIR 1923 All 186 (V 10) =
 ILR 45 All 203 (FB), Badri Singh
 v. Tulsi Ram 77, 78
- (1905) 1905 AC 369 = 74 LJPC 77,
 Colonial Sugar Refining Co. Ltd.
 v. Irving 20

Ravindra Narain Singh, K. P. Singh,
 Ambika Prasad, Namwar Singh, R. S.
 Singh, for Appellant; Sankatha Rai, for
 Respondent.

R. B. MISRA, J.:— I have had the ad-
 vantage of reading the judgment prepared by
 my brother Sinha, J. With all respects,
 however, I find myself unable to concur
 with the view taken by my learned
 Brother.

2. The present Special Appeal came up
 for hearing before a Division Bench. As

on one of the points involved in the case
 there was conflict of judicial opinion, the
 Division Bench referred the case to a
 larger Bench. This is how this appeal
 came up before this Bench.

3. In order to appreciate the point
 involved in this case a few facts would
 be necessary. Matadin, the father of Ram
 Lochan appellant, was a fixed rate tenant
 of the plots in dispute. One Ram Nares
 obtained a money decree against Matadin
 from the Court of Judge, Small Causes in
 the year 1953. He sought to execute the
 decree by attachment and sale of the im-
 movable property of the judgment-debtor.
 As under the rules the Small Cause Court
 had no jurisdiction to execute the decree
 by attachment and sale of immovable
 property, the decree-holder applied for the
 transfer of the decree to the Court of
 Munsif, Varanasi, for execution. The
 transferee Court ordered execution by sale
 of the plots in dispute and transferred the
 decree for auction sale to the Collector.
 Accordingly the plots in question were
 put to auction sale and were purchased by
 the decree-holder himself on 20th July,
 1956. The sale was confirmed on 29th
 August, 1956, and sale certificate was
 issued on 8th September, 1956. The
 Dakhnana on the record indicates that
 the decree-holder obtained possession on
 14th March, 1957. He got his name re-
 corded in the revenue papers also on the
 basis of the auction sale. On 4th March,
 1960, the decree-holder-auction-purchaser
 sold the said plots to respondents Nos. 2
 to 6. The judgment-debtor meanwhile
 died leaving behind Ram Lochan appel-
 lant as his heir and legal representative.
 The suit giving rise to the present appeal
 was filed by Ram Lochan for declaration
 that he was the Bhumidhar in possession
 of the plots in dispute and prior to him
 his father was the Bhumidhar in posses-
 sion of the plots in dispute till his death;
 and, in the alternative, for possession in
 case he (Ram Lochan) was found to be
 out of possession. He alleged that defend-
 ant No. 1 (Ram Nares) got the suit land
 sold in execution of the money decree of
 the Small Cause Court, though such a
 decree could not have been executed by
 attachment and sale of immovable prop-
 erty by the executing Court after the
 enforcement of U. P. Civil Laws (Re-
 forms and Amendment) Act (XXIV of
 1954). He also alleged that the judgment-
 debtor had absolutely no knowledge of
 the sale proceedings, and no notice was
 served on him, and the decree-holder
 managed to get the property in dispute
 sold for a paltry sum of Rs. 360-14-0
 though it was worth Rs. 6,000. It was
 further alleged that the judgment-debtor,
 and after him the appellant, had all along
 been in possession of the suit property in
 spite of the auction sale and the
 Dakhnana.

4. The claim was resisted by the respondents on grounds, inter alia, that the suit was barred by Section 47, Civil P. C., barred by time, barred by res judicata, estoppel and acquiescence, that the Revenue Court had no jurisdiction to try the suit, that the plaintiff was not a Bhumidhar nor in possession, and that respondents Nos. 2 to 6, being the transferees for value in good faith without notice, were entitled to the protection of Sections 41 and 51 of the Transfer of Property Act.

5. The Assistant Collector, First Class, by and large, accepted the defence and dismissed the suit. On appeal, the Additional Commissioner reversed the decree and the findings of the trial Court, and decreed the suit. He held that the entire execution and sale proceedings had taken place behind the back of the judgment-debtor (Matadin) with the result that the land in suit was sold away for a paltry sum of Rs. 360/- and odd, that the execution Court had no jurisdiction at all to order the sale of immovable property and so the auction sale was void in law. Consequently the interest of Matadin judgment-debtor was not extinguished in the suit land and he continued in actual cultivatory possession till 1960. It was further found that the suit was not barred by constructive res. judicata, and that respondents Nos. 2 to 6, the transferees from the decree-holder, forcibly took possession over the land in suit in 1368 F., and that the suit was well within time.

6. The respondents unsuccessfully took up the matter in Second Appeal to the Board of Revenue. The Board of Revenue upheld the finding of the Additional Commissioner that the sale by the execution Court was void. It however, held that the decree-holder got possession in pursuance of the decree, and the Dakhlanama dated 14th March, 1957 was correct but the possession of Ram Naresh of the suit land was in pursuance of a void sale. The Board further held that the question of irregularities, if any, in the conduct of the auction sale could have been raised only in execution Court under Section 47, Civil P. C. and not by a regular suit. In the end, however, the Board observed that—

—“Although I differ with Additional Commissioner on various arguments advanced by him in his judgment, I agree with him in the ultimate conclusion arrived at by him and hold that defendant-appellants Nos. 1 to 5 are clearly liable to ejectment as trespassers.”

A writ petition was filed by the contesting respondents challenging the orders of the Board of Revenue and the Additional Commissioner which was allowed by a learned Single Judge on 23rd April, 1959. The learned Single Judge relied upon the case of “Suraj Bux Singh v. Badri Prasad,

reported in AIR 1968 All 312 to hold that the amended Section 42, Civil P. C. would apply only to decrees passed after the U. P. Civil Laws (Reforms and Amendment) Act (24 of 1954 — hereinafter referred to as Act No. 24 of 1954) had come into force in 1954, and not to decrees passed prior to it, which could be executed in accordance with the provisions of the unamended Section 42, Civil P. C. The learned Single Judge took the view that the decree-holder had a vested right to realize the decretal amount from the immoveable property of the judgment-debtor. This right has been saved by the saving provision of Section 3 of Act 24 of 1954. In this view of the matter the learned Single Judge did not like to express any concluded opinion on the question of the bar of Section 47, Civil P. C. but in the end, relying upon “AIR 1961 SC 272” B. V. Patankar v. G. C. Sastry, he held that the irregularity in the publication and conduct of the sale could be agitated before the execution Court under Section 47, Civil P. C. and not by a separate suit. Feeling aggrieved by that order the plaintiff filed the present Special Appeal which, on reference, as stated earlier has come before this Bench.

7. Before embarking upon the discussion of the points raised by the counsel on either side it would be proper at this stage to refer to the relevant provisions of the Code of Civil Procedure and the U. P. Civil Laws (Reforms and Amendment) Act.

8. Section 38, Civil P. C. provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

9. Section 39, Civil P. C. provides for the transfer of a decree by the Court which passed it to another Court, either on the application of the decree-holder or of its own motion. It also provides the circumstances in which the decree could be transferred.

10. Section 42, Civil P. C. deals with the powers of the transferee Court in executing a transferred decree. The section as it stood prior to its amendment by the State of Uttar Pradesh, vide U. P. Act 24 of 1954, which came in force on 30th November, 1954, read thus:—

“The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.”

But after its amendment by the U. P. Act 24 of 1954, Section 42, Civil P. C. reads thus:—

"The Court executing the decree sent to it shall have the same powers in executing such decree as the Court which passed it. All persons disobeying or obstructing the execution of decree shall be punished by such Court in the same manner as if it had passed the decree and its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself."

In substance, under the unamended Section 42, Civil P. C. the transferee Court executing the decree sent to it had the same powers in executing such decree as if the decree had been passed by itself; but after its amendment by U. P. Act 24 of 1954 the powers of the transferee Court have been made conterminous with the powers of the transferor Court.

11. Order 11, Rule 82, Civil P. C. provides that sale of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

12. Section 51, Civil P. C. provides procedure in execution. In so far as is material to our purpose, it reads thus:

"Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale, or by sale without attachment of any property;
- (bb) by transfer other than sale, by attachment or without attachment of any property;
- (c) by arrest and detention in prisons;
- (d) by appointing a receiver, or
- (e) in such other manner as the nature of the relief granted may require: Provided

13. Section 3 of the U. P. Civil Laws (Reforms and Amendment) Act, which saves certain vested rights is in these terms:—

"3. (1) Any amendment made by this Act shall not affect the validity, invalidity, effect or consequence of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred or any release or discharge of or from any debt, decree, liability, or any jurisdiction already exercised, and any proceeding instituted or commenced in any Court prior to the commencement of this Act shall, notwithstanding any amendment herein made, continue to be heard and decided by such Court.

(2) Where, by reason of any amendment herein made in the Indian Limitation Act, 1908, or any other enactment mentioned in column 2 of the Schedule, the period of limitation prescribed for any suit or appeal has been modified or a different period of limitation will hereafter govern

any such suit or appeal, then, notwithstanding any amendment so made or the fact that the suit or appeal would now lie in a different Court, the period of limitation applicable to a suit or appeal, as aforesaid, in which time has begun to run before the commencement of this Act, shall continue to be the period which but for the amendment so made would have been available."

14. Sri R. N. Singh, appearing for the appellant, contended that the Munsif who executed the decree had no jurisdiction, after the amendment of Section 42, Civil P. C. by Act 24 of 1954, to execute the decree by attachment and sale of immoveable property. After the amendment in 1954 the power of the transferee Court has been made conterminous with the power of the transferor Court — the power of the Small Cause Court in the present case. In view of O. 21, R. 82, Civil P. C., the Small Cause Court has no power to execute the decree by attachment and sale of immoveable property. The transferee Court also, being impressed with the same power, had no jurisdiction to execute the decree by attachment and sale of immoveable property. The learned counsel further contended that the change brought in Section 42, Civil P. C. by Act 24 of 1954 relates to the procedure, and the decree-holder cannot claim any vested right in a course of procedure. Therefore, the learned Single Judge was not correct in holding that the decree-holder had a vested right to realize his money by attachment and sale of immoveable property, which could not be taken away by the amendment of Section 42, Civil P. C. in view of the saving provision contained in Section 3 of Act 24 of 1954. He relied upon "AIR 1963 All 587" Bhukan Lal v. Ishwar Dayal Singh. It was held in that case that Section 42, as amended by U. P. Act 24 of 1954, invests the transferee Court executing a decree with the same power in executing the decree as the Court which passed it. If the transferor Court did not possess the power to execute the decree, the transferee Court would also not have that power qua that decree. The power to execute a decree against immoveable property is specifically denied to Courts constituted under the Provincial Small Cause Courts Act, 1887. Consequently the Court to which a decree passed by a Small Cause Court is transferred will not have the power to attach immoveable property in execution of the same.

15. From the report of the above case it is not clear whether the proceedings there arose out of a case instituted prior or subsequent to the Amendment Act (No. 24 of 1954). When that case was cited before another Division Bench in a case reported in "AIR 1968 All 312", that

Court was also faced with the same difficulty. In order to find out whether the execution proceedings in Bhukan Lal's case, AIR 1963 All 587 (supra) arose out of a case instituted prior or subsequent to the introduction of U. P. Act 24 of 1954, the Bench in Suraj Bux Singh's case, AIR 1968 All 312 had to ransack the record of Bhukan Lal's case. As a result of investigation it was revealed that the decree in that case had been passed by the Small Cause Court in 1950 — prior to the amendment of Section 42, Civil P. C. The Division Bench in Bhukan Lal's case, AIR 1963 All 587 (supra) was alive to the hardship that was likely to be caused in some cases, all the same it was of the view that so long as the present section exists, a decree of the Small Cause Court cannot be executed against immoveable property of the judgment-debtor. It is true that the point taken in the instant case was not specifically considered in Bhukan Lal's case, AIR 1963 All 587 (supra). The Division Bench in that case confined itself to the consideration of the powers of the transferee Court after the amendment in 1954 of Section 42, Civil P. C. It did not pointedly consider whether the amendment would or would not retrospectively operate in cases instituted prior to the coming into force of U. P. Act 24 of 1954.

16. The learned counsel for the appellant next relied upon the case of "Ram Anjore Pande v. Sadanand", reported in 1966 All LJ 356 = (AIR 1967 All 263). In that case, while dealing with Sec. 3 of the U. P. Act 24 of 1954, it was held that:—

"Section 3 of the Amendment Act saves the right already acquired. It cannot be held that as soon as a decree-holder obtains a decree, he acquires a right. In all the modes of execution prescribed at that time by the Code of Civil Procedure. He merely has a right to execute his decree and, as such, execution can only proceed according to the procedure prescribed for execution at the time when the execution is taken out and it cannot, therefore, be said that at the time of obtaining the decree, the decree-holder acquires a right to get immoveable property sold by having his decree transferred to a Court other than a Court of Small Causes."

It was further held in that case that:—

"The modes prescribed by Section 51, Civil P. C. are always subject to other provisions of the Code and S. 42 is one of such provisions."

17. The learned Single Judge, however, allowed the writ petition relying on the Division Bench case of AIR 1968 All 312 (supra) where it was held that:—

"Amendment brought in Section 42 by the Amendment Act of 1954 apparently relates to change in the power of the ex-

ecuting Court, but it does hit the substantive right of the decree-holder inasmuch as it places a bar against him to proceed against the immoveable property of the judgment-debtor. How a decree may be executed may be a question purely of procedure, but whether a decree-holder can realize his decree by sale of immoveable property cannot be said to be a mere matter of procedure. The right to realize the decree money from the immoveable property of the judgment-debtor is a substantive right and cannot be taken away by an amendment which provides that execution cannot be proceeded with by sale of immovable property unless the statute specifically provides so and takes away that right. The amendment, therefore, in so far as it affects the right of the decree-holder who had filed suit prior to the getting into force of the Amendment Act or obtained decree prior to that date, cannot act adversely against the interest of such decree-holders by affecting their substantive right."

18. The decision in Suraj Bux Singh's case, AIR 1968 All 312 (supra) is based on the analogy of the principles laid down in AIR 1957 SC 540, Garikapati Veeraya v. Subbiah Choudhry. It was held by the Supreme Court in that case that the right of appeal is not a matter of procedure but a substantive right which vests in the suitor on the date of the institution of the suit. This vested right of appeal can be taken away by a subsequent enactment only if it so provides expressly or by necessary intendment and not otherwise.

19. The Division Bench in Suraj Bux Singh's case, AIR 1968 All 312 (supra) extended the principle laid down by the Supreme Court to execution of the decree also. It was observed that:—

"The right to recover the decretal amount from immoveable property is similar to a right of appeal, and what has been said of a right of appeal applies to such a right also."

According to the Division Bench, this right was saved by Section 3 of U. P. Act XXIV of 1954 and the same could not be affected by the amendment of Section 42, Civil P. C. in 1954. Reliance was placed on Section 51, Civil P. C. which, according to the Division Bench in Suraj Bux Singh's case, AIR 1968 All 312 (Supra), confers a right on the decree-holder, among others, to realize the decree-money either by attachment and sale or by sale without attachment of any property. How will the sale take place may be a matter of procedure, but the right to realize the decretal amount by attachment and sale is a substantive right of the decree-holder which he gets on the date of suit.

20. Sri Sankatha Rai for the respondents supported the judgment of the

learned Single Judge on the ground that the right conferred by Section 51, Civil P. C. is subject to such conditions and limitations as may be 'prescribed'. 'Prescribed' is a defined term. According to Section 2 (16), Civil P. C. "Prescribed" means prescribed by rules. He contends that the right conferred by Section 51, Civil P. C. is not subject to Section 42 or any other section of the Code. It is subject only to the rules prescribed. Thus the right conferred by Section 51, Civil P. C. to the decree-holder to realise his decretal amount by attachment and sale of immoveable property is not to be affected in the least by the amendment of Section 42 in 1954. He took support from the Division Bench case of Suraj Bux Singh, AIR 1968 All 312 (Supra). Brother Sinha, J. has agreed with the view taken in Suraj Bux Singh's case AIR 1968 All 312 on the reasoning that when the suitor filed his suit prior to the amendment of Section 42, Civil P. C. in the year 1954, for the recovery of his money, he knew it full well that, in view of Section 51, Civil P. C. he had a right to execute his decree, among others, by attachment and sale of immoveable property of the judgment-debtor. With all respect I find myself unable to accept the view taken in Suraj Bux Singh's case, AIR 1968 All 312. As observed earlier, that was a case based upon AIR 1957 SC 440 (supra) which itself was based upon 1905 AC 369, Colonial Sugar Refining Co. Ltd v. Irving wherein it was laid down by the Privy Council that:—

"To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

The principle enunciated by the Privy Council in 1905 AC 369 (supra) had been applied in India for the last over 50 years, and the Supreme Court, on the principle of stare decisis, by majority accepted the principle of law laid down in that case. The only ground for following 1905 AC 369 (supra) was the principle of stare decisis. Hon'ble Venkatarama Ayyar, J. in his dissenting judgment observed:

"It may look a daring and almost famous adventure to canvass the correctness of the decision in 1905 AC 369 (supra), especially when it has been followed by Courts in this country for well-nigh half a century. But with all respect which I have for the decision of a tribunal so august as the Privy Council and of a Judge so

eminent as Lord Macnaghten, I am of opinion that the decision in question cannot be supported on principle, that it is not warranted by the authorities, and cannot, therefore, be followed."

With profound respect I may say that weighty reasons have been given in the dissenting judgment of Hon'ble Venkatarama Ayyar, J. for not accepting the principle laid down in 1905 AC 369 (supra). In my opinion the principle enunciated in it as accepted by the Supreme Court in AIR 1957 SC 540 (supra) cannot be extended to execution proceedings. The decree-holder no doubt has got a right to execute his decree and realize his decretal amount, but he can exercise the right of executing the decree only in accordance with the procedure as it obtains on the date when he puts his decree in execution. If the principle is extended to the accrual of right to execute the decree by attachment and sale of immoveable property of the judgment-debtor on the date of the institution of the suit, there is no reason why should it not be extended even to the date of the transaction of loan itself. Besides, Section 51, Civil P. C. appears under heading "procedure in execution." It evidently, therefore, relates to procedure only. In this view of the matter a decree-holder gets a right to execute his decree only in accordance with the procedure provided by law. If Section 51 is to be considered to be subject only to the conditions and limitations as prescribed by the rules and not subject also to the other sections of the Code, as argued by the learned counsel for the respondent, it would mean that a decree-holder has got a vested right to execute his decree in any of the modes provided by Section 51, Civil P. C. even irrespective of the provisions of Sections 38, 39 and 60, Civil P. C. which could not have been intended by the law-makers. In certain circumstances a decree has got to be transferred to another Court under Section 39, Civil P. C. for execution. Again, in view of Section 60, Civil P. C., the houses and other buildings belonging to an agriculturist and occupied by him as also other moveable property enumerated therein are immune from attachment and sale in execution of a decree. If Section 51, Civil P. C. were to be read independently of this section, it would mean that a decree-holder has got a vested right to execute his decree even in respect of property which has been exempted from attachment and sale in execution of a decree by virtue of Section 60, Civil P. C. Thus, though the modes provided by S. 51, Civil P. C. are subject to such conditions and limitations as may be prescribed, in my opinion, the section has got to be read along with the other sections of the Code otherwise certain sections of the Code would become altogether redundant.

21. I would, therefore, in agreement with brother Dayal, J. in Ram Anjore Pande's case, 1966 All LJ 356 = (AIR 1967 All 263) (supra) hold that the modes prescribed by Section 51, Civil P. C. are always subject to other provisions of the Code, and Section 42 is one of such provisions.

22. If right to execute a decree by attachment and sale of immoveable property is a vested right, it would be saved by the saving Sec. 3 of U. P. Act 24 of 1954. Section 3 of U. P. Act 24 of 1954 protects the rights "already acquired." Section 51 relates to procedure, and no person can have a vested right in a course of procedure. If an Act alters the mode of procedure, he has no other right than to proceed according to the altered mode. The general principle certainly is that alteration in a procedure is retrospective unless there be good reason against it. There is no question of saving any right when the decree-holder had no vested right in the course of procedure. The amendment brought in Section 42, Civil P. C. has only changed the power of the transferee Court. Prior to the amendment of the section the transferee Court could execute a decree as if it had been passed by itself. But after the amendment the power of the transferee Court is the same as that of the transferor Court in matters of execution. It is open to the legislature to regulate the power of a Court.

23. As indicated earlier, the plots in dispute were put to auction sale on 20th July, 1956 and the sale was confirmed on 29th August, 1956 long after the enforcement of the U. P. Civil Laws (Reforms and Amendment) Act, 1954. On the date when the decree was put into execution the Amendment Act had already come into force and the power of transferee Court had been made coterminous with the power of the transferor Court. As the decree in question was passed by Small Cause Court, the Munsif to whom the decree had been transferred for execution was therefore impressed with the power of Small Cause Court. Order XXI, Rule 82, C.P.C. already quoted, prohibits sale of immoveable property in execution of a decree by a Court of Small Causes. Consequently the Munsif, to whom the decree had been transferred for execution, having the same power as that of the Court of Small Causes could not order sale of immoveable property. Thus the sale of immoveable property by the executing Court in this case was completely without jurisdiction and the entire execution proceedings were null and void.

24. The learned counsel for the appellant next contended that the learned Single Judge was not correct in holding that the suit was barred by Section 47, C.P.C. In the view taken by me that the

Munsif had no jurisdiction to execute the decree and the entire execution proceedings were without jurisdiction, it was not at all necessary for the judgment-debtor to have filed any objection under Section 47, C.P.C. He could ignore the execution including the attachment and sale of the property. If the Court had the jurisdiction to attach and sell the immoveable property and the appellant had sought to challenge the sale on the ground of irregularity, certainly Section 47, C.P.C. would have stood as a bar. But as indicated above, the Munsif in the present case had absolutely no jurisdiction to execute the decree by attachment and sale of immoveable property after the amendment of Section 42, C.P.C. in 1954.

25. The counsel for the appellant also relied upon "1969 All LJ 222" Jangl Misra v. Muneshar. A learned Single Judge of this Court held in that case that:—

"When a Court lacks jurisdiction it is *coram-non-judice* and its judgment and decree is a nullity. It is the Court's duty, to see to its own competency. This duty will be circumvented by calling it a discretion and refusing to entertain the question of jurisdiction on the ground that the defendant had not raised the objection in the trial Court or it conceded that the Court had jurisdiction." Though the facts of that case were slightly different, but the principle laid down in that case can safely be relied upon in the instant case.

26. Confusion is apt to arise in not keeping in mind the difference between complete absence of jurisdiction in a Court to pronounce judgment or to execute a decree and where a Court in the undoubted exercise of its jurisdiction proceeds to act irregularly or even illegally in direct violation of the provisions of the statute. In the present case it has been found, while dealing with the first point, that the power of the learned Munsif had been completely taken away by the amendment of Section 42, C.P.C. in 1954 to execute a decree of the Small Cause Court by attachment and sale of immoveable property. There was thus a complete want of jurisdiction.

27. In "AIR 1947 Pat 461 (SB)" Balashwar Chaubey v. Ram Ranvijaya Pratap Singh, while dealing with Section 47, C.P.C., it was held:—

"Where the Court had jurisdiction to sell, a sale held in contravention of some provision of law can be avoided before its confirmation by an application under Section 47 without it being necessary for the applicant to show more than that the provision of that law has been contravened. But after confirmation, the sale can only be avoided if the applicant establishes that owing to fraud or other rea-

son he was kept in ignorance of the sale proceedings preliminary to sale."

28. Sri Sankatha Rai relied upon "AIR 1953 SC 65" Mohan Lal v. Benoy Krishna in support of his contention that even if the judgment-debtor had to raise an objection that the execution Court had no jurisdiction to execute the decree, the failure to raise such an objection which goes to the root of the matter, precludes him from raising the plea of jurisdiction on the principle of constructive res judicata after the property had been sold to the auction-purchaser who has entered in possession.

29. The facts of the Supreme Court case cited above are distinguishable from the facts of the present case. In that case the Calcutta High Court on its original side passed a decree and transmitted the same to the Asansol Court through the District Judge of Bardwan, and the Asansol Court thereupon acquired jurisdiction to execute the decree against the property situate within its territorial limits. The application for execution made by the decree-holder was dismissed for default, and the Asansol Court sent to the High Court what in form purported to be a certificate under Section 41 of the Code. The decree-holder filed another application on 24th November, 1942 to the Asansol Court for execution of the decree against the same judgment-debtors with the same prayer for realization of the decretal amount by sale of the same property as mentioned in the previous execution case. The contention of the judgment-debtors in that case was that the certificate sent by the Asansol Court to the High Court on 11-3-1932 was intended to be, in form as well as in substance, a certificate under Section 41 of the Code and that thereafter the Asansol Court ceased to have jurisdiction as execution Court as there was no fresh transmission of the decree of the High Court. Consequently all subsequent proceedings in the Asansol Court were void and inoperative for lack of inherent jurisdiction in that Court. It was in these circumstances that the Supreme Court held:—

"An omission to send a copy of the decree or an omission to transmit to the Court executing the decree the certificate referred to in clause (b) of Order XXI, Rule 6 does not prevent the decree-holder from applying for execution to the Court to which the decree had been transmitted. Such omission does not amount to a material irregularity within the meaning of Order XXI, Rule 90 and as such cannot be made a ground for setting aside a sale in execution."

The Supreme Court also applied the principle of Section 11 as the judgment-debtors failed to raise an objection at the time when the second execution ap-

plication was made or when notice of the execution proceeding was served upon the judgment-debtors. Failure to raise an objection precludes him from raising the plea of jurisdiction on the principle of res judicata. There was no lack of inherent jurisdiction in that case as we find in the instant case.

30. Though not cited here, before the Additional Commissioner reliance was placed on "AIR 1956 SC 87" Merla Ramanna v. Nallapa Raju. It was held in that case thus:—

"When a sale in execution of a decree is impugned on the ground that it is not warranted by the terms thereof, that question could be agitated when it arises between the parties to a decree only by an application under Section 47 and not in a separate suit."

Plainly the facts of that case were distinguishable. There the sale was not warranted by the terms of the decree, but there was no lack of inherent jurisdiction in the executing Court to execute the decree.

31. "AIR 1954 SC 340" Kiran Singh v. Chaman Paswan, on the other hand definitely holds that—

"It is a fundamental principle, well established, that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings."

32. Sri Sankatha Rai relied upon "1961 All LJ 951" = (AIR 1963 All 319)" Kishan Lal v. Har Prasad, in support of his contention that even if the auction sale was null and void, the judgment-debtor should have filed an objection under Section 47, C.P.C. and a regular suit is barred. It was a Division Bench case of this Court. The question that fell for consideration in that case was as to whether the objection would fall under Order XXI, Rule 90, or under Section 47, C.P.C. The objection in that case was that the sale had taken place at a time when the execution of the decree had been stayed by an order of a superior Court and, therefore, it was null and void. The Division Bench made a distinction in the scopes of Order XXI, Rule 90 and of Section 47, C.P.C. The Division Bench held:—

"A sale attended with an irregularity is quite distinct from a sale that is null and void; the former exists and is in force so long as it is not set aside, whereas the latter does not exist in the eye of law at all. A sale attended with an irregularity has to be set aside; whereas in a null and void sale only a declaration to that effect may be necessary, if at all. Order XXI, Rule 90 does not deal at all with a

sale that is null and void or with a declaration that it is so."

33. From the above observation it is apparent that in case of a sale which is a nullity only a declaration is needed, if at all, that it was a nullity. The case, in my opinion, does not help Sri Sankatha Rai, firstly, because in that case there was no lack of inherent jurisdiction in the executing Court and, secondly, the Court did not hold that a separate suit for such a declaration was barred.

34. The learned counsel for the appellant next relied upon a Full Bench decision of Lahore High Court, "AIR 1944 Lah 294", Surindar Nath v. Ram Sarup. It was held in that case that where the party to the suit against whom a suit had been dismissed does not choose to go to the executing Court either because it has no knowledge of what is happening there or because, having knowledge, he feels that he should wait and see what ultimately happens, then in his case it cannot be said that by not going there the question is constructively decided against him. Such a person has two concurrent remedies and he can choose either of them. If he acquires knowledge that his property is being wrongfully taken in execution of the decree, he may choose the expeditious remedy of going to the executing Court. But if he chooses the remedy under Section 47, C.P.C., it will bar his subsequent suit for the same relief. On the other hand, if either after having acquired knowledge or through ignorance he takes no steps to object to the wrongful sale of the property by the executing Court, on no principle of law can a separate suit to take possession of the property wrongfully sold by the executing Court be held to be barred. In the instant case it has already been mentioned that the judgment-debtor had absolutely no knowledge of the execution proceedings, and the whole thing was so done by perpetrating fraud. So the Full Bench decision of the Lahore High Court fully applies to the present case.

Sri R. N. Singh further contended that the Collector, to whom the decree had been transferred for the auction sale, was not a Court and, therefore, no objection could have been filed under Section 47, C.P.C., nor would Section 47 stand as a bar to the present suit. In support of his contention he relied upon "AIR 1925 All 146," Bhagwan Das Marwari v. Suraj Prasad Singh. In that case the decree was transferred to Collector for execution and the Collector, to whom an application to set aside the sale was made, dismissed the same and confirmed the sale. It was held in these circumstances that a suit to set aside the sale on the ground of fraud covering a wider ground than the one under Order XXI, Rule 10, i.e., fraud in

publishing or conducting a sale, is maintainable and is not barred by any provision of law. As I have already held that the Munsif had no jurisdiction at all to order sale of immoveable property in execution of the decree of the Small Cause Court in this case, it is not necessary to express any concluded opinion on this point.

35. Sri Sankatha Rai for the respondent contended that the Additional Commissioner has committed an error in recording a finding of fraud when the parties were not at issue on that point, and this is why the Board of Revenue did not approve of that finding. I feel hesitation in accepting this contention. It is true that no specific issue of fraud had been framed by the trial Court, but the defendant had no doubt about the case set up by the plaintiff about fraud and want of notice, and no prejudice has been caused, because both the parties have adduced evidence. The Additional Commissioner has accepted the evidence produced by the plaintiff in preference to the evidence produced by the defendant and, therefore, the finding of fact recorded by the Additional Commissioner, which was the last Court of fact, could not have been set aside by the Board of Revenue, and indeed the Board of Revenue has not set aside the finding recorded by the Additional Commissioner. If authority be needed, "AIR 1963 SC 884", Kameswaramma v. Subba Rao may be cited. It was held there:—

"Where the parties went to trial fully knowing the rival cases and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case or that there was that mistrial which vitiates proceedings. The suit could not be dismissed on the narrow ground, and also there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion and neither party claimed that it had any further evidence to offer."

36. For the reasons given above I would allow the appeal and set aside the order of the Single Judge dated 23rd April, 1969. In the circumstances of the case I would make, no order as to costs.

37. S. D. KHARE, J.: I agree.

38. SINHA, J.: This is a Special Appeal directed against an order dated April 27, 1969, passed by a learned Single Judge of this Court in Civil Misc. Writ No. 350 of 1968.

39. The facts leading to this appeal can briefly be stated as under:

40. Mata Din, father of Ram Lochan appellant, was a fixed rate tenant of the plots in dispute. One Ram Naresh Singh

obtained a money decree against Mata Din on 18th February, 1953, from Judge Small Cause Court, Varanasi, in Suit No. 847 of 1953. The decree was transferred to the court of Munsif, Varanasi for execution. The execution court ordered sale of the plots in dispute and the decree was transferred for that purpose to the Collector. The plots were eventually sold in public auction and were purchased by Ram Naresh Singh decree-holder on 20th July, 1956. The sale was confirmed on 29th August, 1956, and on 8th September, 1956, the requisite sale certificate was also issued. Ram Naresh Singh obtained possession over the plots on 14th March, 1957, and his name was also recorded in the Revenue papers. On 4th March, 1960, Ram Naresh Singh sold the said plots to respondents Nos. 2 to 5.

41. Mata Din having died, his son Ram Lochan (hereafter to be called the appellant) filed a suit under Section 229 of the U. P. Zamindari Abolition and Land Reforms Act for declaration that he was bhumidhar of the plots in dispute and for possession over the same. It was, *inter alia*, pleaded by him that the sale of the plots in execution of the decree of the Court of Judge, Small Causes was without jurisdiction and a nullity and further that the execution proceedings were bad in law having been conducted without any notice to or any knowledge of the judgment-debtor.

42. The suit was contested by the respondents.

43. The trial Court held that the suit was barred by Section 47, C.P.C. and by the principles of constructive *res judicata*, that the revenue Court had no jurisdiction to grant the relief prayed for, that respondents Nos. 2 to 5 were bona fide purchasers in good faith for value without notice to the plaintiff's title, and that the suit was also barred by limitation.

44. The present appellant assailed the decree of the trial Court before the Commissioner. The Additional Commissioner, who heard the appeal, reversed the finding of the trial Court on all the points and further held that the executing court had no jurisdiction to order the sale of the plots in execution of the decree of the court of Judge Small Causes. In the result, the Additional Commissioner allowed the appeal and decreed the suit.

45. Against the decision of the Additional Commissioner, the present respondents went up in Second Appeal before the Board of Revenue. The Board of Revenue, vide its decision dated 16th October, 1967, held that the Additional Commissioner wrongly took cognizance of the irregularities in sale, as that point could only be agitated before the execution court under Section 47, C.P.C. The Board, however, further held that the sale of the plots in dispute in execution

was null and void because it took place after the commencement of the U. P. Civil Laws Amendment Act, 1954, which amended Section 42, C.P.C. as a result of which the executing court carried the same powers as the court which passed the decree. Since the decree, in the instant case, was passed by the Court of Judge, Small Causes, the Board of Revenue held that the sale of the plots in dispute was null and void. In the result, the Board of Revenue dismissed the appeal.

46. Against the decision of the Board of Revenue, the respondents filed Civil Misc. Writ No. 350 of 1968. It was decided by a learned Single Judge of this Court. Vide his judgment dated April 23, 1969, The learned Single Judge, relying on a decision of a Division Bench of this Court in case Suraj Bux Singh v. Badri Prasad, AIR 1968 All 153 (and 312) held that the sale of immoveable property ordered by the executing court was valid. It was further held by the learned Single Judge that since the execution court had the jurisdiction to execute the decree against immoveable property, any irregularity or illegality committed by it in the course of execution could only be agitated under Section 47, Civil P. C. In consequence of these two findings, the learned Single Judge allowed the writ petition and restored the order of the trial court.

47. The present Special Appeal is directed against the aforesaid order of the learned Single Judge.

48. The special appeal first came up for hearing before Seth and Khare, JJ. It was found by them that there is apparent conflict in the views expressed in the cases AIR 1963 All 587 and AIR 1968 All 153 (and 312). It was, therefore, directed by them that the papers be laid before the Hon'ble the Chief Justice for constituting a larger Bench to resolve the controversy and to dispose of the appeal. It is thus that this appeal has come up before us.

49. The principal question for consideration in this appeal is whether in a decree passed by the Court of Judge Small Causes before the commencement of U.P. Civil Laws Amendment Act, 1954, the court to which the decree was transferred for execution can order sale of immoveable property?

50. For a proper appreciation of the point in issue, it will be necessary to notice Section 42, Civil P. C. as it stood before the commencement of 1954 Amendment Act and as it stood thereafter. Before its amendment by the 1954 Act, it ran as follows:—

"The court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall

be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself."

51. After the amendment of Sec. 42, C.P.C., it read as follows:—

"The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree and its order in executing such decree shall be subject to the same rules in respect of appeals as if the decree had been passed by itself."

52. Another provision which requires consideration at this very place is Section 3 of 1954 Act, which reads as follows:—

"S. 3. Savings—

(1) Any amendment made by this Act shall not affect the validity, invalidity, effect or consequence of anything already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred or any release or discharge of or from any debt, decree, liability or any jurisdiction already exercised and any proceeding instituted or commenced in any Court prior to the commencement of this Act shall notwithstanding any amendment herein made continue to be heard and decided by such Court.

(2) Where by reason of any amendment herein made in the Indian Limitation Act, or any other enactment mentioned in column 2 of the Schedule, the period of limitation prescribed for any suit or appeal has been modified or a different period of limitation will hereafter govern any such suit or appeal, then notwithstanding any amendment so made or the fact that the suit or appeal would now lie in a different court, the period of limitation applicable to a suit or appeal as aforesaid, in which time has begun to run before the commencement of this Act, shall continue to be the period which but for the amendment so made would have been available."

53. A perusal of Section 3 of 1954 Act makes it abundantly clear that the 1954 Act was not intended to have any bearing on such rights, if any, as accrued to any person before the passing of the 1954 Act.

54. The question that then poses for consideration is whether any right can be said to have accrued to a person who obtained a money decree from a Court of Judge Small Causes before the commencement of 1954 Act.

55. Section 51, C.P.C. says that a court may on the application of the decree-

holder order execution on the decree, inter alia, by attachment and sale of any property. Section 60, C.P.C. states that among other things, lands and houses are also liable to attachment and sale in execution of a decree. Further, a decree passed by a Court of Judge, Small Causes can be transferred to any other court under Section 39, C.P.C. Order XXI Rule 82, C.P.C. provides that every court other than a Court of Judge Small Causes can order attachment of immoveable property in execution of a decree. Therefore, a cumulative reading of Sections 39, 51, 60 and Order XXI, Rule 82, C.P.C. clearly points to the conclusion that if any person had obtained a money decree from a Court of Small Causes before the commencement of 1954 Act, he could get his decree transferred for execution to another Court and could seek its execution by attachment and sale of immoveable property.

56. The matter can be better understood by an illustration:

"A" obtained a money decree from a court of Small Causes in January, 1954. The 1954 Act came into force on 22nd November, 1954. The question is could he or could he not apply any time before 22nd November, 1954, to get his decree transferred to the court of a Munsif and seek its execution by attachment and sale of immoveable property."

57. There can be no two opinions that before 22nd November, 1954, 'A' did have the right to get his decree transferred to the court of a Munsif and to seek its execution by attachment and sale of immoveable property. This position was also not controverted before us. The question before us is would there be any difference in that right of 'A' with the commencement of the 1954 Act on November 22, 1954 despite Section 3 of that Act. The relevant part of Section 3 of the Act can be extracted as follows:—

"Any amendment made by this Act shall not effect any right, obligation or liability already acquired, accrued or incurred."

58. As shown above, a right had accrued to 'A' (on the passing of the decree) to seek its execution against the immoveable property of his judgment-debtor and the judgment debtor had suffered a liability of the decretal amount being realised from him through attachment and sale of his immoveable properties on the option of the decree holder. The latter may or may not be true, but, in my view, there can be no doubt about the proposition that a right had already accrued to 'A' before the commencement of the 1954 Act to put his decree in execution by attachment and sale of immoveable property of the judgment-debtor. Section 3 of the 1954 Act clearly saved that right of the decree holder.

59. In the case before us, the decree had been obtained by Ram Naresh on 18th February, 1953, viz. several months before the commencement of the 1954 Act; therefore any time between 18th February, 1953, and 22nd November, 1954, Ram Naresh could get his decree transferred to a regular court and could seek its execution by attachment and sale of immovable property of the judgment debtor. He could do so because a right had accrued to him on the passing of the decree. Once it is accepted that a right had accrued to Ram Naresh on the passing of the decree to seek the execution thereof by attachment and sale of immovable property, that right was clearly saved to him by virtue of Section 3 of the 1954 Act. It cannot, therefore, be accepted that the sale of the plots ordered in execution of the decree obtained by Ram Naresh was without jurisdiction or that it was a nullity.

60. Learned counsel for the appellant next contended before us that even if the executing court had jurisdiction to order sale of immovable property in execution of the decree of the Court of Small Causes, the sale was void for reasons of fraud. It was contended that the Additional Commissioner accepted the contention of the appellant that the sale was invalid for reasons of fraud and the Board of Revenue had no jurisdiction to disturb that finding of fact in second appeal.

61. The submission made by the learned counsel for the respondent in reply to the above contention is two-fold:—

(1) That since no issue was framed either by the trial court or by the lower appellate court on the point of fraud, it was not open to the Additional Commissioner to give any finding on the point of fraud while dealing with the appeal.

(2) That, in any case, the point of any irregularity or illegality having been committed in the sale of the property could not be agitated by a separate suit and that it could be agitated only before the execution court which ordered the sale of the plots in dispute under Section 47, C.P.C.

62. Taking up the first part of the submission, a perusal of the judgment of the trial court does show that no issue had been framed by the trial court on the point of fraud. That point appears to have been taken up for the first time in appeal before the Additional Commissioner. To point whether there was any fraud at any stage of execution or sale was a point of fact. It may be stated that the appellant's case on the point of fraud is confined to this only that the sale had been conducted without any knowledge thereof to the judgment-debtor. If an issue had been framed by the trial court on the point of fraud, the respondents could lead evidence to show that

due notice and information, as required under the law, was given to the respondent. Since no issue was framed, the respondents could not lead any evidence on that point. It was, therefore, not appropriate for the Additional Commissioner to take the respondents by surprise in appeal and to give a decision on that point without affording them an opportunity to lead evidence in rebuttal of the allegation of fraud. If the Additional Commissioner felt that a finding on fraud was necessary, two courses were open to him. He should either have framed the issue and recorded the evidence of both the parties on that issue himself, or, should have framed an issue and remitted it to the trial court for a finding. Neither of the two courses was adopted by the Additional Commissioner. It is, therefore, obvious that the course followed by the Additional Commissioner has resulted in prejudice being caused to the respondents. As for the criticism that the Board of Revenue in second appeal could not assume jurisdiction to decide whether there had been any fraud or not, the Board of Revenue has not given a finding on that point. All that the Board of Revenue has said is that the Additional Commissioner was wrong in criticising sale for the reason of any irregularities, for, in the opinion of the Board of Revenue, that point could only be agitated by filing objections under Section 47, C.P.C. The Board of Revenue thus considered only the legal aspect of the Additional Commissioner having given a finding on the point of fraud. It cannot be said that the Board of Revenue travelled outside its jurisdiction in doing so. In any case, for the reasons already stated, the appellant cannot fall back upon the finding of the Additional Commissioner on the point of fraud to assail the sale of the plots in dispute.

The second part of the submission made by the learned counsel for the respondent also carries substance. A perusal of the statement of the plaintiff's case, as contained in the judgment of the trial court, would show that the appellant did not plead any fraud having been practised at any stage during the trial of the suit. The allegation made is that the land in suit was sold without the knowledge of the appellant's father. The allegation of fraud made by the appellant thus relates to the stage of the execution of the decree and not to any prior stage.

63. Now, it may be recalled that the decree in the instant case was sent to Collector for sale of immovable property. In exercise of its powers under Section 70, C.P.C., the State Government has framed Rules laying down the manner in which the Collector should conduct himself in the matter of sale of agricultural property ordered by any court in execution of a

decree. These rules are contained in Chapter XL of the U. P. Revenue Manual. Para 969 states that if, after the decree has been transmitted, any claim to the property ordered to be sold or any objection to the order of the court directing the sale be preferred to that court, it may, if it sees fit, recall the decree and proceed to dispose of the claim or objection. In the event of the objection being upheld, the matter ends. In the event of the claim or objection being rejected, the decree is retransmitted to the Collector for sale of the property. Sub-para (2) of Para 969 states that if such claim or objection is preferred to the Collector, the latter shall refer the claimant or the objector to the court which ordered the sale.

Para 976 states that after the decree has been received for sale of the agricultural property, the Collector shall, without delay, appoint a day for hearing any representations which the parties to the decree or any of them, or any person interested in the execution of the decree, may desire to make as to the manner in which the decree shall be executed, and shall cause a written notice to be served on each of the parties of the day so fixed.

Para 983 (which is analogous to Order XXI, Rule 66, C.P.C.) states that when the Collector decides to sell property in execution of the decree transferred, he shall issue a proclamation of the intended sale under paragraph 987 and further that for the purpose of ascertaining the matters to be specified in the proclamation, he shall, after notice to the decree-holder and to the judgment-debtor, inquire into the points, specified in that paragraph.

Para 984 of the Revenue Manual states that after hearing the decree-holder, the judgment-debtor and such other persons as may be summoned under Para 983, and after examining the documents, if any, the Collector may, subject to the provisions contained in Paragraph 984-A, modify the lots of sale and the reserved prices proposed by him. The Collector is required by Paragraph 984 to record a finding on each of the points specified in paragraph 983. Para 988 (which is analogous to Order XXI, Rule 68, C.P.C.) states that no sale, without the consent in writing of the judgment-debtor, can take place until after the expiration of thirty days calculated from the date on which the copy of the proclamation has been affixed in the court-house of the Collector.

Para 999 (which is analogous to Order XXI, Rule 87, C.P.C.) states that where agricultural property has been sold in execution of a decree, the judgment-debtor or any person deriving title through the judgment-debtor, or any person holding an interest in the property, may apply within thirty days from the date of sale to have the sale set aside on

his depositing with the Collector the amount specified in sub-paragraphs (a) and (b) thereof.

Para 1000 (which is analogous to Order XXI, Rule 90, C.P.C.) states that where any agricultural property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interest are affected by the sale, may apply to the Collector, within 30 days from the date of sale to set aside the sale on the ground of a material irregularity or of fraud in publishing or conducting it.

Para 1001 of the U. P. Revenue Manual is analogous to Order XXI, R. 92, C.P.C. It states that where no application is made under paragraph 999 or paragraph 1000, or where such application is made and disallowed; the Collector shall make an order confirming the sale, and thereupon the sale shall become absolute. Sub-para (3) of Para 1001 states that no suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

64. A reference to the various paragraphs of Chapter XL of the U. P. Revenue Manual, as mentioned above, thus shows that the Collector has been bestowed with all the powers of an executing court in the matter of publishing the sale, in the matter of conducting the sale and in the matter of hearing and disposing of objections against it. The rules make it obligatory on the part of the Collector that if no objections are filed before him, either under para 999 or under para 1000, he shall make the sale absolute. Sub-para (3) of para 1001 clearly states that once the sale has been made absolute, no suit can be brought for getting that order set aside. These rules having been framed under Section 70, C.P.C. carry statutory effect. It cannot be said that they are mere rules of guidance.

65. Now, it may be noted that the appellant's allegation is that the sale had been conducted without any notice or knowledge thereof to his father, the judgment-debtor. The objection in effect is that a fraud was committed in publishing and conducting the sale. This was covered by Para 1000 of the U. P. Revenue Manual and it was necessary for the appellant or his predecessor to have filed objections before the Collector under that para. Sub-para (3) of Para 1001 of the U. P. Revenue Manual clearly bars a separate suit being filed to assail that sale.

66. But, even if it be accepted for a moment that the allegations made by the appellant do not fall either under para 999 or under para 1000 of the U. P. Revenue Manual, they were clearly covered by Section 47(1), C.P.C. which states that

all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

67. The point whether the sale had taken place without the knowledge of the appellant's father and whether it became illegal or inoperative on that account was a matter relating to the execution of the decree and was, therefore, covered by Section 47, C.P.C.

68. In case AIR 1956 SC 87, a sale by public auction was impugned on the ground that it was not warranted by the terms of the decree. What happened in that case was that the decree directed a sale only of the mortgage rights but instead sale of the mortgaged property itself had taken place. The Supreme Court held:—

"It is well settled that when a sale in execution of a decree is impugned on the ground that it is not warranted by the terms thereof, that question could be agitated, when it arises between parties to the decree, only by an application under Section 47, Civil P. C. and not in a separate suit."

69. In AIR 1961 SC 272, the execution court ordered delivery of the property to the decree-holder, which it had no jurisdiction to do. The respondent then made an application in the execution court under Sections 47, 144 and 151, C.P.C. for setting aside the ex parte order of delivery of possession. The application was dismissed. An appeal was taken to the High Court and it reversed the order of the executing court and directed the appellant to return possession of the property in dispute to the respondent. The High Court held that the executing court had no jurisdiction to order eviction of the respondent because of the provisions of Mysore House Rent and Accommodation Control Order, 1948. The matter then went up before the Supreme Court. One of the contentions that was raised before the Supreme Court was that Section 47, C.P.C. did not apply to the case and the executing court did not, therefore, have jurisdiction to restore possession of the property to the respondent. The contention was negatived with the following observation:

"The inapplicability of Section 47 to the proceedings out of which the appeal has arisen was also raised before us, but that contention is equally unsubstantial because the question whether the decree was completely satisfied and therefore the court became functus officio is a matter relating to execution, satisfaction and discharge of the decree."

70. The Supreme Court then referred to the case Mahomed Sikri Sahib v. Ma-

dhava Kurup, AIR 1949 Mad 609 in which it was held that where the Executing Court was not aware of the amendment of the Rent Restriction Act by which the execution of a decree was prohibited and passed an ejectment decree against a tenant, the Executing Court could not execute the decree and any possession given under an ex parte order passed in execution of such a decree could be set aside. The Supreme Court went on to observe:

"The prohibition is equally puissant in the present case and Section 47 read with Section 151 would be equally effective to sustain the order of redelivery made in favour of the respondent."

71. In case Ram Chand Sng. and Wvg. Mills v. Bijli Cotton Mills (P) Ltd., Hathras, AIR 1967 SC 1344 a question arose before the Supreme Court whether Section 47, C.P.C. would apply to a case of non-compliance of Rules 84 and 85 of Order XXI, C.P.C. The Supreme Court held that even though Rule 90, C.P.C. did not apply to a case in which sale is held in contravention of Rules 84 and 85 of Order XXI, the case was covered by Section 47, C.P.C. The following observation contained in the report of the case can be reproduced with advantage:—

"Various High Courts have similarly held that when a sale in execution of a decree whose validity is not questioned is attacked on the ground that it is not merely irregular but illegal and void that must be done by a proceeding under Section 47 and not by an independent suit." (The underlined (here in ' ') is by me.)

72. In case Malathy Amma v. Jos, AIR 1964 Ker 68 (FB), sale of certain property was held in contravention of Rules 84 and 85 of Order XXI, C.P.C. The Court accepted that the sale was illegal and void and yet concluded that the remedy to assail the sale was by filing objections under Section 47, C.P.C. and that a separate suit for declaration that the sale was void for contravention of Rules 84 and 85 of Order XXI, C.P.C. was barred.

73. In case Narayanan Nambodiripad v. Thomakutty, AIR 1967 Ker 163, it was held that where the sale is conducted in breach of any provisions relating to the publication or conduct of sale, the matter can be agitated only by an application under Order XXI, Rule 90, C.P.C. and if the sale is invalid or illegal for non-compliance of any other provision, Section 47 has to be invoked.

74. Now, if Section 47, C.P.C. can be applicable to a case where the court orders redelivery of possession of the property, the delivery of which had been made by it in execution of a decree without jurisdiction, and, if Section 47, C.P.C. can apply to a case where sale is a nullity for reasons of non-compliance of Rules 84

and 85, C.P.C., I see no reason why Section 47 should not apply to a case where sale in execution is assailed on the ground that it had been held without the knowledge of the judgment-debtor.

75. Learned counsel for the appellant urged that in the instant case, the sale was held by the Collector and while dealing with the sale of the property, the Collector did not act as a Court and as such no objections against the sale could be filed before the Collector. It was contended that the suit was, therefore, not barred either by para 1001(3) nor by Order XXI, Rule 92(3), C.P.C., nor by Section 47, C.P.C. Reliance for this contention was placed on the case AIR 1925 All 146. A perusal of the report of that case, however, shows that the sale in that case was assailed on much larger grounds than those specified in Order XXI, R. 90, C.P.C. or in paragraph 999 or 1000 of the U. P. Revenue Manual. In the reported case, it was alleged by the plaintiff filing the suit that he was not party to the decree; that he and his brother were victims of a fraud committed jointly by the judgment-debtors, the decree-holders, the auction purchasers and the pre-emptors, that all of them conspired to deprive him and his brother of the property purchased and for that purpose kept him in the dark as to the fact that the execution proceedings were being taken, that when after the sale, his brother Duli Chand came to know of the sale and made a deposit, the application was opposed even by those who had no interest in the property, that the pre-emptors, as they were keen that the property should go to them through the auction-purchaser never made any attempt to pay the decree-holders any amount despite the direction of the Court contained in the decrees passed in favour of the pre-emptors; that when the application filed by the plaintiff's brother for setting aside the sale was rejected, the pre-emptors got their suits withdrawn by an application in the High Court, where the suits were pending; that the pre-emptors did this being in conspiracy with the judgment-debtors, the decree-holders and the auction-purchasers to wrest the property from him. It was in the context of these allegations that the court held that the objections for setting aside the sale could not be filed before the Collector and the suit was not barred.

76. In an earlier Full Bench case Badri Singh v. Tulsi Ram, AIR 1923 All 186 (FB), it was held by this Court that in view of the rules framed by the Government in exercise of the powers conferred on it by Sections 68 and 70, C.P.C., objections regarding invalidity of sale on the ground, mentioned in Order XXI, Rule 92, C.P.C. can be raised before the

Collector and that where no application is made or where an application is made and disallowed, the Collector can make an order confirming the sale and thereupon the sale becomes absolute and no separate suit for a declaration that the sale certificate was ineffective could lie. The rule laid down in this case is clearly applicable to the case before us. It may not be out of place to add that in the case of Bhagwan Das Marwari, AIR 1925 All 146 (supra), which has been relied upon by the appellant, it was recognized (on page 153) that where a case is covered by the provisions contained in Order XXI, Rule 90, C.P.C., objections can be filed before the Collector. It was observed:

"Much stress was laid on Government rule corresponding to Order 21, R. 90(1), the suggestion being that it covered cases of general fraud. The rule covers cases of fraud of a particular kind in "publishing" or "conducting" sale and not such wide collusion and fraud as are alleged in the present case."

77. It was thus in the context of wide allegations made by the plaintiff in the case of AIR 1925 All 146 (supra) that the court held that the rule laid down in the case AIR 1923 All 186 (FB) (supra) was not applicable to it.

78. The case of AIR 1925 All 146 (supra) cannot, therefore, be interpreted to lay down a rule that a Collector, despite the rules framed by the Local Government in exercise of its powers under Sections 68 and 70, C.P.C., cannot entertain and decide objections regarding fraud in the matter of publishing and conducting sale.

79. Reference was also made on behalf of the appellant to the case of Narotam Das v. Bhagwan Das, 1934 All LJ 859 = (AIR 1934 All 314). That case is, however, clearly distinguishable and can be of no assistance to the appellant. In that case, despite the notification issued by the Government directing that all those cases shall be transferred to the Collector in which sale of agricultural property has been ordered by any court, the property has been sold by the civil court itself. The sale was, therefore, wholly without jurisdiction. It was, in these circumstances, that it was held that the matter was not covered by Order XXI, Rule 90, C.P.C.

80. In view of paras 969, 999, 1000 and 1001 of the U. P. Revenue Manual, I am of the view that the Collector did have the jurisdiction in the present case to decide whether there had been any fraud or other illegality in the matter of sale of immovable property. But even if the Collector did not have the jurisdiction, the court which ordered the sale in exe-

cution of the decree had the jurisdiction to decide it under Section 47, C.P.C.

81. The application for execution had been moved by the respondent in the court of Munsif and since the execution had been asked for by attachment and sale of immovable property, it was transferred to the Collector. Despite the fact that the execution had been transferred to the Collector for sale, the court of Munsif continued to be the court "executing the decree" within the meaning of that expression as contained in section 47, C.P.C. Objections assailing the sale on the ground of fraud could, therefore, be filed before the Munsif even after the sale had been held and had been confirmed. It cannot be argued that the objections assailing the sale could not be filed before the Munsif after confirmation of sale because no execution was pending before the Munsif at that time. In case, *M. P. Shreevastava v. Mrs. Veena*, AIR 1967 SC 1193, the Supreme Court making a reference to Section 47, C.P.C., observed:

"The principle of Section 47 is that all questions relating to execution, discharge or satisfaction of a decree and arising between the parties to the suit in which the decree is passed shall be determined in the execution proceedings and not by a separate suit. It follows as a corollary that a question relating to execution, discharge or satisfaction of a decree may be raised by the decree-holder or by the judgment-debtor in the execution department and that pendency of an application for execution by the decree-holder is not a condition of its exercise."

82. It can also not be successfully urged that by the time the appellant came to know about the sale, the limitation for filing objections had expired and he could not, therefore, file any objections before the Munsif. The question was considered at length in the case of AIR 1956 SC 87 (supra). It was held:

"It is not until the purchaser acting under colour of sale interferes with his possession that the person whose properties have been sold is really aggrieved, and what gives him right to apply under Article 181 is such interference or dispossession and not the sale."

83. Thus, having carefully examined the submissions made on either side and the relevant decisions, I am of the opinion that the suit filed by the appellant was barred by the rules contained in Chapter XL of the U. P. Revenue Manual and failing that by Section 47, C.P.C.

84. Learned counsel for the appellant next contended that there was no error of law or fact apparent on the face of the record and the learned Single Judge should not, therefore, have interfered

in exercise of writ jurisdiction to set aside the order of the Board of Revenue and that of the Additional Commissioner. Learned counsel contended that the present appeal should be allowed on that score.

85. It is true that in writ proceedings, this court should not interfere unless there is an apparent error of law or fact resulting in injustice to either party. A perusal of the judgment of the Board of Revenue against which the writ petition was filed, clearly shows that a substantial point of law was involved, viz., whether immovable property could be sold in execution of a decree passed by the Court of Judge, Small Causes. The Board of Revenue arrived at a wrong decision on that point of law and in the result, confirmed the order of the Additional Commissioner who had decreed the appellant's suit. The decision was to result in injustice as the respondents would have been deprived of the property in suit in consequence of that decision. It cannot, therefore, be said that this was not a fit case for assuming jurisdiction in writ jurisdiction.

86. The last point which was urged before us was that the learned Single Judge while deciding the writ petition should only have quashed the order of the Board of Revenue and of the Commissioner and should not have proceeded to say that the judgment of the trial court be restored. The objection is purely technical, for, even if the learned Single Judge had merely quashed the orders of the Board of Revenue and that of the Commissioner without saying anything further, it would have carried the same effect, viz., that of restoring the order of the trial court. In any case, we can modify the order of the learned Single Judge so as to exclude that direction contained therein.

87. In view of the reasons stated above, I am of the view that this appeal should fail and the order passed by the learned Single Judge in so far as it sets aside the orders of the Additional Commissioner and of the Board of Revenue should be maintained.

BY THE COURT

88. The appeal is allowed. The order of the learned Single Judge dated 23rd April, 1963, is set aside. In the circumstances of the case we make no order as to costs.

Appeal allowed.

price with impunity and the decree-holder or the Collector may have to pursue separate remedies to realise the sale price from the auction purchaser. We have therefore no doubt that there is no distinction in principle between a revenue sale under the Hyderabad Land Revenue Act and a court sale under the provision of the Civil Procedure Code as regards the stage at which property passes under law to the purchaser. Hence the principle in (1967) 2 Andh WR 17 (FB) equally applies to the present case, that is to say, after the sale is held and the purchaser is ascertained, he should then apply to the Tahsildar for sanction under S. 47 of the Tenancy Act and on the strength of such prior sanction alone, the sale will be confirmed under section 139 of the Land Revenue Act which represents the final stage at which transfer by operation of law takes place. We accordingly hold that prior sanction under S. 47 of the A. P. (Telangana Area) Tenancy and Agricultural Lands Act is not necessary before the Collector sanctions the auction sale under section 134 of the Hyderabad Land Revenue Act.

12. The result of our decision is that prior sanction under section 47 is required only before the sale is confirmed under section 138 of the Land Revenue Act. By virtue of the order of stay passed by this court, the revenue sale in favour of the purchaser has not yet been confirmed. But it has to be noted that in view of the recent legislation viz., Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act (Third Amendment) (Act 12 of 1969) which came into force on 18-3-1969, section 47 and the other connected provisions of the main Act have been omitted with the result that no sanction is at all necessary before confirming the sale in favour of the 5th respondent.

13. The learned counsel for the petitioner has not urged before us any other ground as vitiating the revenue sale. It was no doubt mentioned in the affidavit in support of the writ petition that there should be a re-auction in view of the fact that the purchaser deposited the balance of purchase money nearly five years after the sale. This ground was not pressed for the obvious reason that the Collector could not call upon the purchaser to pay the balance in view of the stay order issued in the previous writ petition and that when the order of stay ceased to operate on the dismissal of the previous writ petition, the purchaser immediately deposited the amount on receipt of notice from the Collector.

14. For the above reasons, we dismiss this writ petition with costs. Advocate's
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fee Rs. 100/- one set to be shared equally by the Government and the purchaser.

Question answered and petition dismissed.

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(V 57 C 55)

FULL BENCH

NARASIMHAM, KRISHNA RAO AND KUPPUSWAMI, JJ.

Addigiri Vengamuni, Petitioner v. Chukkalooru Narayanappa and another, Respondents.

Writ Petn. No. 1204 of 1969, D/- 16-12-1969, decided by Full Bench on Order of Reference made by Jaganmohan Reddy C. J. and Ramachandra Raju J., D/- 25-7-1969.

Municipalities — Andhra Pradesh Municipalities Act (6 of 1965) S. 11 — Voter below 21 years of age — His name appearing in electoral roll — Election tribunal has jurisdiction to go into question of improper reception of vote by reason of voter being under-aged — (1961) 2 Andh WR 23 Overruled; AIR 1968 Punj. & Har 1 (FB) & AIR 1969 Guj 334 & AIR 1959 All 357 (FB) & AIR 1969 Mys 84, Dissented from.

The Andhra Pradesh Municipalities Act adopted the voters at an election for the Legislative Assembly as voters at an election for the Municipal Council. The voters at an election for the State Assembly must not be less than 21 years of age. It necessarily follows that the voters at a Municipal Council election must not be under 21 years of age on the qualifying date. The finality contemplated by section 62 of the R. P. Act, 1951, is not finality so as to exclude the fundamental incapacity of a voter to vote at an Assembly election and consequently at a Municipal election. If a person did not complete the age of 21 years when his name was registered in the electoral roll, he suffered from a constitutional disability and therefore the very entry of his name in the electoral roll was null and void, and was non est. In such a case the Election Tribunal can set aside the election, as the election has been vitiated by non-compliance with the Act and the rules made thereunder. The Election Tribunal has jurisdiction to go into the question whether the voters specified by the election petitioner as under-aged were in fact so and for that purpose order inspection of ballot papers and proceed, in accordance with his finding, to dispose of the election petition according to law. Case law discussed. (1961) 2 Andh WR 23 Overruled; AIR 1968 Punj & Har 1 (FB) & AIR 1969 Guj 334 & AIR 1959 All 357 (FB) &

DN/DN/B615/70/DHZ/A

AIR 1969 Mys 84 Dissented from: AIR 1970 Andh Pra 56, Rel. on.

(Paras 24, 26, 36, 47, 79).

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1969, D/- 13-8-1969, Kabul Singh

v. Kundao Singh 44, 71, 75, 106

(1970) AIR 1970 Andh Pra 56

(V 57) = (1969) 1 Andh WR 52 (FB).

C. Goverdhana Reddy v. Election

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60, 62, 80, 92

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18 Law Rep 290, Pandharinath

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65, 68, 112

P. Babulal Reddy and M. N. Rao, for

Petitioner; P. A. Chowdary and B. Rama

Rao (for No. 1) and 2nd Govt. Pleader

(for No. 2), for Respondents.

NARASIMHAM, J.: The writ petition

has been referred to the Full Bench for

disposal as raising an important question

as to the jurisdiction of an Election Tri-

bunal constituted under the Andhra Pra-

desh Municipalities Act, 1965 (Act VI of

1965) to go into the questions whether

certain of the votes were cast by voters

who were under-aged being less than 21

years of age, and for that purpose, to

order inspection of ballot papers.

2. The question has arisen this way

At the election held to the Municipal

Council, Dharmavaram, on 24-9-1967 the

petitioner, Vengamuni, and the 1st res-

pondent, Narayanappa, were the candi-

dates who contested from Ward No. 7.

The total votes polled in that ward were

680 out of which Narayanappa secured

325 votes and the petitioner secured 331

votes, 24 votes having been invalidated.

The petitioner was duly declared to have

been elected to the Municipal Council

from Ward No. 7. Narayanappa, the

defeated candidate, filed an Election Peti-

tion O P No 107 of 1967 before the

Election Tribunal (the Subordinate Judge,

Ananthapur) challenging the petitioner's

election on various grounds. At the hear-

ing, however, he pressed only one ground

that certain voters were under-aged on

the date of election and their names

were fraudulently inserted in the Elec-

toral Roll, and even at the time of vot-

ing, objections were raised before the

Polling Officer and the result of the elec-

tion was affected by reception of such

votes.

Narayanappa also filed an applica-

tion before the Election Tribunal for the

scrutiny of the Ballot papers relating to

the 12 persons alleged to have been

under-aged. The application was oppos-

ed, but the Election Tribunal ordered the

inspection of ballot papers. It is against

the said order that the petitioner has fil-

ed the present writ petition under Arti-

cle 226 of the Constitution.

3. In support of this Writ Petition, it

is alleged in the affidavit that the Tribu-

nal has no jurisdiction to go into that

question contrary to the decision of a Division Bench of this Court: Ramachandram v. D. Seshayya, (1961) 2 Andh WR 23 which held that the age of an elector could not be gone into in an Election petition. It is therefore alleged that the Election Tribunal acted in excess of its Jurisdiction.

4. Narayanappa filed a Counter-affidavit stating that the Tribunal acted within its jurisdiction in ordering inspection of the ballot papers. While it was asserted by the election petitioner and denied by the returned candidate that those under-aged had voted, it had become necessary to the Tribunal to decide that point as part of its final decision in the election petition. He relied on a Full Bench decision of this Court in C. Goverdhana Reddy v. Election Tribunal, Bapatla, (1969) 1 Andh WR 52 at p. 57 = (AIR 1970 Andh Pra 56 at p. 57 (FB)) as deciding the question that the entry of a minor's name (minor in the sense of under the age of 21 years) in an electoral roll was null and void and non est being repugnant to Art. 326 of the Constitution.

5. The Writ Petition came up before a Division Bench of this Court consisting of the Honourable the Chief Justice and Ramachandra Raju, J. who have referred the matter for decision by a Full Bench.

6. The learned counsel have argued the matter elaborately with reference to specific provisions of the relevant enactments and the Constitution and cited to us cases both for and against.

7. At the conclusion of the hearing, we have agreed that the Election Tribunal has jurisdiction to pass the order which it did, with reference to the allegation of the election Petitioner which he undertook to prove that certain persons who were under-aged had voted and that such voting by people who were under-aged had materially affected the result of the election, and each of us proposed to give our reasons in separate judgments.

8. I would presently consider the question with reference to the relevant provisions of the concerned enactments and examine the contentions for and against, discussing the case law on this matter.

9. Section 11 (1) of the Andhra Pradesh Municipalities Act, 1965 (Act VI of 1965) to be referred to hereinafter as the Municipal Act, is in these terms:

"11. (1) Every person whose name is included in such part of the electoral roll for any Assembly Constituency as relates to the municipality or any portion thereof, shall be entitled to be included in the electoral roll for the municipality prepared for the purposes of this Act, and no other person shall be entitled to be included in such roll."

"11. (2) As soon as may be, after the electoral roll for the Assembly Constituencies which consist of, or comprise, the muni-

cipality or any portion thereof, have been published, revised or amended in pursuance of the Representation of the People Act, 1950 (Central Act 43 of 1950), any person authorised by the election authority in this behalf, shall publish in such manner as the Government may direct, the portions of the alterations therein as the electoral roll for the municipality or as alterations to such roll, as the case may be:

XX XX XX
"11. (5) The electoral roll for the municipality published under sub-section (2), as revised by any alterations thereto subsequently published under that sub-section or under sub-section (4), shall remain in force until the publication of a fresh electoral roll for the municipality under sub-section (2).

"11. (6) Every person whose name appears in the electoral roll for the municipality, as so revised, shall, so long as it remains in force, be entitled, subject to the provisions of this Act, to vote at an election; and no person whose name does not appear in such roll shall vote at an election.

"11. (7) Notwithstanding anything in this section, the election authority may after making such enquiry as he thinks fit, either suo motu or on an application, correct any clerical error in the electoral roll for the municipality or the alterations thereof as published.

"EXPLANATION:— In this section, the expression "Assembly Constituency" shall mean a constituency provided by law for the purpose of elections to the Andhra Pradesh Legislative Assembly.

12. Notwithstanding anything in sub-section (6) of Section 11, a person who is of unsound mind and stands so declared by a competent court shall not be entitled to vote at any election to a council.

13. A person shall be qualified for election as a councillor only if his name appears on the electoral roll for the municipality."

10. I pause now to state what these sections in substance say. The electoral roll for the Municipal elections is the same as that prepared for the elections to the Andhra Pradesh Legislative Assembly in so far as it comprises the area of the Municipality concerned, and every person who appears in the electoral roll so published shall, so long as it remains in force, be entitled to vote at an election. The election authority may, after making such enquiry as it thinks fit, correct any clerical error in the electoral roll for the municipality. A person of unsound mind and so declared by a competent court shall not be entitled to vote at any election to a council. A person who is in the electoral roll for the Municipality could also stand for the council. In other words, a person competent to vote at an election for the Legis-

lative Assembly of the State is entitled to vote at an election to the Municipal Council. The Municipal Act itself does not enact any provision as to the qualifications of a voter, obviously because a voter at an election to the Municipal Council has to have the same qualifications as a voter at an election to the State Legislative Assembly. This necessarily takes me on to the qualifications of voters under the Representation of the People Act.

11. There are two Acts of Parliament: The Representation of the People Act, 1950 and the Representation of the People Act, 1951 which have to be read together as forming a complete Code. The Representation of the People Act, 1950 will hereafter be referred to for convenience as the R. P. Act of 1950 and the Representation of the People Act, 1951 as the R. P. Act of 1951.

12. Section 2 (1) (e) of the R. P. Act of 1951 defines "elector" thus:

"2. (1) In this Act, unless the context otherwise requires, (e) 'elector' in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950)".

13-21. The material provisions of the R. P. Act of 1950 are these:

Section 15 deals with Electoral roll for every constituency which says that for every constituency there shall be an electoral roll which shall be prepared in accordance with the provisions of the Act under the superintendence, direction and control of the Election Commission.

Section 16 sets out the disqualifications for registration in an electoral roll saying as under:

"(1) A person shall be disqualified for registration in an electoral roll if he—

(a) is not a citizen of India; or
(b) is of unsound mind and stands so declared by a competent court; or
(c) is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with the elections.

(2) The name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included: (proviso not relevant)

Section 19 sets out the conditions of registration thus:—

"Subject to the foregoing provisions of this Part, every person who,

(a) is not less than twenty-one years of age on the qualifying date and

(b) is ordinarily resident in a constituency, shall be entitled to be registered in the electoral roll for that constituency."

The term "qualifying date" is defined in section 14, and the meaning of "ordinarily resident" is stated in section 20. It is not necessary to extract those definitions here.

Section 30 debars the jurisdiction of civil courts and sets out:

"No civil court shall have jurisdiction:—

(a) to entertain or adjudicate upon any question whether any person is or is not entitled to be registered in an electoral roll for a constituency or

(b) to question the legality of any action taken by or under the authority of an electoral registration officer, or of any decision given by any authority appointed under this Act for the revision of any such roll."

I would now examine the substance of these provisions.

As a pre-condition for registration in the electoral roll for the Assembly constituency, a person shall not be less than 21 years of age on the qualifying date and he shall not have the disqualifications enacted under section 16. (I would as far as possible confine the discussion to the point at issue.) Such person who is registered in the electoral roll shall be entitled to vote in that constituency, provided of course he has no disqualifications, and the Court's jurisdiction is barred so far as it relates to a question whether any person is or is not entitled to be registered in an electoral roll for a constituency.

We may also see here section 100 of the R. P. Act 1951. Section 100 inter alia provides thus:

"... If the High Court is of opinion—

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected

xx xx xx xx
(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declare the election of the returned candidate to be void."

I would now refer to the relevant Articles of the Constitution:

"Art. 326. The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than Twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of

non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

"327. Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

"328. Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses."

22. A reading of these three Articles of the Constitution makes it abundantly clear that the Constitution is transcendent law, and any Act of the Parliament or of the State Legislature is subject to the provisions thereof.

23. Coming to the point, the electoral rolls to the House of the People or to the Legislature of a State can only be made subject to the provisions of the Constitution. What concerns us in this petition is that a person shall be registered as a voter at any such election who is not less than 21 years of age on the relevant date and is not otherwise disqualified under the Constitution or any other law made by the appropriate Legislature. It is abundantly clear therefore that only a person who is not less than 21 years of age on the qualifying date could be registered as a voter at an election to the State Assembly and that is a condition of registration under the R. P. Act of 1950. Under the R. P. Act of 1951 the Election Tribunal, viz. the High Court could declare an election to be void if the High Court is of opinion that the result of an election has been materially affected by any non-compliance with the provisions of the Constitution or the reception of any vote which is void.

Now, by adopting the voters of the Assembly as the voters of the Municipal Council, what legitimately follows is that a voter could be registered only if he is not less than 21 years of age on the qualifying date. In the present enquiry, I am not dealing with other matters which also affect the right to vote of a person registered as a voter. Such a disqualification of being under-aged and as such incompetent to vote could be en-

quired into by the High Court as a ground for declaring the election to be void.

24. Now, let us consult the statutory rules made in exercise of the powers conferred by clause (b) of sub-section (2) of section 326 of the Municipal Act for decision of the election disputes under the Act. Rule 10 (c) provides inter alia that if in the opinion of the Election Tribunal the result of the election has been materially affected by any irregularity in respect of a nomination paper or by the improper reception or refusal of a nomination paper or vote or by any non-compliance with the provisions of the Act or the rules made thereunder, the election of such returned candidate shall be void. What does this provision mean in the present context? The Municipal Act adopted the voters at an election for the Legislative Assembly as voters at an election for the Municipal Council. The voters at an election for the State Assembly shall not be less than 21 years of age. It necessarily means that by adopting the electoral rolls for the voters at an Assembly election, the voters at a Municipal Council election shall not be under 21 years of age on the qualifying date. If persons who were under-aged had voted, then clearly the result of the election would have been materially affected by non-compliance with the provisions of the Act.

So, there cannot be any doubt that a reading of these provisions yields the result that the Election Tribunal under the rules framed under the Municipal Act could enquire into the allegation of under-age of specified voters. But, Sri Babul Reddy's contention is that under S. 62 (1) of the R. P. Act, 1951, every person who is for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency, except as otherwise expressly provided by that Act and that under section 62 (2) no person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the R. P. Act, 1950, which does not speak of under-age, i.e. less than 21 years of age on the qualifying date being a disqualification. He would say that a finality is attached to the electoral rolls and that under section 30 of the R. P. Act, 1950 the jurisdiction of the civil courts is barred to adjudicate upon any question whether any person is or is not entitled to be registered in an electoral roll for a constituency. He would therefore say that such an enquiry is barred, and further no such qualifications or disqualifications are contained in the Municipal Act.

25. The contentions to the contrary addressed by Sri Chowdary are that under Art. 326 of the Constitution election shall be on the basis of adult suffrage, that is to say, every person shall be not less

than 21 years of age on the qualifying date and inclusion of any person under that age in any electoral roll would be against the express mandate of the Constitution, and mere registry of such a person gives him no right to vote and such an entry in the electoral roll shall be treated as non est and void and section 30 of the R. P. Act, 1950 does not take away the jurisdiction conferred under Section 100 of the R. P. Act 1951, to decide the question of reception of any vote which is void or non-compliance with the provisions of the Constitution as materially affecting the result of the election.

26. A scrutiny of the relevant provisions leaves me in no doubt that a person who is under-aged according to the Constitution cannot be a voter at an Assembly election and at the Municipal election as well as the Municipal Act adopted the electoral rolls at an Assembly election. The contention of Sri Babul Reddy results in a manifest anomaly that in spite of the express interdiction by the Constitution which is transcendent law, a person who is under-aged although he cannot vote at an Assembly election, could still be competent to vote at a Municipal election. It is against the express provisions of the Municipal Act. A constitutional disability to be a voter can be raised and decided under section 100 of the R. P. Act, 1951. It cannot be said that section 30 of the R. P. Act, 1950 would stand in the way of such a decision under section 100 of the same Act. The two provisions have to be read harmoniously and certainly not as inconsistent with each other.

It is not necessary that qualifications or disqualifications should be enacted under the Municipal Act as well. They are the same as enacted under the R. P. Act of 1950, as by adopting the electoral roll of the voters at an Assembly election, it had adopted their qualifications and disqualifications as well. It is not also necessary that the Rules under the Municipal Act should expressly adopt the words of section 100 of the R. P. Act, 1951, when it is clear that the Municipal Act had adopted the electoral rolls at an Assembly election with the result that one who cannot be a voter for an Assembly cannot vote at the Municipal Election. The finality contemplated by section 62 of the R. P. Act, 1951, is not finality so as to exclude the fundamental incapacity of a voter to vote at an Assembly election and consequently at a Municipal election. If in spite of the incapacity to vote a person is registered as a voter, does it mean that by an entry in the register a right to vote could be conferred contrary to the mandate of the Constitution. This could never have been, nor could be. The finality of the registry should be confin-

ed to the authorities who are to prepare the electoral rolls and cannot operate as a bar to the authority expressly constituted for election disputes to go into the question of constitutional disabilities of voters.

27. I should think therefore that Sri Babul Reddy's contentions would lead to manifest anomalies and unharmonious construction of the provisions of the same enactment; Section 30 of the R. P. Act of 1950 and section 100 of the R. P. Act of 1951, and above all, put the registry above the Constitution which, in clear terms, I feel, cannot be done. It is needless to repeat that the Constitution gives the organic or fundamental law with reference to which the validity of laws enacted by the Legislature is to be tested, and a law enacted by the Legislature cannot transgress or violate the provisions of the fundamental law. I cannot possibly accept his contentions on an examination and interpretation of the relevant provisions.

28. I would now refer to the case law which yields the same conclusion predominantly. I may conveniently commence these references with Durga Shan-ker Mehta v. Raghu Raj Singh, (1955) 1 SCR 267 = (AIR 1954 SC 520). That was a case where the election of one Vasant Rao to a reserved seat in the Lakhnadon Legislative Assembly constituency in Madhya Pradesh was called in question before the Election Tribunal. The ground on which his election was assailed was that Vasant Rao who was declared duly elected to the reserved seat in the said constituency was, at all material times, under 25 years of age and was consequently not qualified to be chosen to fill a seat in the Legislative Assembly of a State under Art. 173 of the Constitution. The allegation was found to be true by the Tribunal and the election was pronounced to be void as amounting to an improper acceptance of nomination within the meaning of S. 100 (1) (c) of the R. P. Act of 1951. The propriety of the decision was challenged before the Supreme Court. The Supreme Court held that Vasant Rao's election has to be declared void under section 100 (2) (c) of the R. P. Act of 1951, as Vasant Rao was constitutionally incapable of being returned as a member being under 25 years of age and consequently not qualified to be chosen to fill a seat in the Legislative Assembly of a State under Art. 173 of the Constitution.

Referring to the constitutional incapacity as rendering his election void, the Court expressed thus at para 278 (of SCR) = (at p. 524 of AIR):

"...the acceptance of the nomination by the Returning Officer must be deemed to be a proper acceptance. It is

certainly not final and the Election Tribunal may, on evidence placed before it, come to a finding that the candidate was not qualified at all. But the election should be held to be void on the ground of the constitutional disqualifications of the candidate and not on the ground that his nomination was improperly accepted by the Returning Officer. . . . The expression "non-compliance" with the provisions of the Constitution is in our opinion sufficiently wide to cover such cases where the question is not one of improper acceptance or rejection of the nomination by the returning Officer, but there is a fundamental disability in the candidate to stand for election at all. The English Law, after the passing of the Ballot Act of 1872, is substantially the same as has been explained in the case of *Stowe v. Jolliffe*, (1874) 9 Court of Common Pleas 734. The register which corresponds to our electoral roll is regarded as conclusive except in cases where persons are prohibited from voting by any statute or by the common law of Parliament".

Earlier, it was expressed that the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly alleged or proved.

29. In the said English case, (1874) 9 C. P. 734, Lord Coleridge with whom the other two Judges agreed, construed persons prohibited from voting by any statute or by the common law of Parliament as meaning

"persons who from some inherent or for the time irremovable quality in themselves have not, either by prohibition of statutes, or at common law, the status of Parliamentary electors."

30. *Radhakrishna Murthy v. Subordinate Judge, Bapatla*, (1960) 2 Andh WR 308 was a case of election to the Chirala Municipality under the District Municipalities Act, 1920 (Act V of 1920). The petitioner was declared elected. Subsequently his election was challenged by an election petition before the Election Commissioner (Subordinate Judge, Bapatla) alleging inter alia that the petitioner was ineligible to stand as a candidate being under 21 years of age. The Election Commissioner on the material placed before him reached the conclusion that the petitioner was less than 21 years of age and as such was not competent to stand as a candidate; with the result he invalidated the election of the petitioner. The aggrieved petitioner moved the High Court filing a petition under Art. 226 of the Constitution. The contention before the High Court was that the disqualification of a candidate could not form the ground of attack in an election petition filed before the Subordinate Judge. The said contention was rejected observing thus:

After referring to Section 19 of the R. P. Act, 1950 and section 44 of the old Municipal Act, corresponding to S. 11 (1) of the present Act, it was said:

"A combined reading of these two sections establishes that it is only a person who is at least twenty-one years old that could get his name entered in the Electoral Roll and be qualified to seek election to the Municipal Council as a candidate. Any person who is below twenty-one years of age is not competent to stand as a candidate. The election of a candidate who is below twenty-one years is therefore contrary to law. It, therefore, amounts to "non-compliance with the provisions of the Act." It follows that the election of a person who lacks the requisite qualifications can be called in question under rule 10 (c). Therefore, an election petition is open to a person entitled to launch it to raise the ground of want of qualification."

They referred with approval to a Full Bench ruling of the Madras High Court in *Selvaranjanaraju v. Doraiswami Mudaliar* 57 Mad LJ 241 = ILR 52 Mad 732 = (AIR 1929 Mad 727) (FB).

31. A reference may be made to 57 Mad LJ 241 = ILR 52 Mad. 732 = (AIR 1929 Mad 727) (FB). The Full Bench held that a disqualification under S. 49 of the Madras District Municipalities Act, 1920, could be made a ground for a petition before an Election court impugning the election and there was nothing in section 51 to preclude such a course being taken.

32. *Narayan Bikram Shah v. Kedar Pandey*, AIR 1964 Pat 417 is a case of an election petition against one Narayan Bikram Shah, a candidate returned to the Bihar Legislative Assembly from Ramnagar Assembly constituency on the allegation that he was not qualified to be a candidate as he was not a citizen of India and Article 173 of the Constitution stood in his way. A contention was raised that it must be deemed to have been decided at the time of registration in the electoral roll that he was a citizen of India and the Election Tribunal could not now go into that question. The said contention did not find favour with the Bench and was countered with these observations:

"The opinion to be given by the Tribunal under section 100 (1) (a) of Act 43 of 1951 cannot be hampered by even an express finding given under Rules 20 and 23 of the Registration of Electors Rules, 1960. The finality contemplated under Rule 23 sub-rule (4) of the Rules has reference to the proceedings under the Rules. It cannot possibly debar the Tribunal from considering the question whether a returned candidate was disqualified to be chosen to fill a seat under the Constitution or under Act 43 of 1951, on the date of his election."

Sri Babul Reddy sought to explain this decision with reference to section 62 (2) of the R. P. Act, 1951, but it is clear that the Judges put it differently as a question of disqualification under the Constitution.

33. P. Kunhiraman v. R. Krishna Iyer AIR 1962 Ker 190 is a Full Bench case of the Kerala High Court which held that in the case of a person whose name appears in the electoral roll and who has exercised his vote, the Election Tribunal can go into the question whether or not he had attained the age of 21 on the qualifying date, and, on the finding that he had not, exclude his vote from the count. The learned Judges cited with approval Juihar Singh v. Bhairon Lal, (1952) 7 Ele LR 457 and Ramdayal Ayo-dya Prasad v. K. R. Patil, (1959) 18 Ele LR 378.

34. The same view was held by a Division Bench of the High Court in S. V. Viswanathan v. G. P. Rangaswamy, AIR 1967 Mad 244. That was also a case of the election of a successful candidate having been challenged on the ground that one of the voters was under-aged and was therefore incompetent to vote, and the ground was upheld. The learned Judges held that the Election Tribunal had jurisdiction to hold that the inclusion of the name of the under-aged person was a nullity.

35. In B. M. Ramaswamy v. B. M. Krishnamurthy, AIR 1963 SC 458 the Supreme Court considered the only substantial contention raised in the appeal that the High Court went wrong in considering the question of the legality of the inclusion of the appellant's name in the electoral roll of the Mysore Legislative Assembly, as, under Section 30 of the R. P. Act, 1950, the jurisdiction of civil courts to question the legality of an action taken, by, or under the authority of, the Electoral Registration Officer, was barred. It was common case that the name of the appellant was included in the electoral roll of the Mysore Legislative Assembly before the date prescribed for filing of nomination papers. But it was said that the Electoral Registration Officer did not follow the procedure prescribed in that behalf. The learned Judges held that there was no provision in the Act which enabled the High Court to set aside the election on the ground that though the name of a candidate was in the list, it had been included therein illegally.

Explaining section 30 of the R. P. Act, 1950, it was said that the terms of the section were clear and the action of the electoral registration officer in including the name of the appellant in the electoral roll, though illegal, could not be questioned in a civil court; but it could be rectified only in the manner prescribed

by law, i.e., by preferring an appeal under R. 24 of the Rules, or by resorting to any other appropriate remedy. But it was contended before the High Court that the action of the electoral registration officer was a nullity inasmuch as he made the order without giving notice as required by the Rules. It was said that the non-compliance with the procedure prescribed did not affect his jurisdiction, though it might render his action illegal. Such non-compliance could not make the officer's act non est, though his order might be liable to be set aside in appeal or by resorting to any other appropriate remedy. This decision brings out succinctly that the non-compliance with the procedure prescribed before including the name of a voter in the electoral roll stands on a different footing as distinct from the inclusion being considered non est.

36. We have the Full Bench case of this Court: 1969-1 Andh WR 52 = (AIR 1970 Andh Pra 56). There the question was considered whether the election Tribunal constituted under the Andhra Pradesh Gram Panchayats Act could enquire into the age of a candidate in order to find out whether he was qualified to stand as a candidate on the date of his nomination. There was a review of the case law bearing on this question and eventually the Full Bench held that the mere entry in an electoral roll was not final or conclusive in regard to the age of the candidate and it was open to the Election Tribunal to enquire, in an election petition, into the age of the candidate and to find out whether he was duly qualified to seek the election. If a person did not complete the age of 21 years, when his name was registered in the electoral roll, he suffered from a constitutional disability and therefore the very entry of his name in the electoral roll was null and void, and was non est. When such was the case the Election Tribunal could set aside the election, as the election had been vitiated by non-compliance with the Act and the rules made thereunder.

37. All these decisions support the conclusion which I have arrived at on an interpretation of the relevant provisions of the Acts concerned and the provisions of the Constitution.

38. Sri Babul Reddy relied on certain decisions which had taken the contrary view, one of which is the Division Bench Ruling: (1961) 2 Andh WR 23. In the said case the election of a candidate returned at the Panchayat elections of Turlapadu Village on 7-10-1959 was questioned on the ground that two of the voters who recorded their votes in favour of the returned candidate were minors and that one of the voters was a fictitious one. The Election Commissioner accepted the defects alleged and set aside

the election whereupon a petition was filed by the candidate returned under Art. 226 of the Constitution of India for a certiorari quashing the said decision of the Election Commissioner. The Division Bench accepted the contention in support of the returned candidate that the electoral roll published for the panchayat was conclusive and final as to the qualifications of the voters entered therein and the election could not be impeached on the ground that some of the voters were minors. It was observed in the course of the judgment that the electoral roll for the Assembly Constituency furnished the basis for the preparation of the voters' list for panchayat elections and that every person whose name was shown in the Electoral roll could exercise his vote. Therefore it was said that even assuming that the voters were minors, it did not vitiate the election. There was reference to (1955) 1 SCR 267 = (AIR 1954 SC 520) as supporting that conclusion. The earlier case of (1960) 2 Andh WR 308 was referred to and distinguished as not affording any parallel to the instant case.

39. It is apparent to me that (1955) 1 SCR 267 = (AIR 1954 SC 520) does not support that decision; nor is the legal position different from that discussed in (1960) 2 Andh WR 308. I have referred to both these cases as authority for the contrary position. I am not therefore persuaded that this decision lays down the correct law.

40. Sudarshan Reddy v. District Collector; Warangal, AIR 1964 Andh Pra 421 was a petition under Art. 226 of the Constitution for the issue of a writ of mandamus directing the respondents not to give effect to the election held on 26-4-1961 for the Municipality of Warangal. Respondents 3 to 36 were declared from various constituencies. The petitioners, who were either the tax-payers or the voters residing in the Municipal area of Warangal, filed the petition questioning the validity of the election on the ground that some of them were holding offices of profit under the Municipality and as such they were disqualified, that one of them was the member and chairman of the Market Committee appointed under the Hyderabad Agriculture Market Act and was therefore holding an office of profit under the local authority and that the electoral rolls were not finalised and there were a number of persons whose names were omitted.

Overruling these contentions, the Bench observed thus:

"The Election Tribunal, or for that matter the High Court in Writ Petitions have no jurisdiction to enquire whether all persons qualified to vote were entered in the rolls. The jurisdiction to prepare the electoral rolls is vested in cer-

tain authorities under the Act and the Rules referred to above and the provisions of that Act and the Rules gave finality to the decision of those authorities. It would be, therefore, futile to challenge the validity of the election on the ground that some persons qualified to vote were not included in the electoral rolls. . . . Some names would always be found to be missing or incorrectly entered. It is too much to expect that such electoral rolls would be final in the sense that every person entitled to vote is entered in it accurately."

The case obviously does not relate to a constitutional disability of a voter to vote and the jurisdiction of an Election Tribunal to go into it. The facts were different and the law stated there was with reference to those facts.

41. In *Roop Lal Mehta v. Dhan Singh*, AIR 1968 Punj and Haryana 1, a Full Bench of that Court answered in the negative the question referred to it:

"Whether in the election petition made to the High Court under section 80 read with section 80-A of the Representation of the People Act No. 43 of 1951 as amended by the Representation of the People (Amendment) Act, 1966, some of the votes cast were open to challenge under Section 100 (1) (d) (iii) and (iv) of the Act on the ground that the persons so voting at the election were below the age of 21 years on the qualifying date".

The ratio behind the said decision was that such an enquiry would render futile and indeed meaningless the elaborate provisions in the 1950 Act for registration of names on the electoral rolls, for their revision and for correction of entries in them, and further the entire process of the preparation of electoral rolls which is a preliminary to the conduct of elections, would thereby become open for scrutiny in the election petition.

The Court observed (in para 10 of the reported judgment) that that surely could not have been the intention of the Constitution makers or of the Parliament. Referring to Art. 326 of the Constitution, the learned Judges took the view that the question as to the manner in which the vote actually cast at the poll by any person, who was registered as a voter, was to be challenged was left by the Constitution as a matter for legislation by the Parliament under Art. 327 and in the absence of any legislation of the Parliament by the legislation of the State under Article 328. With respect to the reasoning adopted, I find myself unable to agree with the ratio of the decision in that case.

42. In *Pandharinath Gyanoba v. Manikrao Shamrao*, AIR 1969 Mys 84 it was held following AIR 1963 SC 458 that the correctness or legality of the electoral roll could

not be gone into in an election petition. This does not render any assistance to the learned counsel.

43. *Mahmadhusain Kurbanhusein v. Onall Fidah*, AIR 1969 Guj 334 is a decision of a single Judge that the Election Tribunal has no jurisdiction to permit evidence being led for determining the question whether a voter is below the age of 21 years and therefore disentitled to vote and that the electoral roll was conclusive evidence of his right to vote. This was said of an election to the Gujarat Municipality. The learned Judge adopted the principle of the decision of AIR 1968 Punjab and Haryana 1 (FB) which has already been considered by me and with respect I could not adopt the said reasoning.

44. An unreported decision of the Supreme Court delivered on 13-8-1969 in *Kabul Singh v. Kundan Singh*, Civil Appeal No. 1359 of 1969 = (Since reported in AIR 1970 SC 340) appearing in blue print was relied on where at an election to the Punjab Legislative Council, the vote of one Tarsen Singh was questioned as invalid as he had taken up Government service subsequent to the inclusion of his name in the electoral roll and so became disqualified to be a member of any local board and so could not vote. The said contention was repelled and the pertinent observations may be appropriately read here. After referring to S. 62 of the R. P. Act, 1951 and section 16 of the R. P. Act, 1950, it was observed thus:

"It is not the case of the appellant that Tarsen Singh had incurred any of the disqualifications mentioned therein (the reference is to section 16 (1) of the R. P. Act, 1950). No other provision of law in the Act or in any other law was brought to our notice disqualifying him from exercising his vote. The right to vote being purely a statutory right, the validity of any vote has to be examined on the basis of the provisions of the Act. We cannot travel outside those provisions to find out whether a particular vote was a valid vote or not. In view of S 30 of the 1950 Act, Civil Courts have no jurisdiction to entertain or adjudicate upon any question whether any person is or is not entitled to register himself in the electoral roll in a constituency or to question the illegality of the action taken by or under the authority of the electoral registration officer or any decision given by any authority appointed under that Act for the revision of any such roll. Part III of the 1950 Act deals with the preparation of rolls in a constituency. The provisions contained therein prescribe the qualifications for being registered as a voter (S 19), disqualifications which disentitle a person from being registered as a voter (S. 16), revision of the rolls (S. 21), correction of

entries in the electoral rolls (S. 22), inclusion of the names in the electoral rolls (S. 23), appeals against orders passed by the concerned authorities under Ss. 22 and 23 (S. 24). Sections 14 to 24 of the 1950 Act are integrated provisions. They form a complete code by themselves in the matter of preparation and maintenance of electoral rolls. It is clear from those provisions that the entries found in the electoral roll are final and they are not open to challenge either before a civil court or before a tribunal which considers the validity of any election. In AIR 1963 SC 458 this court came to the conclusion that the finality of the electoral roll cannot be challenged in a proceeding challenging the validity of the election."

45. The observations make it very clear that this is not a case of challenge that a voter suffers from a constitutional disability. I have referred to AIR 1963 SC 458 to the extent necessary for purposes of this petition. There is nothing in the said decision which I can accept as barring the jurisdiction of the Election Tribunal to go into the question of the constitutional disability of a voter entered in the Electoral rolls.

46. I find myself unable to accept the ratio on which the cases cited by Sri Babul Reddy rested the conclusion to the contrary.

47. In my considered view, the Election Tribunal has jurisdiction to go into the question whether the voters specified by the election petitioner as under-aged were in fact so and for that purpose order inspection of ballot papers and proceed, in accordance with his finding, to dispose of the election petition according to law.

48. KRISHNARAO, J.: This writ petition is placed before a Full Bench for disposal in pursuance of an order of reference made by Jaganmohan Reddy, C. J. and Rama Chandra Raju, J. under the following circumstances:

49. The petitioner herein was declared as Municipal Councillor for Ward No. VII, Dharmavaram Municipality having secured a majority of 6 votes over his rival candidates the first respondent herein, at the election held on 24-9-1967. Aggrieved by the result of the election, the first respondent filed an Election petition O. P. No. 107 of 1967 on 29-9-1967 before the election tribunal (Subordinate Judge, Anantapur) to declare the election as void alleging various grounds. Ultimately only one ground was pressed in support of the election petition, namely, that 12 votes were improperly received at the election as the said voters were below the age of 21 years and were not competent to vote. The serial numbers of the said voters were furnished and it appears that evidence was also let in on both

sides regarding their age at the relevant date.

At that stage, the first respondent herein filed an application I. A. 290 of 1968 before the tribunal for inspection of the ballot papers in order to find out whether and if so how many of the disputed votes were cast in favour of the successful candidate. The Tribunal allowed the application for inspection by its order dated 2-4-1969. Aggrieved by the said order, the petitioner filed the above writ petition challenging the jurisdiction of the tribunal to go into the question of the correctness of the entries in the electoral roll with respect to the age of the voters. So far as the power of the tribunal to direct an inspection of the ballot box is concerned, there is no dispute. But as the above question of jurisdiction was argued before the tribunal when the application for inspection came up for orders, the tribunal expressed its opinion following the observations of a Full Bench decision of this court in (1969) 1 Andh WR 52 = (AIR 1970 Andh Pra 56) (FB) that it is open to the tribunal to go into the said question. The learned counsel for the petitioner contended that the Tribunal ought to have followed a direct decision of this Court in (1961) 2 Andh WR 23 which was not expressly overruled in the said Full Bench decision.

When this writ petition originally came up for hearing before a Division Bench consisting of Jagannathan Reddy C. J. and Ramachandra Raju, J. it was argued that the correctness of the decision (1961) 2 Andh WR 23 should be considered by another Full Bench as the said question was specifically left open in the Full Bench decision (1969) 1 Andh WR 52 = (AIR 1970 Andh Pra 56) supra. It is stated that the respondent's learned counsel raised an objection that this Court is not bound to interfere at this stage under Article 226 of the Constitution even before the Tribunal has given its findings regarding the age of the voters in question. But as the tribunal gave its decision on the question of its jurisdiction, it is submitted by the petitioner's learned counsel that this court may go into the said question even at this stage as in any event it has to be gone into when the matter is brought up before this court on the final disposal of the election petition by the tribunal. Normally this court would have been reluctant to go into these questions at this interlocutory stage but for the fact that Division Bench of this court expressed the desirability of the question being considered by a Full Bench.

50-57. The contention raised on behalf of the petitioner is that the entries in the electoral roll have become final and that the election tribunal in dealing with an application to declare the election void, has no jurisdiction to go into the correct-

ness of the entry regarding the age of a voter as noted in the electoral roll. On the other hand, it is urged on behalf of the first respondent that a person under the age of 21 years is not entitled to vote at all, as per the provisions of Article 326 of the Constitution of India and that though the name of such a person is entered in the electoral rolls, the entry is a nullity and has no force under law and that therefore it is perfectly open to the tribunal to entertain the plea that the vote exercised by such a person is void and that if the factum about the age is disputed, the tribunal is bound to decide the said question of fact in dealing with a petition to set aside the election. The petitioner therefore argued on the footing that even if the said persons are below the requisite age of 21 years, the said question cannot be gone into and that their ballot papers should be regarded as valid in law.

In order to appreciate this point of controversy, it is necessary to refer to the relevant provisions of the law and the decisions of this court which have given rise to the above reference to the Full Bench.

Provisions of the A. P. Municipalities Act (Act VI of 1965).

Section 11 (1). Every person whose name is included in such part of the electoral roll for any assembly constituency as relates to the municipality or any portion thereof, shall be entitled to be included in the electoral roll for the municipality prepared for the purposes of this Act, and no other person shall be entitled to be included in such roll.

Explanations I & II . . . XXX XXX

(2) As soon as may be, after the electoral rolls for the Assembly constituencies which consist of, or comprise, the municipality or any portion thereof, have been published, revised or amended in pursuance of the Representation of the People Act, 1950 (Central Act 43 of 1950), any person authorised by the election authority in this behalf, shall publish in such manner as the Government may direct, the portions of the said rolls which relate to the municipality or of the alterations therein as the electoral roll for the municipality or as alterations to such roll, as the case may be.

Provided that any alterations made to the relevant portions of the Assembly electoral roll within a period of thirty days prior to the date fixed for the poll for ordinary, or casual elections to the council, shall not be published as alterations to the electoral roll for the municipality, until after the said elections are held.

(3) xx xx xx xx

(4) Whereafter the electoral roll for a municipality or any alterations thereto have been published under sub-section (2) the municipality is divided into wards for the first time or the division of the

municipality into wards is altered or the limits of the municipality are varied, the election authority shall, as soon as may be, after such division or alteration or variation, as the case may be, in order to give effect to the division of the Municipality into wards or to the alteration of the wards, or to the variation of the limits as the case may be authorise a re-arrangement and republication of the electoral roll for the municipality or any part of such roll, in such manner as the Government may direct.

(5) xx xx xx

(6) Every person whose name appears in the electoral roll for the municipality as so revised, shall so long as it remains in force be entitled, subject to the provisions of this Act, to vote at an election; and no person whose name does not appear in such roll shall vote at an election.

(7) Notwithstanding anything in this section the election authority may after making such enquiry as he thinks fit, either suo motu or on an application correct any clerical error in the electoral roll for the municipality or the alterations thereof as published.

Explanation:— In this section, the expression "Assembly constituency" shall mean a constituency provided by law for the purpose of elections to the Andhra Pradesh Legislative Assembly.

Section 12. Notwithstanding anything in sub-section (6) of section 11, a person who is of unsound mind and stands so declared by a competent court shall not be entitled to vote at any election to a Council."

The Andhra Pradesh Municipal Councils (Conduct of Elections Rules, 1965)

Rule 3. In these rules, unless...

(b) 'Act' means the Andhra Pradesh Municipalities Act, 1965.

(c) 'Elector' in relation to an election to any Municipal Council means any person entitled to vote at the election of a councillor to the Municipality.

(d) xx xx

(e) xx xx

(f) 'Electoral Roll' means the electoral roll prepared and published under section 11 (2) of the Act.

Under rule 55, the Election Officer is given the power to reject a ballot paper on certain grounds which relate to formal defects as regards the entries to be made in the ballot paper and the decision of the Election Officer as to the validity of a ballot paper is said to be final subject only to reversal on an election petition.

Rules for decision of the Election disputes:

Rule 10. If in the opinion of the Election Tribunal

(a) xx xx xx

(b) xx xx xx

(c) the result of the election has been

materially affected by any irregularity in respect of a nomination paper or by the improper reception or refusal of a nomination paper or vote or by any non-compliance with the provisions of the Act or the rules made thereunder;

the election of such returned candidate shall be void;

Proviso omitted.

The Representation of the People Act, 1950 (Act 43 of 1950):—
Electoral rolls for Assembly Constituencies.

Section 14. Definitions — In this part, unless the context otherwise requires:

(a) 'Constituency' means an Assembly constituency;

(b) 'qualifying date' in relation to the preparation or revision of every electoral roll under this part, means the 1st day of January of the year in which it is so prepared or revised.

15. Electoral Roll for every constituency
For every constituency there shall be an electoral roll which shall be prepared in accordance with the provisions of this Act under the superintendence, direction and control of the Election commission.

16. Disqualification for registration in an electoral roll. — (1) A person shall be disqualified for registration in an electoral roll if he—

(a) is not a citizen of India; or,

(b) is of unsound mind and stands so declared by a competent court; or

(c) is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections.

(2) The name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included.

Provided xx xx

19. Conditions of registration — Subject to the foregoing provisions of this Part, every person who—

(a) is not less than twenty-one years of age on the qualifying date and

(b) is ordinarily resident in a constituency, shall be entitled to be registered in the electoral roll for that constituency. Section 20 defines the expression "ordinarily resident".

Section 21 lays down the procedure for preparation and revision of electoral rolls.

Section 22. Correction of entries in electoral Rolls — If the electoral registration officer for a constituency, on application made to him or on his own motion, is satisfied after such inquiry as he thinks fit, that any entry in the electoral roll of the constituency:

(a) is erroneous or defective in any particular;

(b) should be transposed to another place in the roll on the ground that the

person concerned has changed his place of ordinary residence within the constituency, or

(c) should be deleted on the ground that the person concerned is dead or has ceased to be ordinarily resident in the constituency or is otherwise not entitled to be registered in that roll, the electoral registration officer shall, subject to such general or special directions, if any, as may be given by the Election Commission in this behalf amend, transpose or delete the entry;

Provided x x x

Section 23 enables persons to get their names included in the electoral roll if their names are not already included. Under Section 24 an appeal is provided to the Chief Electoral Officer against an order of the electoral registration officer under sections 22 and 23.

Section 30. Jurisdiction of civil courts barred:

No Civil Court shall have jurisdiction:

(a) to entertain or adjudicate upon any question whether any person is or is not entitled to be registered in an electoral roll for a constituency; or

(b) to question the legality of any action taken by or under the authority of an electoral registration officer, or of any decision given by any authority appointed under this Act for the revision of any such roll.

The Representation of the People Act, 1951.

Section 100. Grounds for declaring election to be void.

(1) Subject to the provisions of Sub-section (2) if the High Court is of opinion.

(a) xx xx

(b) xx xx

(c) xx xx

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.

The Registration of Electors Rules, 1960.

Rules 10 to 19 provide for publication of electoral rolls and the procedure for preferring objections and for the hearing of such objections. Rule 20 provides that the registration officer shall hold a summary enquiry into every claim or

objection as to the entries in the electoral rolls. Rule 23 provides for appeals from orders and every decision of the appellate officer is declared final.

Provisions of the Constitution of India.

Article 325 declares that no person shall be ineligible to be included in an electoral roll on grounds of religion, race, caste or sex or any one of them.

Article 326. Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage:

The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage, that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

Article 327. Power of Parliament to make provision with respect to Elections to Legislatures:— Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

58. The effect of the above provisions of law may be summed up as follows: Persons under the age of 21 years are not entitled to any franchise. Persons who are not citizens of India (as defined in Article 5 of the Constitution) are also not entitled to any franchise. Persons above the age of 21 and who are citizens of India are not disentitled from exercising their franchise on the ground of religion or race or caste or sex. But persons though entitled to a right to vote are precluded from exercising their franchise if they are disqualified by any provision of the Constitution or any law made by the appropriate legislature. It is only persons who are entitled to exercise their franchise that are shown in a list called the electoral roll. The manner in which the electoral rolls are prepared and the conduct of elections including the decisions of disputes regarding elections are all laid down by the Parliament in the Representation of the People Act, 1950 (Act 43 of 1950) and the Representation of the People Act, 1951 (43 of 1951).

Under the provisions of the 1950 Act, provisions are made for the preparation of the electoral roll specifying the disqualifications of persons who are not entitled to be shown in the electoral rolls. A complete procedure for objections to the entries in the rolls and for enquiring the objections is laid down including a provision for appeal and its finality. The jurisdiction of the civil Court is barred in respect of adjudication relating to the right of a person to be registered in the electoral rolls and as to the legality of any orders passed by the electoral registration officer as regards the preparation or the revision of the rolls. Under the 1951 Act, provision is made inter alia constituting an election tribunal to declare an election void on certain specified grounds including, among other things, the improper reception of votes or the reception of votes which are void and for setting aside an election on the ground of non-compliance with the provisions of the Constitution or the Representation of the People Act. For the purpose of holding elections for the local bodies like municipalities electoral rolls prepared under the provisions of the foregoing statutes are taken as the basis.

Similar provisions are contained in the local Acts providing for disqualifications of the voters, for the constitution of an election tribunal and to declare elections void on certain specified grounds including the improper reception of a vote and non-compliance with the provisions of the Municipalities Act. Though there is no provision in the Municipalities Act corresponding to section 30 of the Representation of the People Act, 1950 as to the bar of the civil Court's jurisdiction, it is contended that as the electoral roll prepared for the Assembly is adopted as the basis for the elections of the Municipal Councillors, the tribunal constituted under the relevant rules is also bound by the principle of finality attached to the assembly electoral roll incidentally barring its jurisdiction to question the correctness of the entries in the electoral roll. On behalf of the first respondent it is contended that as the tribunal is vested with plenary powers of setting aside an election on the ground that certain void votes have been received, the tribunal is, by necessary implication, vested with the jurisdiction to go into the question whether certain votes were void or not. In other words, it is submitted that the tribunal can find out on evidence whether certain persons who cast their votes were minors or not, that is, under the age of 21 at the relevant date.

59. In order to appreciate the petitioner's grounds of attack against the order in question, it is necessary in the first instance to refer to the Full Bench

decision relied on by the first respondent in (1969) 1 Andh WR 52 = (AIR 1970 Andh Pra 56) (FB) (hereinafter called the Full Bench decision) consisting of Jaganmohan Reddy, C. J. Sambasiva-Rao and Kuppuswami J.J. in support of the decision of the Tribunal (Subordinate Judge, Anantapur.) It arose out of an order passed by an election tribunal under the Andhra Pradesh Gram Panchayats Act declaring the election of a candidate as void on the ground that the candidate was below the age of 21 years on the date of his election. It was held by Sambasiva Rao J. who delivered the judgment on behalf of the Full Bench that the mere entry in the electoral roll is not final or conclusive as regards the age of a candidate and that it is open to an election tribunal to enquire into the said fact in an election petition and to find out whether he was duly qualified to stand for the election.

This conclusion was based upon the following reasons. If a person is under the age of 21 when his name is registered in the electoral roll he suffers from a constitutional disability and therefore the very entry of his name in the electoral roll is not cast that is null and void. It is therefore open to an election tribunal to declare such an election as void as being vitiated by non-compliance with the provisions of the Act and the rules made thereunder. In coming to the above conclusion, the decision of an earlier Division Bench in (1960) 2 Andh WR 308 was approved while a doubt was thrown as to the correctness of a decision of another Division Bench in (1961) 2 Andh WR 23. While expressing such a doubt, the Full Bench made certain categorical observations virtually undermining the authority of the said decision (1961) 2 Andh WR 23.

60. In (1960) 2 Andh WR 303 a decision of Chandra Reddy, C. J. and Sankar Reddy, J. which is approved by the Full Bench decision (1969) 1 Andh WR 52 = (AIR 1970 Andh Pra 56) (FB) the election of a municipal councillor was set aside on the ground that the candidate was below the age of 21 years on the relevant date. This conclusion was reached on the following grounds: A combined reading of the provisions of the Municipalities Act and those of the Representation of the People Act, 1950 leads to the conclusion that a person should have attained the requisite age as a qualification for a candidate. The candidate having failed to satisfy the requirement as to the age, his election was contrary to law and not in compliance with the provisions of the Act. But the learned Judges did not consider the case from the point of view of the constitutional disability as regards the age limit.

61. The decision of Chandra Reddy, C. J. and Chandrasekhara Sastry J. in

(1961) 2 Andh WR 23 the correctness of which was doubted by the Full Bench arose out of an election petition under the Madras Village Panchayats Act to declare an election void on the ground that the votes of certain persons who were below the age of 21 years were void and that they were improperly received. It was held by the Division Bench, distinguishing the earlier decision in (1960) 2 Andh WR 308 which related to a case of disqualifications of a candidate, that so far as voters are concerned, the question of their being under-age cannot be considered in view of the fact that the age entered in the electoral rolls became final and conclusive. In this decision also, the learned Judges did not consider the question of the constitutional disability as regards franchise. It is contended on behalf of the first respondent that the principle laid down by the Full Bench decision though relating to the case of a candidate's age, is equally applicable to the case of the age of voter and that the decision of the Division Bench in (1961) 2 Andh WR 23 should be held to be no longer good law.

62. Having considered the reasoning of the Full Bench, I am inclined to hold that it makes no difference whether the dispute relates to the age of a candidate or a voter and that the same principle may be applied even to the case of a voter who is proved to be below the age of 21 years. It follows therefore that the Division Bench decision in (1961) 2 Andh WR 23 cannot be regarded as good law in view of the Full Bench decision (1969) 1 Andh WR 52 = (AIR 1970 Andh Pra 56) (FB). In coming to its conclusion the Full Bench followed the decision of the Madras High Court in AIR 1967 Mad 244 = ILR (1968) 1 Mad 1 in which it was laid down that the election of a municipal councillor should be declared as void on the ground that one of the voters was below the age of 21 years and that the said vote was void notwithstanding the fact that the voter was shown as an adult in the electoral roll as being contrary to the provisions of the Constitution.

63. Reference may be made to a decision of the Kerala High Court in AIR 1962 Ker 190 (FB) in which the same view as in Madras was taken.

64. The next case to which reference may be made is the decision of the Supreme Court in AIR 1954 SC 520 = (1955) 1 SCR 267 which was also followed by the Full Bench. The question before the Supreme Court in this case was whether the nomination of a particular candidate at an election for the legislative Assembly was valid, the objection being that he did not attain the requisite age as required by the Constitution. It was held by B. K. Mukherjea, J. who delivered the Judgment on behalf of

the Court that the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly alleged or proved. Though the candidate was described in the electoral roll as having been of the proper age, and was therefore on the face of it fully qualified to be chosen as a member of the Assembly, nevertheless, the electoral roll is not final and the election tribunal may on the evidence placed before it come to a finding that the candidate was not qualified at all on the ground that there is a breach of the provisions of the Constitution.

It was further observed that the expression "non-compliance with the provisions of the Constitution" is sufficiently wide to cover cases where there is a fundamental disability in the candidate to stand for the election at all. In coming to this conclusion, the English law as laid down in (1874) 9 C. P. 734 is quoted with approval, namely,

"the register which corresponds to our electoral roll is regarded as conclusive except in cases where persons are prohibited from voting by any statute or by the common law of Parliament."

65. In (1874) 9 C. P. 734, which was referred to by the Supreme Court in the above case AIR 1954 SC 520 the entire history of the law relating to the electoral register and the provisions of the Ballot Act and the Representation of the People Act on the basis of which the Indian Act is passed, has been set out. A fundamental distinction between mere irregularities regarding the exercise of franchise on the one hand and the exercise of franchise by persons disqualified from voting on the other, is clearly emphasised. It was observed as follows:

"I think the true construction of these sections, which alone remain, is, to make the register conclusive not only on the returning Officer, but also on any tribunal which has to inquire into elections, except in the case of persons ascertained by the proviso. These are, 'persons prohibited from voting by any statute or by the common law of Parliament.'"

The principle was illustrated by stating that the correctness of the roll is not open to question on mere grounds of receipt of parochial relief; non-residence within the proper distance of the borough, non-occupation, insufficient qualification, which are not covered by the said proviso. But it is pointed out that the proviso relating to total prohibition covers cases of peers of Parliament, women, persons convicted of crimes who are all totally disqualified from voting. The learned Judge advisedly adds a qualification that his list of persons disqualified is not exhaustive. In answer to an argument in the said case that the proviso practically leaves open to the inquiry into

any voter's vote, which, although it may be on the register, is capable of being impeached on any legal ground, it was observed that the argument is ingenious, but untenable.

66. Again in *Brijendralal v. Jwala-prasad*, AIR 1960 SC 1049 it was held that even if a disqualification as to age is not apparent on the face of a nomination paper, nevertheless, the validity of the nomination can be challenged before the election tribunal on the ground that the candidate did not in fact attain the required age as laid down in Article 173 of the Constitution. It was further observed that

"under section 36 (7) of the Representation of the People Act 1951 a certified copy of the entry in the electoral roll shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency; but this presumption is raised for the purposes of this section and it is made expressly subject to the last clause of this sub-section, that is to say, the presumption can arise unless it is proved that the person in question is subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act 1950. But this *prima facie* presumption can be rebutted by evidence to the contrary."

67. Reference may also be made to the case in AIR 1964 Pat 417 in which it is held that the entries in the electoral roll are only final with regard to the proceedings under the rules and that it is perfectly open to the election tribunal in a petition challenging an election to go into the question whether a candidate for an Assembly constituency is an Indian citizen as required by Article 173 of the Constitution of India. It was observed that the opinion to be given by the tribunal under section 100 of the Representation of the People Act, 1951 cannot be hampered by even an express finding given under Rules 20 and 23 of the Registration of Electors Rules 1960 -

68. In this connection reference may also be made to the relevant law in England.* The right to vote at Parliamentary elections is governed by the English Representation of the People Act, 1949. A person who is not of full age on the qualifying date of the poll is not entitled to vote. A peer of Parliament is legally incapable of voting at a Parliamentary election, even though his name may have been placed upon the register without objection. No person is entitled to be registered or to vote if he is not a British subject or citizen of the Republic of Ireland. Persons of unsound mind and idiots are subject at common

law to an incapacity to vote at an election. A person convicted of treason or felony for which he has been sentenced to death, etc. is incapable of exercising any right of franchise. Offenders against election laws are also incapable of exercising their franchise. There is a detailed procedure for preparing the electoral rolls, for hearing and deciding objections thereto, for finalising the electoral rolls and for making additions or alterations thereto.

The register of Parliamentary electors is conclusive of the following questions, namely, whether or not a person registered therein was on the qualifying date resident at the address shown; whether or not that address is in any constituency; or any particular part of a constituency; and whether or not a person registered therein is registered as a service voter. *A person registered as an elector cannot be excluded from voting on the ground that he is not a British subject or citizen of the Republic of Ireland or is otherwise subject to any legal incapacity to vote, or was not of full age.* But this does not, however, prevent the rejection of the vote on a scrutiny. The effect of the Ballot Act and the Voters Registration Act as to the enquiry at the time of polling was held to make the register conclusive on the Returning Officer and on the election court, except in the case of persons who were prohibited from voting by any statute or by the common law of Parliament (1874) 9 C. P. 734. It would appear that any person who, being subject to a legal incapacity to vote, votes at an election, will have his vote struck off on a scrutiny as in the case of a person who is not of full age. The principles and the rules with regard to striking of votes on scrutiny apply equally to all election petitions.

69. To a similar effect is the law in America as stated in the *Corpus Juris Secundum* Vol. 29 Elections.*

An elector is one who possessed the necessary qualifications for vote. Registration is a method of proof prescribed for ascertaining the electors who are qualified to cast votes. It is a part of the machinery of elections and is a safeguard against frauds. It is a regulation of the exercise of the right of suffrage and not a qualification for such right. The right to vote ordinarily is considered to be a privilege conferred by the State rather than a natural right of the individual or citizen. The right of suffrage is the right of a man to vote for whom he pleases. The right to vote is a political right or privilege, or civil right to be given or withheld at the exercise of the law making power of the sovereignty.

A person may not vote until he has attained the age prescribed by the Con-

*Halsbury's Laws of England Third Edition Vol. 14 Elections — pages, 4, 9, 11, 32, 34, 35 and 301

twenty-one years, and persons under the prescribed age are ineligible to vote. Where the age is fixed by the Constitution, it cannot be changed by any statutory regulations. All persons who possess the constitutional and statutory qualifications of electors are entitled on making proper application to the registrars to have their names registered on the voting lists of their respective districts. Conversely, persons not entitled to vote are not entitled to be registered. A registration list is conclusive evidence as to the fact of registration of these persons whose names appear thereon. It is at least prima facie evidence of who constitute the qualified voters. Under some provisions, the final registration list is conclusive evidence of those entitled to vote, until reversed or set aside in the prescribed manner, and it cannot be collaterally attacked. Under other provisions, however, such a list is not conclusive of right of those who are registered to vote, and the qualifications of registered voters may be inquired into in a contest by the tribunal having jurisdiction of such contest.

70. Reference may now be made to the cases relied on by the petitioner in support of his plea that the election tribunal has no jurisdiction to question the correctness of the entries in the electoral roll. Considerable reliance is placed on a ruling of the Supreme Court in AIR 1963 SC 458 = (1963) 3 S.C.R. 479 which arose out of a panchayat election governed by the Mysore Assembly electoral roll. It appears that the electoral registration officer included the name of the appellant therein without following the procedure prescribed in the rules relating to publication and calling for objections thereto. It was therefore urged that the order of the electoral registration officer in entering the name of the appellant was a nullity which has vitiated the election.

This argument was negated by the Supreme Court in the following terms.

"The electoral registration officer did not follow the procedure prescribed in R. 26 relating to the posting of the application in a conspicuous place and inviting objections to such application. It cannot, therefore, be denied that the inclusion of the name of the appellant in the electoral roll was clearly illegal. Under S. 30 of the Representation of the People Act, 1950, no civil court shall have jurisdiction to question the legality of any action taken by or under the authority of, the electoral registration officer. The terms of the section are clear and the action of the electoral registration officer in including the name of the appellant in the electoral roll, though illegal, cannot be questioned in a civil court, but it could be rectified only in the man-

ner prescribed by law, i.e. by preferring an appeal under R. 24 of the Rules, or by resorting to any other appropriate remedy. . . We find it difficult to say that the action of the Electoral Registration Officer is a nullity. He has admittedly jurisdiction to entertain the application for inclusion of the appellant's name in the electoral roll and take such action as he deems fit. The non-compliance with the procedure prescribed does not affect his jurisdiction, though it may render his action illegal. Such non-compliance cannot make the Officer's act non est, though his order may be liable to be set aside in appeal or by resorting to any other appropriate remedy."

The above observations, far from supporting the contention of the petitioner, seem to support the plea of the respondent that if the order of the Electoral Registration Officer is non est, that is, if it is a nullity and not merely erroneous or illegal, the tribunal is not barred from questioning the entry in the roll. The above passage also emphasises the well known distinction in law which is real though thin, namely, between an order passed by an authority without jurisdiction being a nullity and an erroneous order passed by the authority in the exercise of its admitted jurisdiction not being a nullity but merely being erroneous or illegal. It may also be noted that in this case before the Supreme Court, there was no fundamental disqualification or lack of qualification on the part of the voter whose name was included in the electoral roll by the registering officer.

71. The next case, which according to the petitioner's learned counsel has finally settled the question in his favour, is the decision of the Supreme Court in Civil Appeal No. 1359 of 1969 D/- 13-8-1969 = (AIR 1970 SC 340). This case arose out of an election petition challenging the validity of an election to the Assembly Constituency. As regards the vote of one person whose name was included in the electoral roll after the prescribed date it was held to be void and as regards another voter it was held that the disqualification alleged against him was not a disqualification envisaged in section 16 of the Representation of the People Act, 1950 and that except as provided therein a person is entitled to vote as laid down in section 62 of the Representation of the People Act, 1951. It was pointed out that in the absence of any allegation or proof that the voters suffered from any of the disqualifications set out in section 16 of the Representation of the People Act, 1950, it is not open to a court or a tribunal dealing with an election petition to challenge the entries in the electoral roll.

It was further observed that the relevant provisions of the Representation of the People Act, 1950 relating to the finalisation of the electoral roll constitute a complete code in itself not open to challenge before a civil court as provided in section 30 of the Act or before a Tribunal dealing with an election petition. In coming to this conclusion, reference was also made to the *Prati-dhikar* decision of the Supreme Court in (1953) 3 SCR 479 in (AIR 1953 SC 458) referred to supra in this judgment. On the strength of the observations in the above civil appeal, it was argued by the petitioner's learned counsel that the only questions which are within the jurisdiction of the election tribunal for investigation are the disqualifications set out in section 16 of the Representation of the People Act 1950 and no other. In other words, the argument is that as the said section does not refer to a disqualification on the ground of under-age, it is not open to the tribunal to go into the said question. This argument is based upon a fallacy and a failure to appreciate the true scope of the said decision of the Supreme Court.

72. The above decisions of the Supreme Court bearing upon the interpretation of Section 30 of the Representation of the People Act, 1950 and the application of those principles by the petitioner's learned counsel in support of his contention can be really appreciated and answered if only the question is examined on principle.

73. The first aspect to be considered is as to the true legal effect emerging from the preparation of the electoral roll. There is a fundamental distinction between the existence of a right, namely, the right of franchise and the power to exercise such a right. The substantive right of franchise is derived from the Constitution, according to which irrespective of religion, race, caste or sex, persons who are above the age of 21 years shall be entitled to vote. Though foreigners may be entitled to franchise in their home country, they are not entitled to any franchise in the Indian Union unless they are citizens of India as contemplated by Article 5 of the Constitution. Hence the Constitution defines persons upon whom the right of franchise has been conferred. The second category of persons envisaged in the Constitution are those who are disqualified from exercising their franchise on certain grounds specified in the Constitution or by the legislative enactments. As regards this second category of persons, the law implies that they had the right of franchise but the only bar is that they are prevented from exercising the said right. But the common feature as regards the two categories is that their names cannot be entered in the electoral roll.

The Representation of the People Acts of 1950 and 1951 are enacted in pursuance of the Constitution (Article 327) in order to regulate the manner in which the electoral roll should be prepared and the manner in which elections should be conducted and disputes relating thereto decided. It is therefore clear that the electoral roll prepared in pursuance of the provisions of the Constitution and the Representation of the People Act, 1950 does not by itself constitute the source or the foundation of the substantive right of franchise but the electoral roll is a mere record of the names of persons who are enabled to exercise their right of franchise. For the same reason, persons who are disqualified from exercising their franchise are not entitled to be included in the electoral roll. The names of persons having the right to exercise their right of franchise are not shown in the electoral roll does not necessarily give rise to the converse conclusion that all persons whose names are entered in the rolls are deemed to have the right to possess the substantive right of franchise. In fact, there is no provision of law leading to such a result. The conclusion understood in this background.

To put it in other words, the Presiding Officer of a polling station cannot refuse to issue a ballot paper in favour of a person whose name is shown in the electoral roll as being over 21 years of age, though apparently the voter is a boy of 5 or 10 years. Similarly at the time of scrutiny of the votes, it may not be possible for the Returning Officer to reject the ballot paper whether an objection is raised or not on the ground that the voter had either no right of vote or was disqualified from exercising the vote. The only ground on which the ballot paper is liable to be rejected is some formal and apparent defect in casting the vote on the ballot paper. The rules providing for objections or correction of entries in the rolls not only contemplate errors or description but also objections regarding qualifications or disqualifications of the voters. Whether an objection has been raised and decided or whether no objection at all is raised on any one of the above grounds, the electoral roll is final so far as the Returning Officers are concerned.

74. The next question for consideration is how far the entries in the electoral roll are final as against or with reference to which is called upon to make an election void. It follows from the above that irregularities or errors and other erroneous orders of the Electoral Registering Officers which are not open to challenge before the tribunal. But orders and

the electoral rolls which have no legal effect in the sense that the electors had either no right at all or that they were disqualified from exercising their right are certainly open to challenge before the election tribunal. This view receives support from the decisions of the Supreme Court cited above, namely, AIR 1954 SC 520 and AIR 1960 SC 1049 and AIR 1963 SC 458 = (1963) 3 SCR 479 and the principles of English law empowering an election tribunal to strike off the void votes and incidentally to decide questions of fact in order to find out whether the votes were void or not.

75. This leads us to a final consideration of the limits of the jurisdiction of the election tribunal. So far as S. 30 of the Representation of the People Act is concerned, it does not refer in terms to the bar of the tribunal's jurisdiction but specifically precludes the civil court from entertaining any disputes regarding the right to be registered in the electoral registration offices. I do not understand that the Supreme Court in the last mentioned case cited supra (Civil Appeal No. 1359 of 1969) = (reported in AIR 1970 SC 340) intended to interpret the words 'Civil Court' contained in S. 30 as including the election tribunal. We have to understand the observations of the Supreme Court in relation to the context and the background in which the observations are made. Evidently, the Supreme Court was referring to the provisions of section 62 read with section 16 of the Representation of the People Act, 1950 as limiting the jurisdiction of the election tribunal from going into questions of disqualifications other than those mentioned in section 62 and section 16 of the 1950 Act.

In the said ruling Civil Appeal No. 1359 of 1969 = (reported in AIR 1970 SC 340) the Supreme Court was dealing with an argument that one Tarsem Singh, whose name finds a place in the electoral roll became disqualified to exercise his vote as he had taken up Government service subsequent to the finalisation of the electoral roll. In rejecting this argument, it was observed by the Supreme Court that in view of the provisions of section 62 read with section 16 of the Representation of the People Act, the voter did not suffer from any of the disqualifications as mentioned therein and he could therefore exercise his vote as his name found a place in the roll. These observations of the Court can be easily appreciated if we bear in mind the distinction between the person who has no right of vote, and the person who suffers from a functional lack of qualification and a person who though possessing such a right, is disqualified from exercising such right. In the first category the person cannot be said to possess the right to vote, but it can be said that he is not qualified to exercise it.

In the case before the Supreme Court, Tarsem Singh had admittedly the franchise right apart from his name appearing in the electoral roll. Hence the exercise of his vote was not specifically barred by any of the provisions mentioned in Sections 62 and 16 of the Act. The attempt of the petitioner's learned counsel is to apply these observations to the case of a minor voter. This argument can be easily answered in view of the true legal position emerging from the electoral roll already stated by me supra. Sections 62 and 16 deal only with disqualifications, that is about persons, who though possessed of the right of vote are precluded from exercising the said right. The language of section 62 clearly supports this distinction when it says "no person... shall be entitled to vote." The expression "to vote" should be interpreted as "to exercise the vote." The omission of any reference to a minor in section 62 or in S. 16 is quite obvious, for a minor is a person who has no vote at all as laid down by the Constitution and hence the question of his being debarred from exercising such a right does not arise.

When the election tribunal is entitled to enquire into the disqualifications envisaged in sections 62 and 16 of the Representation of the People Act, 1950 as materially affecting the result of the election on the ground of non-compliance with the provisions of the Act, it necessarily follows as a matter of simple logic, that the tribunal is entitled to strike down and eliminate the ballot papers relating to persons who have no right at all, not to speak of any exercise of the right. By reason of the specific omission of the case of the minors in sections 62 and 16, it cannot be contended by any stretch of reasoning that the legislature intended to uphold the result of an election at which certain void votes, namely votes of certain persons who did not possess the very right itself were polled. In view of the fact that the Representation of the People Acts of 1950 and 1951 were enacted under the provisions of the Constitution we have to read the said provisions of law in conjunction with the basic requirement laid down in the Constitution as regards the qualifications for franchise. No doubt in a broad sense persons who have no right at all and persons who though having the right are disqualified from exercising the same can be said as being disqualified from exercising the vote. But strictly speaking there is a fundamental distinction between the initial want of qualification at all and disqualification as such, for in the second category, the person can exercise the vote in the absence of the disqualification whereas in the first category the person can never exercise a right which he did not possess.

It is for this reason that the Supreme Court in the cases mentioned earlier held that it is open to an election tribunal to set aside an election on the ground that it was not in compliance with the provisions of the Constitution. The omission of the expression 'non-compliance with the provisions of the Constitution or the Representation of the People Act' occurring in section 100 of the Representation of the People Act, 1951, while enacting the relevant rule under the Municipal Act, does not mean that a Municipal election is not vitiated when there is a violation of the provisions of the Constitution. This omission can be explained only on the ground that it was a surplusage or on the ground that it is a result of bad draftsmanship. When the rule under the Municipal Act says that the election can be declared as void if there is non-compliance with the provisions of the Act (Municipal Act) we have to interpret the word 'Act' as taking in the law laid down by the Constitution and the Representation of the People Act.

In this view of the matter the tribunal is vested with the plenary jurisdiction of entertaining any plea, and if necessary to take evidence in support of the plea, and if it is disputed by the opposite party in order to ascertain whether any ballot papers should be struck down on the ground that they were mere waste papers in the eye of law having been signed by persons who did not possess the very right itself, these questions can be gone into by the tribunal notwithstanding the fact that identical objections were raised and decided by the electoral registering officer at the time of the preparation of the roll. The provisions of the Representation of the People Act in so far as they provide for the finality of the electoral roll cannot be construed in such a way as to cut down and limit the jurisdiction of the election tribunal which is bound to exercise its powers in setting aside an election as provided in the relevant rules.

In *Veluswami v. G. Raja Nair*, AIR 1959 SC 422 the jurisdiction of the tribunal was stated in the following terms:

"The tribunal exercises jurisdiction under Section 100 of the Representation of the People Act not as an appellate authority against the decision of the returning Officer. An election petition is an original proceeding. The contesting party files a written statement and issues are framed. The trial is conducted as far as possible as regulated by the Civil Procedure Code. The parties are entitled to adduce full evidence and that is the essence of the original proceeding as contrasted with a summary enquiry by the returning officer before whom an objection may be decided if it is actually raised."

It was therefore observed that not-

withstanding any decision of the returning officer with respect to the objections raised against the acceptance of a nomination paper it is nevertheless open to the tribunal to go into the same question to find out whether the provisions of the Act have been complied with or not. If the tribunal is precluded from going into such questions, it is pointed out that the nature of the enquiry before a tribunal becomes illusory. It was finally observed as follows:

"It is no doubt true that if on its true construction, a statute leads to anomalous results, the Courts have no option but to give effect to it and leave it to the legislature to amend and alter the law. But when on a construction of a statute, two views are possible, one which results in an anomaly and the other, not, it is our duty to adopt the latter and not the former, seeking consolation in the thought that the law bristles with anomalies."

The above case no doubt unholds the tribunal's power to consider any objections as to want of qualification or disqualification of a candidate whether actually raised before the returning officer or not. Applying the same principle, I think the tribunal should have jurisdiction to decide all objections as to disqualifications or want of qualifications of voters, for the simple reason that such invalid or void votes materially affect the result of the election on the ground of non-compliance with the substantive provisions of the Constitution or other relevant enactments. Such an enquiry can be conducted by the tribunal notwithstanding the fact that similar objections were already raised before the electoral registration officer at the final preparation of the roll. If the purity of the elections has to be maintained as laid down by the Supreme Court in more than one decision, the tribunal is charged with the duty of not only eliminating votes which are obtained as a result of corrupt practices but also to eliminate votes which are null and void.

76. In the light of the above discussion, I am unable to agree with the other decisions cited by the learned counsel for the petitioner, to which I now propose to refer.

77. In *Ghulam Mohinuddin v. Election Tribunal*, AIR 1959 All 357 (FB) the majority view proceeded on the footing that the electoral roll by itself constitutes the source of the right of vote and that it cannot be regarded as void even though the person, a minor, had no right to vote at all under law. The dissenting judgment, if I may say so with respect, brought out the real distinction in the following terms:

"With the greatest respect I am unable to agree with the decision mentioned above because I have already held

that want of qualification or 'unqualification' is quite distinct from 'disqualification'. The result of unqualification or want of qualification is that a person cannot at all be enrolled as a voter, but the result of a disqualification is that though he is entitled to be recorded as a voter his name is liable to be struck off on any of the grounds on which he can be disqualified under the Law."

78. In AIR 1968 Punj and Haryana I (FB) the decision proceeded on the footing that in spite of the constitutional prohibition, the electoral roll is the foundation for the franchise and that the vote cannot be struck down. The decision of the Gujarat High Court in AIR 1969 Guj 334 also proceeds on the erroneous assumption that it is the electoral roll which confers upon a person the substantive right of vote and incidentally the power to exercise the vote. The decision of a single Judge of the Mysore High Court in AIR 1969 Mys 84 does not touch the present question as the dispute therein was that as many as 1000 persons were not given the ballot papers as their names were not found in the electoral roll published in the Marathi language though their names were found in the equivalent Kannada roll. I am not therefore inclined to accept the reasoning in the last mentioned cases AIR 1968 Punj and Haryana I (FB); (AIR 1969 Guj 334) and (AIR 1969 Mys 84) as the said decisions took an erroneous view of the legal effect emerging from the preparation of the electoral roll.

79. To sum up the foregoing discussion, a person under the age of 21 years has no franchise at all as declared by the Constitution. The entry of his name in the electoral roll is a nullity and cannot operate to override the Supreme Provisions of the Constitution. The ballot paper relating to such a person has no legal effect and should be struck down at the scrutiny of the ballot papers. As there is no special procedure for an enquiry into these questions at the stage of scrutiny, the tribunal is invested with the powers to enquire into the said objections so that the said votes may be eliminated. When an election tribunal is constituted for the purpose of declaring the election void on the ground that the result of an election is materially affected due to non-compliance with the provisions of law, the tribunal is necessarily vested with plenary powers to investigate the said questions notwithstanding the fact that the said questions may have been summarily decided either by the returning officers or by the electoral registration officers, for, the enquiries contemplated by the electoral registration officers at the time of finalisation of the rolls or by the returning officers at the time of scrutiny of the nomination papers are only summary in the sense that the ex-

tent of the enquiry is at the discretion of the said officers. The electoral roll is therefore final and binding on the election tribunal except in cases where the voters are prohibited to vote either by the Constitution or by any Act of Parliament or local legislature.

80. For the above reasons it follows that the election tribunal has got the jurisdiction to decide whether certain voters are under the age of 21 years, so that if they are found to be under-aged, their votes may be eliminated. In other words, the enquiry is not as regards the correctness of the entries in the roll but as to whether the persons who voted possessed the requisite qualifications as prescribed in the Constitution. The decision in ((1961) 2 Andh WR 23) is therefore overruled in view of the principle enunciated by the Full Bench in (1969) 1 Andh WR 52 = (AIR 1970 Andh Pra 56).

81. KUPPUSWAMI, J.: The petitioner and the 1st respondent contested for election to the Municipal Council, Dharmavaram, Anantapur district from Ward No. 7. The petitioner secured 331 votes, and the respondent 325 votes, with the result, the petitioner was declared elected to the Council.

82. The 1st respondent filed an Election Petition (O. P. No. 107 of 1967) before the Election Tribunal (Subordinate Judge, Anantapur) challenging the election on several grounds all of which, except ground No. 3, were abandoned. Ground No. 3 was to the effect that a number of voters who voted at the election were 'minors' on the date of election, and their names were fraudulently inserted in the electoral rolls. It was stated that the result of the election had been materially affected by taking into consideration these votes also.

83. The 1st respondent also filed a petition (I. A. 290 of 1956) setting out the names of 12 persons with their serial numbers in the electoral roll with an allegation that all of them were minors, and that the electoral roll to that extent was void. It was prayed that the Tribunal may be pleased to order the cover containing electoral roll, and the cover containing the ballot papers to be opened so as to enable the court to pick out the ballot papers issued to the 12 persons.

84. It was contended on behalf of the petitioner that so long as the electoral roll remains in force, all the persons named therein were entitled to vote. It was not open to the petitioner to question the correctness of the electoral roll on the ground that the names of the minors were included in that roll.

85. The Tribunal, by its order dated 2nd April, 1969 held that the 1st respondent herein who was the petitioner in the Election Petition is entitled to ques-

tion the entries in the electoral roll on account of the elector's minority. He came to the conclusion that a prima facie case has been made out for ordering inspection of the ballot papers, and other documents, and, therefore, allowed the petition.

86. The writ petition is filed challenging the said order.

87. Therefore, the question for consideration in the writ petition is whether it is open to the petitioner in an Election petition before a Tribunal to contend that certain votes are void as the voters were 'minors', though their names are found in the electoral roll.

88. At the outset, it may be pointed out that the expression "minor" is not apt in this connection. According to Section 11 of the Municipalities Act, the electoral roll for the Municipal election is the same as the electoral roll for the Assembly Constituency prepared under the Representation of the People Act 1951. Under that Act, one of the qualifications for being entered in the electoral roll is that the voter must be not less than 21 years; whereas the age of majority is 18 years. The proper criterion, therefore, is whether the voter has attained the age of 21 years or not, and not whether he is a 'minor' or a 'major'. It is, therefore, proper to use the expression "under-aged" instead of 'minor' while dealing with this question.

89. The relevant provisions in the Constitution, the Representation of the People Act, 1950, the Representation of the People Act 1951, the Andhra Pradesh Municipalities Act, and the rules made thereunder have been set out in detail in the judgments of my learned brothers which have preceded mine, and it is unnecessary to set them out in detail.

90. In order to determine the jurisdiction of the Election Tribunal under the Municipalities Act, we have to start with rule 10 (c) of the rules for decision of the election disputes made in exercise of the powers conferred by Section 326 (2) (b) of the Andhra Pradesh Municipalities Act. There is no provision in the Act dealing with the election disputes, but Section 326 authorises the Government to make rules for carrying out all or any of the purposes of the Act including rules relating to elections of the Councillors, and in pursuance of that power, the aforesaid rules have been made. Under rule 10 (c) which is the part of the rule relevant for the purposes of this case, the election of a returned candidate shall be void, if, in the opinion of the Election Tribunal, the result of the election has been materially affected by the improper reception, or refusal of a nomination paper, or vote or by any non-compliance with the provisions of the Act or the rules made thereunder. Under

this Rule, therefore, in so far as it is relevant for this case, the Election Tribunal has to declare an election void, if in its opinion

(a) there has been on improper reception or refusal of a vote, or

(b) if there is any non-compliance with the Act or the rules made thereunder. The question is whether in considering these matters referred to in rule 10 (c), the Tribunal has jurisdiction to go into the question whether a particular person who has voted is under-aged, and, therefore, was not entitled to vote. Section 11 (6) of the Act states that every person whose name appears in the electoral roll for the Municipality shall be entitled subject to the provisions of the Act to vote at an election, and no person whose name does not appear in such roll shall vote at an election. Section 11 (1) provides that the electoral roll for any Assembly constituency as relates to the Municipality is deemed to be the electoral roll under section 11 (2) for the Municipality, and under Section 11 (1) every person whose name is included in such part of the electoral roll for any assembly constituency as relates to the Municipality or any portion thereof shall be entitled to be included in the electoral roll for the Municipality and no other person shall be entitled to be included in such a roll.

The Representation of the People Act, 1950 after providing in Part III for the preparation of electoral roll in accordance with the provisions contained therein for the Assembly constituency has provided under Section 30 that no civil Court shall have jurisdiction to entertain or adjudicate upon any question whether any person is or is not entitled to be registered in an electoral roll for a constituency. S. 62 of the Representation of the People Act of 1951 provides that no person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in the constituency. Section 100 of the Act gives the grounds for declaring an election to be void. So far as it is relevant for the purpose of this case, the High Court shall declare an election void if it is of the opinion that the result of the election in so far as it concerns the returned candidate has been materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or by any non-compliance with the provisions of the Constitution or of the Act or of any rules or orders made under the Act.

91. There is some difference between the language used in Rule 10 (c) of the Andhra Pradesh Municipalities Act and Section 100 (1) (d) (iii) and (iv) referred to above. Rule 10 (c) refers only to non-compliance with the provisions of the Act

and the rules, whereas Section 100 (1) (d) (iv) refers also to non-compliance with the provisions of the Constitution. In my view, however, this does not make any difference. It is axiomatic that every court, tribunal or authority in India should adhere to the Constitution which is supreme. It is unnecessary to say in express terms that the election is void or that tribunal has jurisdiction to declare an election void if the provisions of the Constitution have not been complied with. The absence of such a provision is not, therefore, of much significance, and has to be implied in Rule 10 (c).

Again it is noticed that the expression used in rule 10 (c) is "non-compliance with the provisions of this Act." But it is already seen that the roll of the Assembly Constituency under the Representation of the People Act is deemed to be the roll for an election to the Municipal Council. Thus, if a roll of the Assembly constituency is defective by reason of the non-compliance with the provisions of the Representation of the People Act, it would be equally defective for the purposes of election to the Municipal Council. In other words, the expression "non-compliance with the provisions of this Act" in rule 10 (c) would also include non-compliance with the provisions of the Representation of the People Acts of 1950 and 1951 which have to be read together. Lastly rule 10 (c) refers only to improper reception or refusal of a vote whereas Section 100 (1) (d) (iii) refers also to reception of any vote which is void. In this case also, in my view, the omission of the latter clause is not of much significance as a void vote is invalid and must be treated as non-existent and no express provision is needed to say that the election can be declared void if it is the result of reception of void votes.

Of course, in all these cases as is provided by both rule 10 (c) and S. 100 it must be proved also that the result of the election has been materially affected. The result of the above examination of Rule 10 (c) of the Municipal Rules and S. 100 of the Representation of the People Act, 1950 is that the grounds with which we are concerned in this case on which the Tribunal may declare an election to the Council void are the same on which the High Court may declare the election to the Assembly Constituency void. It is, therefore, sufficient to consider what exactly is the extent of the jurisdiction under Section 100 of the Representation of the People Act.

92. The various steps in the arguments of Sri Babul Reddy for the petitioner may be stated as follows: The Representation of the People Acts of 1950 and 1951 are complete codes in dealing with the elections to various

Assemblies and to the Parliament. Section 62 of the Act of 1951 provides that all those whose names do not appear therein are not entitled. The only prohibition is against a person voting, if he is subject to the disqualifications mentioned in Section 15 of the Act of 1950. These are not being a citizen, being of unsound mind etc. Being under-aged is not one of the disqualifications referred to in Section 16. Hence, once a person's name is entered in the roll, he has a right to vote, whatever may be his age. It is true that it is only persons over 21 that are entitled to be registered as voters, and S. 100 of the Representation of the People Act of 1951 authorises the Tribunal to declare an election void if there has been non-compliance with the provisions of the Constitution or the Act. Far from there being a violation of this Act, there is compliance with such provisions if all the persons who are entered in the roll are allowed to vote. On the other hand, if a person whose name is found and is not subject to the disqualifications mentioned in Section 16 is not permitted to vote, there is a violation of S. 61 of the Act. Even though under Section 100 the Tribunal has jurisdiction to set aside the election if the provisions of the Constitution (in this case Article 326) have been violated, that jurisdiction cannot be exercised unless it is found as a fact that persons below 21 have voted. But this fact, it is precluded from going into, by reason of section 30 of the Representation of the People Act of 1950. If that rule cannot be questioned before the Tribunal under Section 100 of the Representation of the People Act, it cannot equally be questioned under the Municipalities Act as Section 11 (1) of the Act says that the roll for the Assembly Constituency and roll for the Municipal Council election shall be the same.

Thus the position is that as long as persons whose names are entered in the roll and who are not subject to disqualifications under Section 16 are permitted to vote there is neither violation of the provisions of the Constitution nor of the provisions of the Act. It cannot also be stated that there is an improper reception of vote, or reception of a void vote.

93. On the other hand, the contention of Mr. Choudary for the respondent is that on a proper construction of Art. 326 there is a constitutional prohibition on the part of the person below 21 from being registered as a voter. If an electoral roll is prepared containing the names of such persons as voters, that roll is void in so far as it contains such entries. Therefore, there is a violation of the provisions of the Constitution. If such persons are permitted to vote, their votes also are void. The Tribunal has, therefore, jurisdiction to declare the election as void on the ground that there has

been a violation of the provisions of the Constitution and also on the ground of reception of void votes. It is not correct to say that the Tribunal has no jurisdiction to go into the question whether any of the voters are not of the requisite age or not. As it has got the jurisdiction to decide whether the election is void on the ground of non-compliance with the provisions of the Constitution, or the reception of a void vote, it has got jurisdiction to decide all the facts which would enable it to come to that conclusion.

94. I must confess that I felt considerable difficulty in deciding between the two points of view presented on both sides. But after a careful consideration of the various aspects of the matter and the decisions on the question I find the submission made by the Advocate for the respondent more acceptable.

95. As the preamble to the Constitution clearly says, India is a Sovereign Democratic Republic. The framers of the Constitution felt that Democracy can be best achieved only by recognising the principle of universal suffrage. At the same time, considerations of public policy require that the right to vote is limited to citizens of a particular age, and citizens who are not considered to be capable of comprehending the significance of a franchise should not be given the right to vote. In our Constitution, this principle has been recognised in Article 326 which says that the election to the House of People and to the Legislative Assemblies shall be on the basis of adult suffrage. In this article, the expression "adult" has been taken to mean a person who is not less than 21 years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature.

Thus, our Constitution has recognised the right of every person who is not less than 21 years of age to take part in the elections to the House of the People, and the Assemblies. Though the Article provides that an adult is entitled to be registered as a voter at an election, it does not need much of an argument to say that a person who is not an adult is not entitled to be registered as a voter. In other words, the right to vote is withdrawn by the provisions of the Constitution from citizens who have not attained the age of 21 years. If, therefore, an electoral roll prepared in accordance with the provisions of an Act of Parliament contains the names of voters who are not adults, or does not contain the names of voters who are adults, and who are not subject to any disqualifications referred to in Article 325, such an electoral roll would be contrary to the provisions of the Constitution. If the name of any person who is not entitled to vote under

Article 326 of the Constitution is included in the electoral roll, such inclusion has to be treated as void and has to be ignored. If that vote is taken into account in determining the result of an election, it would certainly be a violation of the provisions of the Constitution.

Under Section 100 (1) (d) (iv) of the Representation of the People Act, the High Court in deciding an election dispute in the matter of an election to the Assembly Constituency, has to declare the election of the returned candidate to be void in case it comes to the conclusion that the result of the election has been materially affected by taking into account the votes of voters who are under-aged, as it would be non-compliance with the provisions of the Constitution within the meaning of that sub-section. If, therefore, the question arises in respect of an election to the Assembly Constituency, there cannot be any doubt that the High Court can hold that the reception of a vote of a person who is not an adult amounts to non-compliance with the provisions of the Constitution, and therefore, can declare the election void if such reception has materially affected the result of the election. The position cannot be different in respect of an election under the Municipalities Act. It has already been seen that the Municipalities Act merely provides that the electoral roll of the Assembly Constituency as it relates to the Municipality shall be the electoral roll for election to the Municipality. If the electoral roll is prepared in a manner which violates the provisions of Article 326 of the Constitution the reception of a vote of a person who is not entitled to vote, would amount to non-compliance with the provisions of the Act.

96. It is argued by Mr. Babul Reddy that this reasoning assumes that the vote is that of an under-aged person, and that fact cannot be determined unless the Tribunal is entitled to go into the question whether the entry in the electoral roll containing his name is correct or not and that the Tribunal is precluded from going into it by reason of Section 20 of the Representation of the People Act. It is an accepted principle that when a Tribunal is given jurisdiction to decide a particular matter, it has also the jurisdiction to consider all questions which are necessary to enable it to decide that question. In this case, we have already seen that the Tribunal has jurisdiction to consider whether there has been a non-compliance with the provisions of the Constitution or of the Act or the rules which would include the Representation of the People Act and the rules regarding electoral roll. In order to decide this question, it is necessarily to go into the question whether any electoral roll which has been prepared under the provisions

of this Act read in conjunction with the Representation of the People Act, was prepared in compliance with the provisions of those Acts or the Constitution.

If, therefore, the Constitution prohibits a person who is not an 'adult' from voting, the Tribunal is entitled to consider whether a person who has exercised his vote was an adult or not, and whether his name has been rightly included in the electoral roll. It is true that Section 30 of the Representation of the People Act is in wide terms but that section cannot be so interpreted as to disable the tribunal from exercising its duty to declare an election void if the provisions of the Act or the Constitution have not been complied with. This question can be looked at from another angle. If under Article 326 there is a constitutional prohibition against a person other than adult being included in the register, every entry which contravenes that provision is void and non est. It is as if the electoral roll does not contain those entries. Under Section 30 it is only the roll consisting of the remaining entries that cannot be questioned before a civil Court or the Tribunal. Mr. Babul Reddy argued that if this argument is accepted the names of those who are not citizens, who are of unsound mind, who have been guilty of corrupt practices have also to be ignored with the result, Section 30 would become a dead letter.

97. This argument, in my opinion, proceeds upon a misconception of the terms of Article 326 of the Constitution. That Article starts by declaring that the elections shall be on the basis of adult franchise. The clause that follows explains what is meant by adult franchise, i.e., every person who is a citizen of India and who is not less than 21 years on the said date, as may be fixed in that behalf, by or under any law made by a proper Legislature is entitled to be registered as a voter. Thus, these two qualifications viz., that he is a citizen and that he should not be less than 21 years on a particular date are required by the Constitution and if they are not observed, there is a violation of the provisions of the Constitution. Article 326 also provides that the voters should not be disqualified under the Constitution or any law made by a proper Legislature on the ground of non-reception, unsoundness of mind or corrupt or illegal practice. If the Legislature provides for disqualifications on any of those grounds, those provisions cannot be regarded as provisions of the Constitution. Any violation of those provisions cannot stand on the same footing as the violation of the provisions of the Constitution. At any rate, we are not now concerned with the question as to the effect of the non-observance of the provisions of that Act in the preparation of the rolls. Here, we are concerned with

the violation of the requirement of age, as provided under the Constitution in preparing the electoral roll.

98. It now remains to consider the various decisions relied on by the advocates on both sides. In (1955) 1 SCR 267 = (AIR 1954 SC 520) the Supreme Court had to consider the case of an election of a candidate below 25 years of age. It was argued that by accepting his nomination, there was an improper acceptance of nomination, and further there was a violation, or non-compliance with the provisions of Article 173 of the Constitution which provides that a person less than 25 years is not qualified to be chosen to fill a seat in the Legislative Assembly of a State. On behalf of the candidate it was contended that as his name found a place in the electoral roll, and as the electoral roll was conclusive, his right to stand could not be questioned. The Supreme Court held that as the want of qualification, namely, being under-aged was not apparent on the electoral roll itself, or on the face of the nomination paper the acceptance of the nomination paper could not be regarded as an improper reception of a nomination paper. It was, however, held that the election should be held to be void on the ground of the Constitutional disqualification of the candidate, and the expression "non-compliance with the provisions of the Constitution" was sufficiently wide to cover cases of a fundamental disability in the candidate to stand for election at all.

It was observed that the acceptance of the nomination by the Returning Officer is not final, and the election tribunal may, on evidence, placed before it come to a finding that the candidate was not qualified at all. I am of the view that though this case relates to a candidate the same reasoning would apply to the case of an elector. The disqualification of an elector to vote on the ground of under-age is as much a constitutional disqualification as that of an under-aged person to stand for election. The former is prohibited by Article 326 and the latter by Article 173 of the Constitution.

99. In (1960) 2 Andh WR 308, a Division Bench of this court was also concerned with the case of a person below 21 years who was elected to the Municipal Council. It was held that the election of such a candidate amounts to non-compliance with the provisions of the Act, and could be called in question under rule 10 (c) of the rules made under the District Municipalities Act. This decision was referred to with approval in a recent decision of a Full Bench of this court in (1969) 1 Andh WR 52. The Full Bench also had to deal with the case of an election of a person below the age of 21 years on the date of the election. It

was held that the mere entry in an electoral roll is not final, and conclusive in regard to the age of the candidate, and it is open to the Election Tribunal to enquire in an Election Petition into the age of the candidate, and to find out whether he is duly qualified to seek the election. It was held that if a person does not complete the age of 21 years when his name is registered in the electoral rolls, he suffers a Constitutional disability and, therefore, the very entry of his name in the electoral roll is null and void, and is non est.

Thus, it appears that the basis of the decision is that the Election Tribunal is entitled to go behind the electoral roll, and come to the conclusion on the evidence before it whether the name of the voter was properly entered in the electoral roll. Though, it was observed that the question of the validity of a vote was not before them, and it was not necessary for them to decide the question whether, when persons below the required age exercise their franchise in an election, such elections would be vitiated by the non-compliance with the provisions of the Act, or the rules made thereunder, the following observations in that judgment indicate that they were inclined to take the view that the election would be vitiated:

"That apart, it is very doubtful, to what extent a person, who has incurred the constitutional disability in regard to the age, can validly exercise his vote simply because his name finds in the electoral roll. If he has suffered a constitutional disability, in regard to age, and if for that reason, the very entry of his name in the electoral roll is null and void and non est, that would mean that he is not a voter and cannot, therefore, exercise his vote. That might lead to the result, that when such persons exercise their franchise in an election such election would be vitiated by non-compliance with the provisions of the Act or the Rules made thereunder."

These observations, in my view, follow directly from the ratio of the decision before them, namely, that the entry in the roll of a person who is under a constitutional disability to vote, is non est.

100. In AIR 1967 Mad 244 the very question before us felt to be considered by a Division Bench of the Madras High Court. It was held that the electoral roll which contained the list of voters below the age of 21 years infringes the Constitution, to that extent, and the effect would, therefore, be that part of the Instrument would be void, and non est, and the Election Tribunal has every jurisdiction to hold that the inclusion of the names is a nullity. The decision of this court in (1960) 2 Andh WR 308 was cited with approval. One of the learned Judges also observed that the recep-

tion of the vote of a person who was under-age would amount to an improper reception of a vote within the meaning of rule 10 (c) of the rules under the Madras District Municipalities Act. Mr. Babul Reddy is perhaps justified in saying that as far as this part of the decision is concerned, it may run counter to the decision of the Supreme Court in (1955) SCR 267 = (AIR 1954 SC 520) but no exception can be taken to the decision that the electoral roll in so far as it contains the list of voters below 21 years violates the provisions of the Constitution, and is void to that extent.

101. The Full Bench of the Kerala High Court has taken the same view in AIR 1962 Ker 100 (FB). It was held that the presence of minors in an electoral roll and their voting in consequence thereof will both be violative of the provisions of Article 326 of the Constitution. Vaidalingam, J., observed that the age entered in the electoral roll cannot be considered to be final so as to preclude the Election Tribunal from going into that matter when deciding an election petition.

102. In AIR 1964 Pat 417 the question was whether it was open to the Tribunal to investigate into the question as to whether a particular candidate was citizen of India or not on the date of his election. Though the question before the Division Bench in that case was somewhat different from that with which we are concerned here, they considered a preliminary objection raised namely, that when the voter was registered in the electoral roll it must have been decided that he did not suffer from any disqualification, in other words, it must have been deemed to have been decided that the voter was a citizen of India and it was not open to the Tribunal to decide in the election petition whether he was, or was not a citizen. Dealing with this objection, it was observed that the opinion given by an Election Tribunal in an election petition cannot be hampered even by an express finding given under the rules, and that the finality contemplated under the rules has reference to the proceedings under the rules, and it cannot debar the Tribunal from considering the question.

103. In a recent decision of the Supreme Court (unreported) in Civil Appeal 25 of 1969, D/- 13-8-1969 = (AIR 1970 SC 314), the controversy related to the validity of some of the votes of voters whose names were included in the electoral roll after the date fixed under section 23 of the Representation of the People Act, 1950. It was held that the Electoral Registration Officer had no power to include new names in the electoral rolls after that date. Therefore, the votes of the electors whose names were included on the rolls on that date, must

be held to be void votes, and, therefore, would be covered by Section 100 (1) (d) (iii) of the Act which deals with improper reception, refusal or rejection of any vote, or the reception of any vote which is void. This principle in my view, will apply with greater force to the case of the vote of a voter who is below the age of 21 years as, such a vote being opposed to Article 326 of the Constitution, would be a void vote.

104. The decisions relied on by the petitioner as supporting his contention that the Election Tribunal has no jurisdiction to go into the question whether a voter whose name appears in the electoral roll is under-aged, and hence his vote is void, and has to be rejected, may now be considered.

105. The first of these decisions relied on is that of a Division Bench of this Court in (1961) 2 Andh WR 23. That case related to an election under the Madras Village Panchayats Act, the provisions of which are on the same lines as the Andhra Pradesh Municipalities Act. It was held that the electoral roll is conclusive as to the qualification of a voter and, therefore, when two voters whose names appeared in the roll were allowed to record their votes, there was no improper reception of votes, or non-compliance with the provisions of the Act, or the rules framed thereunder. In view of what has been stated earlier, we have to dissent from this view. Referring to the decision of the Supreme Court in (1955) SCR 267 = (AIR 1954 SC 520), it was stated as follows:

"It was ruled by the Supreme Court that the Electoral Roll was conclusive as to the qualification of the elector except where the disqualification was expressly alleged or proved and that where a person of under-age was shown as having been of proper age in the Electoral Roll, it could not be said that his nomination was improperly accepted by the Returning Officer within the meaning of S.100 (1) (c) of the Representation of the People Act 1951, so as to render the whole election void. Thus, the casting of a vote by a person under the age of 21 but whose name is recorded in the Electoral Roll does not in any way vitiate the election."

This purported summary of the decision of the Supreme Court is, in our opinion, a result of misappreciation of the judgment of the Supreme Court. It is true that the Supreme Court held that the acceptance of nomination would not be an improper acceptance, but it was held by the Supreme Court that the acceptance of the vote would result in a violation of the provisions of the Constitution. As a matter of fact, in that case, the election was held to be void on that ground.

¶106. Considerable reliance was placed upon a decision of the Supreme Court in *B. M. Ramaswamy v. B. M. Krishnamurthy* AIR 1963 SC 458 = (1964) 2 SCJ 268. There an application was filed before the Registration officer for inclusion of the appellant's name in the electoral roll, and on such application, his name was included, but the Electoral Officer did not follow the procedure prescribed in rule 26 relating to the posting of the application in a conspicuous place, and inviting objections to such application. It was held that though the inclusion of the name was illegal, the action of the Registration Officer was a nullity as the non-compliance with the procedure prescribed did not affect his jurisdiction. In those circumstances, it was held that the inclusion of his name cannot be questioned under section 33 of the Representation of the People Act. It is thus seen that the case does not deal with a void vote. Far from being of assistance to the petitioner, the decision recognises the distinction between a case where the action of the Electoral Officer in preparing the roll is a nullity, and where it is not. The Supreme Court observed that the non-compliance with the procedure cannot make the Officer's act non est, though his order is liable to be set aside in appeal, or by resorting to any other appropriate remedy.

From these observations it is clear that if the officer's act were non est the result of the decision would have been otherwise. It has already been pointed out that in this case the roll prepared in so far it includes the names of voters below 21 would violate the Constitution, and, therefore, such entries would be a nullity, and non est. The distinction between the two classes of cases has been brought out clearly in another decision of the Supreme Court (unreported) in Civil Appeal No. 1359 of 1969; D/- 13-8-1969 = (since reported in AIR 1970 SC-340). In that case, the Supreme Court had to consider two classes of cases (1) the case of votes which were included in the electoral roll after the date prescribed, and (2) the vote of a person who had become a Government servant by the time the polling took place. The Supreme Court held that the first class of cases were void votes following its decision in Civil Appeal No. 25 of 1969, D/- 13-8-1969 = (reported in AIR 1970 SC 314) referred already. But, as far as the vote falling under the 2nd category was concerned, it was observed that in view of the provisions of S. 23 (3) of the Representation of the People Act, 1950, every person who is for the time being entered in the electoral roll of a constituency as it stood on the last day for making a nomination in an election in that constituency, is entitled to vote unless it is shown that

he is prohibited by any of the provisions of the Act from exercising his vote.

After holding that the prohibitions contained in Section 62 of the Act read with Section 16 do not apply and no other provisions of law in the Act or in any other law was brought to their notice disqualifying him from exercising the vote, the Supreme Court observed as follows:

"The right to vote being purely a statutory right, the validity of any vote has to be examined on the basis of the provisions of the Act. We cannot travel outside those provisions to find out whether a particular vote was valid vote or not. In view of Section 30 of the 1950 Act, civil courts have no jurisdiction to entertain or adjudicate upon any question whether any person is or is not entitled to register himself in the electoral roll in a constituency. . . sections 14 to 24 of the 1950 Act are integrated provisions. They form a complete code by themselves in the matter of preparation and maintenance of electoral rolls. It is clear from those provisions that the entries found in the electoral roll are final, and they are not open to challenge either before a civil court or before a Tribunal which considers the validity of any election."

These observations which are strongly relied upon were made in connection with a vote which was not void, or non est. On the other hand, in the same judgment, void votes were excluded from consideration. In the case before us, the vote of a person below 21 would violate article 326 of the Constitution, and would be a void vote coming under the first category of cases referred to in this judgment.

107. Our attention was also drawn to a decision of Full Bench of the Punjab High Court in AIR 1968 Punj and Haryana 1 (FB), a judgment of a single judge of the Gujarat High Court in AIR 1969 Guj 334 following the decision of a Bench of that Court in Kantilal Mathuradas Parikh v. Village Panchayat of Shivrajpur, (1963) 4 Guj LR 929 and a decision of the Allahabad High Court in AIR 1959 All 357 (FB).

108. AIR 1968 Punj and Haryana 1 (FB) dealt with the case of the same nature as that before us, namely the vote of a person whose name is entered in the electoral roll, but who is less than 21 years on the qualifying day. Dealing with article 326 it was observed that it referred only to the qualification for being entitled to be registered as a voter, but it did not add that the person so qualified shall have a right to vote. We do not see any basis for such a distinction. If the effect of the article is that persons less than 21 years cannot be registered as voters, it follows that any

entry in an electoral roll of a person who is less than 21 years would contravene article 326 of the Constitution. For the reasons stated in this judgment, we have to express our dissent from the view expressed in this decision.

109. In view of what we have observed, we have to respectfully dissent also from the majority decision of the Allahabad High Court in AIR 1959 All 357 (FB).

110. In AIR 1969 Mys 84 the electoral rolls for an Assembly constituency were published in two languages in such a way that the serial numbers of the electors in either list differed from the other, and that some names of the electors in the Marathi roll were altogether dropped. One of the questions raised was whether the grievances of the petitioner relating to the legality or correctness of the Marathi electoral rolls can be basis of an election petition under section 100 (1) (d) (iv) of the Representation of the People Act 1951 and whether it was not barred by Section 30 of the Representation of the People Act, 1950. The case does not deal with a vote of a person who is under-age, but it was broadly stated the correctness of the legality of the electoral rolls is barred under section 30 of the Representation of the People Act. We are not prepared to agree that the bar applies to the case of a vote of under-age person which according to us, contravenes the Constitution, and is void.

111. The position under the English Law also seems to be that notwithstanding the fact that the Register of rolls is final, the vote of a minor can be struck off on scrutiny. Under English law, a person who is not of full age on the qualifying date, and on the date of the poll, is not entitled to vote. If such a person votes, his vote may be struck off on scrutiny; see Halsbury's Laws of England, 3rd Edition. Vol. 14, page 303. It is true that this result is arrived at by reason of the special provision contained in Section 39 (4) of the Representation of the People Act, 1951 which while providing that if a person's name is found in the register of electors, he shall not be excluded from voting on the ground that he is not of full age etc., and states that the provision shall not prevent the rejecting of the vote on a scrutiny or affect his liability to penalty for voting. There was a similar provision in Section 7 of the Ballot Act of 1872 viz. Section 7 which was as follows:

"At any election for a county or borough, a person shall not be entitled to vote unless his name is on the register of voters for the time being in force for such county or borough, and every person whose name is on such register shall be entitled to demand and receive a ballot paper and to vote: Provided that nothing in this section shall entitle any

person to vote who is prohibited from voting by any statute, or by the common law of Parliament, or relieve such person from any penalties to which he may be liable for voting."

112. It was held in (1874) 9 CP 734 that the proviso to Section 7 of the Ballot Act, 1872 made the Register conclusive except where persons were prohibited from voting by any statute, or by the common law of Parliament i.e. persons who from some inherent or, for the time irremovable, quality in themselves have not, either by prohibition of statutes or at common law, the status of parliamentary electors. In this class would fall persons below a particular age. Though there is no similar provision in our Representation of the People Act, this principle was applied, and the decision in (1874) 9 CP 734 was cited with approval by the Supreme Court in *Durga Shanker Mehta v. Thaker Raghuraj Singh* 1955 SCR 267 = (AIR 1954 SC 520), where it was observed as follows:

"The English law after the passing of the Ballot Act of 1872 is substantially the same as has been explained in the case of (1874) 9 CP 734. The 'Register' which corresponds to our 'electoral roll' is regarded as conclusive except in cases where the persons are prohibited from voting by any statute or by the common Law of Parliament."

113. For the various reasons set out in this judgment, I have come to the conclusion, though not without hesitation that it is within the competence of the Election Tribunal to go into the question whether a person whose name appears in the Electoral roll is not entitled to vote for the reason that he is below 21 years of age, and that therefore, the vote cast by him should be disregarded in an election.

114. In the result in view of our finding the Writ petition is dismissed with costs, Advocate's fee Rs. 100/-.

Petition dismissed.

AIR 1970 ANDHRA PRADESH 365
(V 57 C 56)

N. KUMARAYYA, C. J. AND
KONDIAH, J.

In the Matter of District Munsif, Chittoor, Referring Officer.

Referred Case No. 18 of 1967, D/-16-6-1969.

Civil P. C. (1908), S. 113, O. 46, R. 1 — Reference cannot be made on hypothetical questions of law — Reference when can be made.

Whether on the language of Section 113 itself or that read with the provisions relevant thereto under O. 46, R. 1 or which have a bearing thereupon, unless there is

a pending case before the Court which involves a point of law, the determination of which is essential for the disposal of the case, no question of reference can arise. Reference of hypothetical or imaginary questions or of points likely to arise in cases that may be filed in future in view of the jurisdiction conferred on a Court, is wholly incompetent. (Para 5)

3rd Govt. Pleader, for State.

KUMARAYYA, C. J.:— This is a reference made under Section 113 of the Civil P. C. made by the District Munsif, Chittoor for opinion of this Court on the question whether the Government in appointing District Munsifs to function as Controllers under the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, has exceeded its power under that Act and whether the District Munsifs so appointed have jurisdiction to entertain any matters under the said Act.

2. It does not appear that any such controversy has arisen in any case pending before the said District Munsif, the determination of which became necessary for him. The statement, at any rate, does not bear any mention to this. In fact, it does not proceed on the basis that there is a case pending before him which involves determination of this issue. In these circumstances, the reference is unwarranted and wholly incompetent. Section 113, Civil P. C. is clear and categorical in this behalf. It reads thus:—

"Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit:

Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation, or of any provision contained in an Act, Ordinance, or Regulation the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which the Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court."

3. The section gives power to a court to refer a question for opinion or decision of the High Court and provides also for cases where such reference is but obligatory. It refers to cases wherein reference may be made at the discretion of the Court and also cases wherein it should necessarily be made. While the substantive provision enables a Court to make reference at its discretion, the proviso is concerned with cases where it is but obli-

gatory on the court to make such reference. Both the component parts of the section are however, controlled by conditions and limitations prescribed by rules in the Civil P. C. In fact, the opening clause clearly states that it is subject to such conditions and limitations as may be prescribed. The word 'prescribed' as defined in sub-clause (16) of Section 2 means 'prescribed by rules.' What then are these rules? They are to be found in O. 46, Civil P. C. Rule 1 of O. 46, Civil P. C. reads thus:—

"Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court."

4. It is manifest that enabling provision as this is, it prescribes the conditions or circumstances for exercise of power of reference and also the mode of exercise thereof. As a condition precedent for exercise of this power, it provides that there should be a lis before the court, that a question of law or usage having the force of law must arise therein and that the court trying the same must entertain a reasonable doubt thereon. It is only then that the Court either suo motu or on the petition of any of the parties may refer the point on which doubt is entertained for opinion of the High Court. It also lays down the procedure to be followed. The Court should draw up a statement of the facts of the case and the point on which the doubt is entertained and its own view on the matter and then refer such a statement for the opinion of the High Court. On the clear language of the provision, no reference can be made on a question of fact.

Even on questions of law, reference can be made only in exceptional cases when the said conditions are satisfied. Then again, Rule 2 of Order 46, Civil P. C. prescribes certain limitation on the power of the court after reference is made. These in short are some of the conditions and limitations prescribed by rules referred to in the opening words of Section 113, Civil P. C. Rule 4-A makes the provisions of Rules 2 to 4 applicable to the compulsory reference under the proviso to Sec. 113, Civil P. C. Section 113 also, both in its main provision and the proviso, refers to the statement of the case. The proviso elaborates the same by saying that it should contain the opinion of the court as

well together with the reasons therefor. It is clear that the statement of case contemplated in this section is no other than what is enjoined in Rule 1 of O. XLVI, Civil P. C., at any rate, both are identical in their scope and meaning.

5. It follows that the statement of case contemplated by Section 113 should be a statement of facts of the case and the point or question of law that arises for determination in the lis. Therefore, unless the lis is before the court and raises a question of law, which has to be necessarily determined, there can be no occasion for making a reference even under the main provision of Section 113, Civil P. C. It is further necessary that the court must have entertained a reasonable doubt in relation to the same. It is only then that it is open to the court to make a reference at its discretion. The proviso to that section which makes reference imperative states the essential prerequisites therefor and Rule 4-A of Order XLVI, Civil P. C., as already noticed, makes the provisions of Rules 2, 3 and 4 applicable to such reference in the same manner as they apply to a reference under Rule 1. This proviso says that the court in order to make a reference should be satisfied that in the case pending before it, the validity of any Act, Ordinance or Regulation or of any provision contained therein is involved, the determination of which is essential for the disposal of the case and that the High Court or the Supreme Court has not expressed its opinion in that behalf. It is only in that event that it is obligatory on it to make a reference stating the case, setting out its opinion and the reasons therefor.

It is thus plain that whether on the language of Section 113 itself or that read with the provisions relevant thereto or which have a bearing thereupon, unless there is a pending case before the Court which involves a point of law, the determination of which is essential for the disposal of the case, no question of reference can possibly arise. It is only a question essential for disposal of a case pending before the court that can validly form subject-matter of reference. Reference of hypothetical or imaginary questions or of points likely to arise in cases that may be filed in future in view of the jurisdiction conferred on a court, is wholly incompetent. Evidently the point referred for opinion has not arisen in any case pending before the court. It has been referred in anticipation of cases wherein this point is likely to arise. The reference therefore is wholly misconceived and incompetent. Consequently it should not merit our consideration.

6. The reference, therefore, is rejected.
Reference rejected.

AIR 1970 ANDHRA PRADESH 367
(V 57 C 57)GOPAL RAO EKBOTE AND
RAMACHANDRA RAJU, JJ.Anantha Naganna Chetty, Appellant v.
The Commissioner of Income-Tax, A. P.,
Hyderabad, Respondent.Case Referred No. 62 of 1965, D/-12-9-
1969.(A) Civil P. C. (1908), Pre. — Inter-
pretation of Statutes—Proviso — Func-
tion and rule of construction.

A proviso to a particular provisions
embraces the field which is covered by
the main provision. It carves out an
exception to the main provision and deals
with a case which would otherwise fall
within the general language of the main
enactment. There is no rule that the
enacting part is to be construed without
reference to the proviso. AIR 1918 Mad
1266 (SB) & AIR 1944 PC 71 & AIR 1955
SC 765 & AIR 1959 SC 713, Rel. on.

(Paras 6 & 10)

(B) Income-tax Act (1922) (as amend-
ed in 1953), S. 5(7-C) — Jurisdiction of
Income-tax Officers — Proceeding under
the Act — Cessation of jurisdiction of
Income-tax Officer — Succeeding Officer
intending to continue proceeding must
give notice of his intention, though Sec-
tion 5 (7-C) in terms does not provide for
it. (Para 19)

The compliance of first proviso to Sec-
tion 5(7-C) is a condition precedent for
exercising the power to continue proceed-
ings by the succeeding Officer. If the
assessee demands that the previous pro-
ceedings should be reopened before it is
decided to be continued or that he should
be re-heard before an order of assess-
ment is passed, the Income-tax authority
has no option whatsoever except to direct
the re-opening of the proceeding or re-
hearing, as the case may be.

Since the succeeding officer is authoris-
ed to continue the proceedings it is mean-
ingless to divide the stages, with a view
to hold as to in what cases he can conti-
nue without giving notice and in what
cases he can continue only after notice.
In all cases where the succeeding officer
is empowered to continue, that power is
made subject to the first proviso and no
such artificial division in the stages of
proceedings can be permitted to affect
the right of the assessee which he has
under the first proviso. (Para 22)

(C) Income-tax Act (1922) (as amend-
ed in 1953), S. 23 — Penalty proceedings
— Initiation of, after notice under Sec-
tion 28(3) — Cessation of jurisdiction of
authority issuing notice — Succeeding
Officer intending to continue proceeding
— Notice under Section 5(7-C) and not

under Section 28(3) necessary.

(Paras 13, 21)

(D) Civil P. C. (1908), Pre. — Inter-
pretation of Statutes — Statute giving
quasi-judicial power — Rule of construc-
tion.

It is a cardinal principle of construction
that in giving quasi-judicial powers to
affect prejudicially the rights of persons,
the power is to be exercised in accord-
ance with the fundamental rules of judi-
cial procedure. For instance, before its
exercise, the persons sought to be pre-
judicially affected shall have an oppor-
tunity of defending himself. (Para 16)

Cases Referred: Chronological Paras

(1968) 70 ITR 33 (SN) = ILR (1969)

1 Punj 53, Sat Prakash Ram

Naranjan v. Commr. of Income-
tax

31

(1967) 63 ITR 130 = (1966) 2 Mys.

LJ 500, Hulekar & Sons v. Commr.
of Income-tax

29

(1967) 66 ITR 14 = ILR (1967) 17

Raj 592, A. C. Metal Works v.
Commr. of Income-tax

30

(1964) 53 ITR 57 = (1964) 1 ITJ 271

(Mys), Shop Siddegowda & Family
v. Commr. of Income-tax

27

(1963) 48 ITR 262 (Cal), Kanailal

Gatani v. Commr. of Income-tax

26

(1961) 42 ITR 129 = ILR 40 Pat 571.

Murlidhar Tejpal v. Commr. of
Income-tax

25

(1960) AIR 1960 Cal 543 (V 47) =

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ries (1944) Ltd. v. Commr. of

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23, 26, 27, 33

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71 Ind App 113, M. & S. M. Rly.
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18 Cri LJ 239 (SB), Annie Besant
v. Emperor

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Cooper v. Wardsworth Board of
Works

117

A. Siva Rao, for Appellant; T. Ananta

Babu, for Respondent.

GOPAL RAO EKBOTE, J.: — This is a
reference made under Section 66(2) of
the Income-tax Act, 1922 and arises in
the following circumstances:

The assessee is an individual. The as-
sessment year is 1949-50. The assessee
derived income from property, business,
and share income from firms in which he
was partner. He, however, failed to dis-
close his 14/16th share in the firm of
Messrs. Revana Siddeswara Oil Com-
pany for the assessment year. He con-
tended that he had nothing to do with

the firm and that he was a mere financier and that he was receiving only interest on the amount which he had supplied to the firm. This contention was rejected. He was ultimately assessed on the share of income from that firm also. The Department had also initiated penalty proceedings against the assessee for his omission to account for the share income from the said firm. The explanation of the assessee was that he has not concealed any particulars of his income and that he had advanced certain monies to the firm by way of loan charging interest therefor. He also stated that the firm since has been dissolved no penalty therefore was exigible. After this explanation was filed, the Income-tax Officer, who had issued the notice under S. 28 (3) was transferred and was succeeded by a new Income-tax Officer. The succeeding Income-tax Officer without issuing any notice or informing the assessee of his intention to continue the proceedings passed the order levying penalty on the assessee.

The assessee took up the matter in appeal to the Appellate Assistant Commissioner. He confirmed the order of the Income-tax Officer. On a further appeal to the Appellate Tribunal, it was contended that the order of the succeeding Income-tax Officer levying penalty on the assessee without the issue of a notice was illegal. The Tribunal went into the merits of the case and while considering the abovesaid contention found that although with the change of Income-tax Officer no intimation was sent to the assessee, that does not in any way vitiate the proceedings. If the assessee had elected, he could have requested the Income-tax Officer to proceed afresh but he did not do so. The Tribunal further observed that as the assessee had not taken up the plea before the Appellate Assistant Commissioner, the Tribunal refused to entertain the plea at that late stage, although earlier it expressed its opinion.

The assessee thereafter filed an application before the Tribunal for reference. By its order dated 7-11-1962 the Tribunal refused to make a reference as in its opinion the case did not involve any legal principle or interpretation of any law. The assessee thereafter filed an application under Section 66(2) of the Act before this Court and this Court directed the Tribunal to state the case. The Tribunal has accordingly submitted the statement of the case dated 17-8-1965.

2. The question, which must necessarily be answered in this reference, is whether the levy of penalty by the succeeding officer without giving notice to the assessee is valid.

3. In order to provide a correct answer to this question, it is necessary to

read Section 28(3) and Section 5(7-C) of the Income-tax Act, 1922.

Section 28(3):—

No order shall be made under sub-section (1) or sub-section (2) unless the assessee or partner, as the case may be, has been heard, or had been given a reasonable opportunity of being heard.

Section 5(7-C):—

Whenever in respect of any proceeding under this Act an Income-tax authority ceases to exercise jurisdiction and is succeeded by another who has and exercises jurisdiction, the Income-tax authority so succeeding may continue the proceeding from the stage at which the proceeding was left by his predecessor:

Provided that the assessee concerned may demand that before the proceeding is so continued the previous proceeding or any part thereof be re-opened or that before any order for assessment is passed against him he be re-heard;

Provided further that in computing the period of limitation for the purpose of sub-section (3) of Section 34, the time taken in re-opening the whole or any part of the proceeding or in giving an opportunity to the assessee to be re-heard under the preceding proviso shall be excluded."

4. Section 28, which specifically relates to imposition of penalty for concealment of income, provides in sub-section (3) that no order imposing penalty under sub-section (1) or (2) shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. This sub-section therefore embodies in itself the wholesome principle of *audi alteram partem*. For the purposes of this enquiry, it is not necessary to enunciate as to what a hearing means and includes. It is also unnecessary to consider as to when reasonable opportunity would be deemed to have been given for the purposes of the said section. Nor it is necessary to consider as to whether the notice issued under Section 28(3) in the penalty proceedings is valid. It is sufficient to say that it is obligatory on the part of the authorities imposing penalty under Section 28(3) to hear or give a reasonable opportunity to the assessee before any order imposing penalty is passed. The sub-section is peremptory and couched in mandatory language. Its compliance is essential to make the order of penalty valid.

5. We are, however, more concerned in this case with Section 5(7-C). That provision was inserted by the Amending Act of 1953 which amendment came into effect from 1-4-1952. It provides that whenever in respect of any proceeding under the Act, which it is admitted will include a proceeding for imposition of penalty under Section 28 of the Act, an income-tax authority is succeeded by an-

14. Section 6(1) of the Civil Courts Act is as follows:

"Whenever the office of District Judge or Subordinate Judge is vacant by reason of the death, resignation or removal of the Judge or other cause, or whenever an increase in the number of District or Subordinate Judges has been made under the provisions of Section 4, the State Government or as the case may be the High Court may fill up the vacancy or appoint the Additional District Judge or Subordinate Judge."

15. Section 8 of the Civil Courts Act is as follows:

"(1) When the business pending before any District Judge requires the aid of Additional Judges for its speedy disposal, the State Government may, having consulted the High Court appoint such Additional Judges as may be requisite.

(2) Additional Judges so appointed shall discharge any of the functions of a District Judge which the District Judge may assign to them, and, in the discharge of those functions, they shall exercise the same powers as the District Judge."

16. From AIR 1956 SC 391 (supra), it is found that there was no provision in the Punjab Courts Act for appointment of Additional Judges to the District Court and in that view it was held that though Mr. J. N. Kapur called himself the Additional District Judge he was in fact the Additional Judge which was a separate and distinct court of its own. Under Section 6(1) of the "Civil Courts Act", however, there is provision for appointment of Additional District Judge whenever the circumstances mentioned therein require for such appointment. In Assam as we find there is no separate Court of the Additional Judge. In the circumstances, the appointment of Mr. D. C. Sarma as Additional District Judge must be held to be an appointment under Section 6(1) of the Civil Courts Act, though it was incorrectly mentioned in the Government Notification dated 13-2-63 that he was appointed under Section 8(1) of the Civil Courts Act.

17. In this connection, Ganpat v. Mahadeo, AIR 1949 Nag 408, may be considered. After considering the definition of the District Judge as given in Section 2(bb) of the Succession Act and the language of Sections 266, 267, 268, 270 and 273(b) of the Succession Act, the learned Judges of the Nagpur High Court observed that "there are indications in the Act that when the term 'District Judge' is used it has reference not to a persona designata but to a Court and that Court is the principal civil court of original jurisdiction." We have already found that in Assam there is no separate class of Court of Additional Judge and as

such Mr. D. C. Sarma, the Additional District Judge, must have been appointed under Section 6(1) of the Civil Courts Act and the Court of the Additional District Judge must be held to be a division court of the Court of the District Judge and it is not a separate and distinct court of its own. As held by the Supreme Court in AIR 1956 SC 391 (supra) the District Judge of a District Court may make administrative allotment of the work among the judges of his court and that does not affect their jurisdiction and powers. Probate and letters of administration under the Succession Act may be issued by the Court of the District Judge which is the Principal Civil Court of original jurisdiction. In the circumstances, we hold that the Additional District Judge in Assam has jurisdiction to decide matters relating to probate and letters of administration under the Indian Succession Act.

18. The next submission made by Mr. Medhi is that proper procedure laid down under the Indian Succession Act had not been followed in the instant case. He drew our attention to Section 268 of the Succession Act wherein it is provided that the proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908. The learned counsel for the appellants submitted that notice on defendant No. 4 Must. Pahibala Choudhury was not served and there was no order of the Court to the effect that the notice was served on her. On the other hand, the Court stated wrongly in its order dated 3-2-64 that all the defendants filed a written statement whereas, in fact, only defendants 1, 2 and 3 filed a written statement. Non-service of summons on defendant No. 4, according to the learned counsel, vitiated the proceedings. In this connection, our attention was drawn by the learned counsel for the Respondent that notice was, in fact, served on Pahibala Choudhury (defendant No. 4) which was accepted by S. C. Choudhury, that is, Sagar Chandra Choudhury, defendant No. 1. The notice is at page 27 of the original record wherefrom it appears that S. C. Choudhury accepted the notice and signed for Pahibala Choudhury. From the report of the Jarikarik on the notice it is found that notices on defendants Nos. 2 and 4 were served on the members of their family as they were not found at home. Defendant No. 2 is Tithi Ram Choudhury and defendant No. 4 is Must. Pahibala Choudhuri. On a consideration of the endorsement on the notice and the report of the Jarikarik, we are satisfied that notice of the suit was served on defendant No. 4.

19. The learned counsel for the appellants submitted that after the death of defendant No. 3, Nakul Chandra Choudhury, though his legal heirs were brought on record, no notice was served on the minor defendants and nobody appeared for the minor defendants. After the death of defendant No. 3 the plaintiff filed an application supported by an affidavit for substitution of his legal heirs. Therein it is stated that the minor sons and daughters shown in the petition were under the care and protection of Must. Harimati Choudhuri, widow of late Nakul Choudhuri and she was the fit person to be appointed guardian of the minors in the suit and accordingly the prayer was made for the appointment of her as guardian of the minor sons and daughters for the purpose of the suit. The petition was filed on 14-6-65 and the Court passed the following order on 14-6-65:

"The advocates for the parties present. The petitioner (plaintiff) files an application praying for substitution of heirs of O. P. No. 3 Nakul Choudhuri, who died on 19-5-65. It is further prayed that the mother Harimati Choudhuri should be appointed the legal guardian for the minor heirs for this suit. Heard the parties. Substitute the legal heirs of O. P. No. 3 in place of him and issue notice to them as prayed for. Srimati Harimati Choudhuri is also appointed as the guardian of the minors. Fix 5-7-65 for appearance. Steps within 5 days." On 5-7-65 the Court passed the following order:

"Defendants Aswini Kumar Choudhuri and Must. Harimati Choudhuri appeared on behalf of the minors through their advocate Shri S. C. Choudhuri and pray for time to file written statement and documents. The prayer is allowed. Time allowed till 30-7-65 for written statement and documents."

Thereafter additional written statement was filed by substituted defendants Srimati Harimati Choudhuri and Aswini Kumar Choudhuri. Our attention has been drawn to the two *Haziras* dated 15-12-65 filed on behalf of the defendants. One is for Sagar Chandra Choudhuri and Tithiram Choudhuri filed by the advocate. The other *Hazira* is for the minors and that is also filed by the same advocate. It is thus found that by the court's order the minors were represented in the suit by their mother who filed additional written statement. In the case and the learned lawyer who appeared for the other defendants also appeared for and on behalf of the minors as evidenced by the *Hazira* filed on 15-12-65.

20. On a consideration of the facts and circumstances of the case, we find that no prejudice has been caused to the minor defendants in this case and they have been amply represented by their mother.

We, therefore, hold that the learned counsel's submission that the proceedings in the case were vitiated by non-compliance with the procedural law has no substance.

21. Dr. Medhi, the learned counsel for the appellants then submitted that on merits also the will was not proved to be legally executed by the testator. His submission was that the defendants' definite case was that the signature of the testator in the will, Ext. 1, was a forged signature. There was apparently overwriting on the signature itself and it could not be said that the signature was in the handwriting of the testator who was a graduate. The evidence on the side of the plaintiff was that at the time of putting the signature the hand of the testator trembled and therefore the signature appeared to be in a trembling hand and there was no overwriting on the signature. The learned Additional District Judge observed that "Shri" in the signature of the testator was doubly written and that showed that it was written with a shaky hand. But there appeared some overwriting even on the latter portion of the signature, though the Additional District Judge failed to observe that. In the circumstances, Dr. Medhi submitted that the learned Court should have allowed the defendants to send the signature in the will for examination by a handwriting-expert and after obtaining the report of the handwriting expert only he should have decided the case.

22. We have examined the signature of the testator in the original will and we find that there is some substance in this submission of the learned counsel. As the defence case was that the signature was a forged one and the burden of proving it to be so lay on the defendants, they should have been given a chance to send the signature to Handwriting Expert for examination. The learned Additional District Judge failed to consider properly this aspect of the matter. It is the settled law that for obtaining a probate or letters of administration, the propounder has to dispel all doubts regarding the execution of the will from the mind of the Court. Even though the execution of the will is proved, still if any reasonable doubt remains in the mind of the Court regarding the genuineness of the will, a probate or letters of administration may be refused. In the instant case, the signature of the testator in the will appears to be in a trembling hand and to the naked eye also it appears that there is some kind of overwriting in the signature. In view of these circumstances, the learned trial Court should have allowed the defendants to get the signature of the testator examined by a Handwriting Expert and obtain his opinion.

23. In view of the facts and circumstances of the case and for the ends of justice, we are of the opinion that the parties should be given reasonable opportunity to dispel all doubts regarding the genuineness of the will by producing the evidence of Handwriting Expert. We, therefore, set aside the judgment and decree of the learned Additional District Judge and remand the case to the District Judge, Gauhati, as there is no Additional District Judge at present, for disposal on the evidence already on record as well as the evidence of Handwriting Expert regarding the signature of the testator in the will, that may be adduced by the defendants at their costs. The District Judge shall give reasonable opportunity to the defendants to produce the evidence of Handwriting Expert.

24. The appeal is thus allowed and the case is remanded to the District Judge, Gauhati, for disposal in accordance with law and in the light of the observations made above. We make no order as to costs of this appeal.

25. S. K. DUTTA, C. J.: I agree.
Appeal allowed.

AIR 1970 ASSAM & NAGALAND 115
(V 57 C 26)

P. K. GOSWAMI AND
M. C. PATHAK, JJ.

Must. Dudmera Bibi and others, Plaintiffs-Appellants v. Hari Bhakta Seal and others, Defendants-Respondents.

Second Appeal No. 124 of 1964, D/- 4-2-1969, from decision of Sub-J. No. 2, Cachar, at Silchar, D/- 4-5-1964.

(A) Transfer of Property Act (1882), S. 110 — Exclusion of date of commencement of lease — Section applies only in cases of written leases. (Para 5)

(B) T. P. Act (1882), S. 106 — Duration of leases in absence of contract — Document relied on as lease though registered, not executed according to S. 107 — Since contract is not admissible to prove terms lease must be deemed to be from month to month — Commencement of lease on 22-1-45 — Notice demanding vacant possession by 21-9-59 is valid. (Para 5)

(C) Civil P. C. (1908), O. 1, R. 9 — Non-joinder of parties — Suit for eviction of lessee — Sub-lessees and parties deriving right from defendant are not necessary parties — Suit cannot be dismissed on account of their non-joinder. (Para 6)

(D) Tenancy Laws — Assam Non-agricultural Urban Areas Tenancy Act (12 of 1955), S. 5 — Eviction of tenant — Does

not require proof of bona fide requirement by landlord. (Para 7)

N. M. Dam, B. K. Das and C. R. De, for Appellants; P. Choudhuri, A. R. Banerjee, for Respondent No. 1.

GOSWAMI, J.:— This second appeal is directed against the judgment of the learned Subordinate Judge No. 2, Cachar, dismissing the plaintiff's suit for eviction of the defendants from the land mentioned in the schedule to the plaint. Earlier, the learned Munsiff decreed the suit.

2. The grounds on which the learned Subordinate Judge dismissed the plaintiff's suit were: firstly, notice which was given was invalid under Section 110 of the Transfer of Property Act; secondly, the suit was defective for not making certain sub-lessees as parties in the suit and also for not separately giving them eviction notices; and, thirdly, the plaintiff failed to prove that she bona fide required the suit land for her own use.

3. We may refer very briefly to the facts disclosed in the suit. By a registered kabuliyat dated 22-1-1945, the defendant No. 1 took the land under the plaintiff and it is stated therein that the lease will expire on 22-4-1951. It is also stated that the plaintiff gave the defendant No. 1 a patta about the same time. The notice given by the plaintiff which is dated 18-8-1959 demanded from the defendant No. 1, who is the main defendant in the case, the others being admittedly the sub-lessees or deriving right from him, to vacate the suit land by 21-9-59 and since this was not complied with, the suit was instituted on 28-4-1960.

4. Mr. Banerjee, the learned counsel appearing for the respondent No. 1, submits that the learned Subordinate Judge is correct in holding that a new tenancy was created after the expiry of the first, on and from 23-4-51 either by operation of law in view of the provisions of Section 116 of the Transfer of Property Act or, at any rate, by admission of the plaintiff herself in her eviction notice. In other words, he submits that since the original lease expired on 22-4-51, a new tenancy was created from 23-4-51 and as such, the notice demanding vacant possession by 21-9-1959 is invalid under the law and the learned Subordinate Judge is justified in dismissing the suit.

5. In several decisions of this Court, it has been held that Section 110 of the Transfer of Property Act is attracted only in the case of a written lease — a view with which we are in complete agreement. Apart from that, the lease in this case is not a valid lease under the law in view of the provisions of Section 107 of the Transfer of Property Act as the lessor and the lessee have not executed that document. The so-called lease, which is relied on for the purpose of ascertaining

the expiry of the term of the lease is an inoperative document under the law.

Being faced with this difficulty, Mr. Banerjee relies upon the admission of the plaintiff in her eviction notice. Once the contract cannot be looked into for the purpose of ascertaining the term limited therein, the lease, although registered in this case, must be deemed to be one from month to month. That being the position the lease which was operating from 22-1-45 is liable to be terminated under section expiring with the month of the tenancy. The commencement being admittedly 22-1-45, there can be no legal objection to the notice in the instant case demanding vacant possession from the defendants by 21-9-1959. We are therefore unable to agree with the learned Subordinate Judge when he relied upon Section 110 of the Transfer of Property Act to hold that the particular notice is invalid. The submission that the notice is invalid under the law has no substance.

6. Regarding the second point that certain necessary parties were not impleaded in the suit for which the suit was liable to be dismissed, it is sufficient to state that the sub-lessees, as they are, and parties who are deriving their right from the defendant No. 1, cannot be considered necessary parties in this suit and the suit would not fail for not impleading them. The learned Subordinate Judge is therefore wrong in law in holding that the suit was defective for not having served notice on these pro forma defendants or for not impleading the sub-lessees in the suit.

7. Regarding the third ground that the plaintiff had not proved her bona fide requirement, it is sufficient to state that in a suit of this description where the provisions of the Assam Non-agricultural Urban Areas Tenancy Act, 1955 (Act XII of 1955) would apply, such a bona fide requirement is unknown to that law. The learned Subordinate Judge had therefore no occasion to refer to any bona fide requirement, nor was it incumbent on the plaintiff to either plead or establish that element in order to entitle her to succeed in the suit. All the three grounds on which the learned Subordinate Judge based (his judgment?) to dismiss the suit failed.

8. In the result the appeal is allowed and the plaintiff's suit is decreed. The judgment and decree of the learned Subordinate Judge are set aside and those of the Munsiff are restored. But in the entire circumstances of the case, the parties will bear their own costs, throughout.

R. M. C. PATHAK, J.: I agree.

Appeal allowed.

AIR 1970 ASSAM & NAGALAND 118
(V 57 C 27)

P. K. GOSWAMI, C. J.

Nisaddar Ali Majumdar and others, Appellants v. Kona Mia and others, Respondents.

Second Appeal No. 148 of 1965, D/- 31-3-1970, from decision of Sub-J. No. 2, Cachar at Silchar, D/- 10-5-1965.

Transfer of Property Act (1882), S. 110 — Leases — Computation of time — Section is not applicable to oral leases but only to written leases. Letters Patent Appeal No. 2 of 1961, D/- 6-8-65 (Assam) & AIR 1970 Assam & Nagaland 115, Ref. (Para 5)

Cases Referred: Chronological Paras (1970) AIR 1970 Assam & Nagaland

115 (V 57) = Second Appeal No. 124

of 1964, D/- 4-2-1969, Mst. Dud-

mera Bibi v. Hari Bhakta Seal 5

(1965) Letters Patent Appeal No. 2

of 1964, D/- 6-8-1965 (Assam).

M/s. Premasukh Hiralal v. Baj-

rangal Agorwalla 5

D. K. Sarma, M. H. Choudhury and

J. N. Sarma, for Appellants; N. M. Dam

and B. K. Das, for Respondents.

JUDGMENT:— This second appeal is directed against the judgment and decree of the learned Subordinate Judge No. 2, Silchar reversing those earlier of the learned Munsiff.

2. That was a suit for khas possession of about 2 Kathas 10 Lechas of land, which the defendant No. 1 was occupying by holding a tea-stall on a bazar site which it was. The land appertains to R. S. Patta No. 107 and Dag No. 178. The plaintiffs served a notice dated 23-2-61 (Ext. 1) which was received by the defendant on 28-2-61. The notice demanded vacant possession by the end of 30th Chaitra, corresponding to 13-4-61. The tenancy is said to be according to Bengali Calendar year and a monthly tenancy.

3. The learned Munsiff decreed the suit. He held that the notice was valid and the service was proper. He further repelled the contention of the defendant that there was a splitting up of tenancy to make the suit non-maintainable in the form it was laid. The learned Subordinate Judge, however, did not consider the question of splitting up of tenancy but dismissed the suit on the ground that the notice was invalid and hence this second appeal.

4. Mr. Dam, the learned counsel for the respondents, strenuously contends that the suit is clearly not maintainable, as the plaintiff has not brought the suit for eviction of the defendant from the entire tenancy which related to two pattas — R. S. Patta No. 107 and R. S. Patta No. 109 — which was really the original tenancy under which the defendant came to

occupy the plaintiff's land. Mr. Dam further contends that although the learned Subordinate Judge has not dealt with this point in terms of Order 41, Rule 22 of the Code of Civil Procedure, he can support the decree of the learned Subordinate Judge on a point which was not decided in his favour or even by relying on some other ground. I have allowed Mr. Dam to raise that point before me. Unfortunately, however, Mr. Dam is up against his own pleading in the case. In the written statement while mentioning the real facts at paragraph 11, the defendant has clearly stated that the plaintiffs had sold the land in R. S. Patta No. 109 to one Jiyauddin Mia whom the defendant owned up as a landlord and made payments of rent to him. If this is the position, the learned Munsiff was clearly right in holding that the question of splitting up of tenancy would not arise. The land from which the plaintiffs are now trying to evict the defendant is clearly a small piece of land covered by R. S. Patta No. 107 and there is no question of splitting up of tenancy so far as this part of the land is concerned, the land in R. S. Patta No. 109 having already been transferred to Jiyauddin under whom the defendant himself admits to hold his new tenancy. The first contention of Mr. Dam, therefore, fails.

5. Regarding the Invalidity of the notice, Mr. Sarma, the learned counsel for the appellants, contends that the learned Subordinate Judge was wrong in holding that the notice was bad in view of the provisions of Section 110 of the Transfer of Property Act. The notice was, as earlier stated, given on 23-2-1961 and served on 28-2-61 demanding vacant possession by 13-4-61, corresponding to 30th Chait. There was no written lease in this case. That is a short answer to the objection by Mr. Dam on the score of Section 110 of the Transfer of Property Act. We have held in several decisions of this Court that Section 110 is not attracted to an oral lease. Since this matter has been again argued, it is well to look at Section 110 once again:—

"110. Exclusion of day on which term commences— Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making the lease."

It is clear from the very wording of Section 110 that oral lease is not attracted. It must apply to a periodic lease and the period must be specified in a written document. If authorities are necessary, at hand, I may refer to a decision in Letters

Patent Appeal No. 2 of 1964 (Assam) *M/s. Premsukh Hiralal v. Bajranglal Agarwalla* dated 6-8-1965 where a Division Bench of this Court held to the following effect:

"Having regard to the language employed in the section, we are clearly of opinion that this section has no application unless the above conditions are fulfilled, and which would only be possible when the lease is a written lease." Sitting with Hon'ble Pathak, J. in Second Appeal No. 124 of 1964, disposed of on 4-2-69=(Reported in AIR 1970 Assam & Nagaland 115), I held to the same effect that S. 110 of the Transfer of Property Act is attracted only in the case of a written lease. If S. 110 is not applicable, Mr. Dam fairly concedes that he cannot question the validity of the notice. The second contention of Mr. Dam also had no force and the submission which is made by Mr. Sarma is well founded.

6. The appeal is accordingly allowed but in the circumstances of the case, there will be no order as to costs throughout. Mr. Dam prays that in view of the coming monsoon the defendants may be allowed some time to vacate the land. Mr. Sarma does not oppose this prayer. The defendants are allowed time till 31st of October, 1970 for vacating the land.

Appeal allowed.

AIR 1970 ASSAM & NAGALAND 117
(V 57 C 28)

P. K. GOSWAMI C. J. AND
D. M. SEN, J.

M/s. Dasuram Mirzamal, Decree-holder Appellant v. Balchand Surana Judgment-debtor, Respondent.

Misc. Appeal (First) No. 19 of 1964, D/- 2-3-1970.

(A) Civil P. C. (1908), O. 21, R. 68 — Time to pass post proclamation before effecting sale — Non-compliance with the rule does not vitiate sale unless irregularity has resulted in substantial injury to judgment-debtor — AIR 1954 Nagpur 240 Dissented from; (1893) 20 Ind App 176 (PC), Followed. (Para 5)

(B) Civil P. C. (1908), O. 21, Rule 90 (Assam) — Drawing up of sale proclamation—Proclamation containing misdescription of property — Judgment-debtor not objecting to non-compliance with R. 66 — Sale is not liable to be set aside. AIR 1964 SC 1300, Followed.

(Paras 5 and 7)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 1300 (V 51) =
(1965) 6 SCR 1001, Dhirendra Nath
Gorai v. Sudhir Chandra Ghosh 5

EN/FN/C429/70/GDR/T.

- (1954) AIR 1954 Nag 240 (V 41) =
ILR (1955) Nag 434, Kisan
Dinaji v. Deorao Nathuji 5
(1893) 20 Ind App 176 = ILR 21
Cal 66 (PC), Tasadduk Rasul
Khan v. Ahmad Husain 5
(1841) 9 Dowl 487, Holmes v.
Russell 6

M. H. Choudhury, D. N. Hazarika and
A. R. Kalita, for Appellant; S. C. Chou-
dhury, for Respondent.

GOSWAMI, C. J.:— This appeal is directed against an order of the learned Subordinate Judge passed on 18-5-1964 whereby he set aside a sale under O. 21, R. 90, Civil P. C., holding that the judgment-debtor suffered great loss and substantial injury "due to material irregularity in proclaiming the attachment of the property and in proclaiming the sale of the same"

2. The decree-holder who was the auction purchaser is the appellant before us. The respondent-judgment-debtor examined six witnesses before the Court below including himself by commission. The decree-holder examined eight witnesses on his behalf. The learned Subordinate Judge held that the attachment was irregular and invalid as no copy of the attachment was served in the Court house and in the office of the Collector. He further held that there was material irregularity in not publishing the sale by beat of drum or any such customary manner and for not serving any copy in the Court house. He also held that there was non-compliance of the provisions of Order 21, Rule 68, Civil P. C. in holding the sale on 6th April 1959 within thirty days of 10th March, 1959, the date of affixing the copy of the sale proclamation on the Court house at Mangaldai, although the sale was ordered by the Subordinate Judge at Gauhati. The learned Subordinate Judge, after noting the above as material irregularities, dealt with the question whether any substantial injury was caused to the judgment-debtor on account of the said sale and held in his favour.

3. The facts briefly are that the decree-holder had a decree against the judgment-debtor for a sum of Rs. 41,000 and odd, in execution of which he prayed for sale of the judgment-debtor's immovable property situated at Kharupata in Mangaldai sub-division. The Subordinate Judge at Gauhati, who passed the sale order, entrusted the Munsiff at Mangaldai for conducting the sale. The judgment-debtor was served with the writ of attachment as well as the notice for settlement of terms of sale proclamation, together with a copy of the proclamation of sale, as is clear from his endorsements in his own

hand—vide Exts. A(1), B(1) and C(1). The judgment-debtor for the first time appeared in Court on 7-9-1957 praying for stay of execution till the disposal of his appeal in the Supreme Court against the decree. He is therefore, in the know of the execution proceedings and was represented by a lawyer in the same.

The judgment-debtor's main objections are that the attachment effected under Order 21, Rule 54, Civil P. C. is irregular; that the proclamation did not contain a proper description of the property and that the sale took place on 6-4-1959 before the expiry of thirty days from the date of affixing a copy of the sale proclamation on the Court house, assuming that the Court of the Munsiff is the proper Court for the purpose although the judgment-debtor submits that the appropriate Court was the Court of the Subordinate Judge where no copy of the sale proclamation has been affixed. The sale commenced before the Munsiff on 6th April 1959 and continued on 7th, 8th, 11th, 13th and 16th April 1959, on which date one Sitaram (D W 8) offered a bid of Rs 33000/- on behalf of the decree-holder and the sale was knocked down in his favour as the highest bidder. The sale report from Munsiff, Mangaldai was received by the Subordinate Judge at Gauhati on 20th April 1959 and the judgment-debtor made an application under Order 21, Rule 90, Civil P. C. on 22nd April 1959 for setting aside the sale.

4. On the questions of law raised in this appeal, it is necessary to see whether there was any substantial injury which resulted from the sale in question to the judgment debtor on account of any material irregularity. At this stage, we may read O. 21, R. 90, Civil P. C., as amended in Assam.

"Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it or on the ground of failure to issue notice to him as required by R. 22 of this Order:

Provided (i) that no sale shall be set aside on the ground of such irregularity, fraud or failure unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure.

(ii) That no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the

drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied upon."

It is therefore, clear that the scope of Rule 90 is that the sale may be set aside on the ground of material irregularity if the Court is satisfied upon the facts proved before it that the applicant has sustained substantial injury by reason of the material irregularity found. We are not required to consider the other grounds mentioned in Rule 90 in the instant case. The question will therefore, arise whether there has been any material irregularity in publishing or conducting the sale. The sale, as is well known, is preceded by a proclamation under O. 21, Rule 66 and Order 21, Rule 67 prescribes the mode of making a proclamation and the manner is as prescribed by Order 21, Rule 54 as in the case of attachment. Order 21, Rule 66 may be read, omitting what is not necessary for the purpose of this case:—

"Time of sale:—

X X X X X

.....no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property calculated from the date on which the copy of the proclamation has been affixed on the court-house of the Judge ordering the sale."

Order 21, Rule 69 refers to adjournment or stoppage of sale. The above are the material provisions which need to be considered in deciding the controversy raised in this appeal.

5. It is clear that in an application under Rule 90 it will not be open to the judgment-debtor to question that there was some irregularity regarding attachment of the property. Besides, in this case, the judgment-debtor having been served with a copy of the writ of attachment is estopped from questioning this as he, by his own endorsement in the writ of attachment, has waived his right to object on the score of irregularity of attachment. Regarding the terms of sale proclamation also the judgment-debtor must be held to have waived his rights to object to any misdescription of property in the sale proclamation. The judgment-debtor in absence of substantial injury cannot be heard to say that the sale, on account of those irregularities complained of, is a nullity and that the Court had no jurisdiction to continue the sale of the property. The question, however, will be different when the judgment-debtor complains substantial injury resulting from these material irregularities which, although will not make the sale a nullity, will subject it to close scrutiny to find

out whether it has resulted in any substantial injury to the judgment-debtor as in this case. The terms of Order 21, Rule 68 are indeed imperative, but even so a sale that takes place without complying with these provisions may not per se be null and void.

Mr. S. C. Choudhury, the learned counsel for the respondent, drew our attention to a decision of the Nagpur High Court in AIR 1954 Nag 240 (*Kisan Dinaji v. Deorao Nathuji*) wherein it has been held that the terms of Rule 68 are imperative and the sale held before the expiration of thirty days from the date of the publication of the sale proclamation is vitiated. With all respect, although we are in agreement with the above decision so far as the terms of Rule 68 are concerned that these are imperative, yet we are unable to agree that the sale is vitiated on that score. It does not appear that the learned single Judge's attention in that case was drawn to a decision of the Privy Council in the Law Reports 20 Ind App 176 (PC) (*Tassaduk Rasul Khan v. Ahmad Husain*)—a decision dated 24th June 1893, where the Privy Council had to consider the effect of Section 290 of the Old Civil P. C. (Act 14 of 1882) which corresponds to the new provisions of Order 21, Rule 68, Civil P. C. The Privy Council held that non-compliance of Section 290 is a material irregularity within the meaning of Section 311, but a sale in disregard of Section 290 is not a nullity and will not be set aside unless direct evidence of substantial injury resulting from the irregularity has been given. To a similar effect the Supreme Court has recently observed in AIR 1964 SC 1300 (*Dhirendra Nath Gorai v. Sudhir Chandra Ghosh*). Their Lordships were considering a case from the Calcutta High Court under Order 21, Rule 90, Civil P. C. read with Section 35 of the Bengal Money Lenders Act. Section 35 has got provisions of the nature of those under Order 21, Rule 66(2) (a), Civil P. C. and their Lordships have observed as follows:—

"It is not correct to say that the sale held in contravention of the provisions of Section 35 of the Act was a nullity and therefore, no question of setting aside the sale within the meaning of O. 21, R. 90, Civil P. C. would arise. The safest rule to determine what is an irregularity and what is nullity is to see whether the party can waive the objection: if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

6. At this stage, it may be useful, in passing, to notice the fine distinction between irregularity and nullity and it is not possible to improve upon a workable test laid down by Coleridge, J. in *Holmes v. Russell*, (1841) 9 Dowl 487 to the following effect:—

"It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity." As Maxwell "on the Interpretation of Statutes", (11th Edition, page 375) puts it:

"Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy."

To a similar effect has Craies on Statute Law (6th Edition, page 269) observed:

".....if it appears that the statutory conditions were inserted by the Legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the Court."

It is therefore, clear that a party cannot by waiver confer jurisdiction on a Court lacking it, but even a mandatory provision can be waived if it is not intended in the interests of the public and only conceived in the interests of the party that waives.

7. The judgment-debtor in this case has clearly waived his right to object to the sale proclamation on the ground of mistake in description of the property, but he cannot be said to have waived the thirty days requirement of Order 21 Rule 68. He was not present when the sale notice was affixed on the Court house of the Munsiff. None was affixed on the Court house of the Subordinate Judge who had ordered the sale. The second proviso to Rule 90 relates only to defect in the sale proclamation. The defect pointed out in this case, relating to non-compliance of Order 21, Rule 68 is not covered by the second proviso to Rule 90. Even, generally speaking, the judgment-debtor in this case has not waived his right to question the sale on the score of violation of Order 21, Rule 68.

8. The provision of Order 21, Rule 68 clearly provides a terminus a quo which is the date on which the copy of the proclamation has been affixed on the Court house of the Judge ordering the sale and the period of thirty days has to be calculated from this date which is very material. This express provision has only to be contrasted with the absence of it in Order 21, Rule 51 in order to appreciate the imperative character of the provisions of Rule 68. Any violation of this would be a clear material irregularity in the process of publication of the sale. In the instant case, the sale having commenced

within thirty days but continuing for a period more than, that and having been concluded without that period will not make the sale itself a nullity, but it is certainly a material irregularity within the meaning of Rule 90(1).

9. The material irregularity being there, the next point to be considered is whether this material irregularity has resulted in any substantial injury to the judgment-debtor. The learned Subordinate Judge, after examining the evidence of the witnesses on both sides, appears to come to the conclusion that the judgment-debtor's property worth about Rupees 1,00,000/- had been sold at a lower value of Rs. 33,000/- to the decree-holder. The judgment-debtor has produced several witnesses P. Ws. 2, 3 and 4 who deposed by exhibiting their deeds of conveyance of land in the locality (Exts. 3, 4 and 5). The decree-holder also produced a witness (D. W. 7) who has proved his registered sale deed Ext. F. The learned counsel for the judgment-debtor has pointed out that the average market value of the land alone, which may be struck from these sale deeds, comes to about Rs. 4498/- per bigha. Besides this, there are permanent structures on the land which have been valued by a retired Surveyor of Local Board (P. W. 5) at Rs. 91,735/-.

This valuation by the Surveyor has, of course, been made at the instance of the judgment-debtor and may even be exaggerated. At any rate, we are satisfied that the entire property which measures more than twelve bighas of land with house property on it cannot be less than Rs. 1,00,000/- and the learned Subordinate Judge is not unjustified on the evidence on record when he put the figure even at Rs. 1,20,000/-. The learned Subordinate Judge has also referred to a security bond, Ext. 1, which was accepted by the Court on the report of the Sheristadar (P. W. 1) who deposed to the effect that the value of the property, which is now the subject-matter of these proceedings, was worth more than Rs. 1,00,000/-, vide Ext. 2. This security bond was given when there was an order for attachment before judgment in the Original Suit and the plaintiff-decree-holder did not object to the valuation of the property at that stage.

We, therefore, agree that the valuation of the property as given by the learned Subordinate Judge and the property sold would be of the value of more than Rs. 1,00,000/-. The learned counsel for the decree-holder, at one stage, drew our attention to the fact that because of a diversion of public road the property in question was not at that time on the main road. This would, however, not affect the value of this property in a bazar. The value of the property is not, because of

the situs of the land but because of the commercial value being a bazar site, howsoever inconvenient it may be from other points of view.

10. We have now to see whether there is any substantial injury which has resulted on account of this material irregularity. The property situated in a bazar area, although at Kharupatia, is of commercial value to merchants and traders even elsewhere. The decree-holder himself is a businessman of Gauhati and spread his business to that place which must be therefore of some importance. If the property were advertised at the Court of the Subordinate Judge at Gauhati who had ordered the sale, it was likely to have attracted rival bidders from a wider area. The absence of publication at Gauhati would lead to black out the sale where it should have been more widely circulated. Although the sale was continuing for about six days, there were no bidders on three intervening dates on 8th, 9th and 11th April. There were only two bidders on 13th including the decree-holder and on the final date 16th April, there were two bidders including the decree-holder and the sale was knocked down in his favour at Rs. 33,000/-. This would also show that non-publication of the sale proclamation on the court house at Gauhati must have affected the bidding and the resultant sale. It is because of this reason that the decree-holder was able to have the property at a lower value of Rs. 33,000/-. We are, therefore, satisfied that the judgment-debtor has sustained substantial injury by reason of the material irregularity pointed out and the sale has been rightly set aside by the learned Subordinate Judge.

11. The appeal is dismissed, but we will make no order as to costs.

12. D. M. SEN, J.: I agree.

Appeal dismissed.

AIR 1970 ASSAM & NAGALAND 121
(V 57 C 29)

P. K. GOSWAMI, C. J. AND
D. M. SEN, J.

Majan Mia and others, Accused-Appellants v. The State, Respondent.

Criminal Appeal No. 119 of 1968, D/- 23-2-1970, from order of S. J., Cachar, D/- 19-11-1968.

(A) Evidence Act (1872), S. 32 — Dying declaration — Recording of — Correct mode — It must be recorded in the exact words of declarant — It need not be in the form of questions and answers

EN/FN/C431/70/SNV/C

— Further, it may be open to objection if information is elicited by putting leading questions. (Para 8)

(B) Evidence Act (1872), S. 5 — Credibility of witnesses — Witness trying to implicate persons in a serious charge of murder is unreliable. (Para 10)

M. H. Choudhury and M. S. Rahman, for Appellants; R. C. Choudhury, Public Prosecutor, for Respondent.

GOSWAMI, C. J.:— This appeal is by three appellants who are the only convicted persons out of twelve including them charged before the Court of Session under various sections of the Indian Penal Code. These three were convicted under Sections 302/149, 302/34 and 147, I.P.C. and sentenced to imprisonment for life under the first two sections and one year's R.I. under Section 147, I.P.C.

2. Prosecution case as revealed in the first information report is that on 2nd September, 1966 at about 8-00 A.M. when Ramesh Chandra Nath (deceased) and his son Rabindra Kumar Nath (P.W. 4) were ploughing their land, accused Majan Mia along with 30/35 persons armed with lenjas, spears, daos and lathis attacked them from all directions. Ramesh and Rabindra received severe injuries and Ramesh who was removed to the Bar-khola hospital succumbed to the injuries the same day after a dying declaration had been recorded by the doctor attending him there. Rabindra who received medical treatment at Silchar has survived the attack.

3. According to the prosecution, Ramesh and his brothers have cultivable land under jote from their aunt Champak Devi measuring about 14 kears and they have been in possession of the same since the time of her husband under whom also they had held the land. Ramesh was separate from his other brothers and while he had separate possession of four kears, he also along with his brothers had joint possession of the remaining kears. It is said that on the date of occurrence when Ramesh and Rabindra were on their field ploughing a portion of this land, the accused persons along with many others came in two boats and attacked them resulting in injuries to both the persons with the result as above stated.

4. Prosecution examined 13 witnesses including two doctors and two police officers. The evidence of another doctor who was examined in the Committing Court has been tendered in the court below. The defence of the accused is that they are innocent and accused Majan particularly states that the land was in his possession under Champak Devi and that his servants Jonab Ali, Aktar Ali, Jomsed Ali and Irsad Ali went to the

field for clearing water hyacinth and he knows nothing about the occurrence.

5. Prosecution rests on the evidence of Lakshyamani Nath (P.W. 1), Rabindra Chandra Nath (P.W. 4), Gour Ch. Rai (P.W. 6), Basant Rai (P.W. 7), Girindra Das (P.W. 8), Kumud Ranjan Nath (P.W. 9) and Suresh Chandra Nath (P.W. 10), who, according to it, saw the occurrence. It may be noted here that the learned Sessions Judge disbelieved the evidence of P.Ws. 1, 6 and 7 and the learned Public Prosecutor who appears on behalf of the State fairly concedes that he cannot say that the conclusions arrived at by the learned Sessions Judge with respect to them are unjustified. We have gone through the evidence of these three witnesses and are satisfied that the learned Judge was justified in not relying upon their testimony for the purpose of considering the charges against the accused persons. We may only briefly state that P.W. 1 is no one else than the brother of the deceased and wrote a detailed first information report, according to him, on the verandah of the hospital after death of his brother and lodged the same at the Thana at 4-00 P.M. although the Thana record under Section 154 of the Criminal Procedure Code shows that the report was lodged at 12 noon. Be that as it may, this ejhar was prepared after the death of his brother which is clearly noted in the document itself. Although he does not categorically state in this ejhar that he had seen the occurrence, reading it, one takes the impression that he had seen Majan, his son and nephews attacking the persons being armed with various weapons. In evidence he mentions having met various witnesses at the place of occurrence, but he does not state any names in this ejhar. On the other hand, he states that "the names of other accused persons and witnesses will be revealed at the time of investigation". So far as the accused are concerned he only names Majan Ali, his son and nephews along with 30/35 persons. Since admittedly Majan Ali has two sons facing trial and he has used singular number in the ejhar, it is not even clarified during investigation which son was meant by this witness. There is also nothing to show that any of the accused persons facing trial are the nephews of Majan Ali. Be that as it may, P.W. 1 stated that he reached the place of occurrence first of all. He also stated that his brothers also arrived there. He was in his house at the time and the place of occurrence would be about half a mile from his house. He further stated that

"suddenly, at about morning 7/8 heard halla 'Ramesh Nath is being murdered by persons' in the field. I went to the place of occurrence and saw accused

Majan Mia dealing blows on the head of Ramesh Nath with a lathi from a distance of 20/25 nals. At that time I saw another of 20/25 persons in the boat. The boat anchored at a distance of 20/25 nals to the west of the place of occurrence. Majan Mia got up on the boat having dealt blows. x x x x x. As soon as they had got up on the boat and I had just reached the place, the boat sailed away. Another boat was sailing to the south-west of this boat at (a) distance of 20/25 nals."

It is therefore clear that this witness could not have seen the occurrence. On his own showing he was half a mile away and there is evidence on record to show that there was flood and the entire area was flood-affected and people had to punt their boats in order to go from one place to another. The learned Sessions Judge is therefore perfectly justified in rejecting the testimony of this witness.

6. P.W. 6 also saw the assault from his house which is about two furlongs from his homestead. This witness stated that he had identified accused Nisar Ali, who is not an appellant, in the jail. It is also not clear why this witness had to be taken to the jail for identification of accused persons. We have nothing to show that there was any test identification parade held in this case although the ejhar only gave the name of Majan and none else. This witness came by boat from his house after hearing alarm to the effect "man is being killed". He admits that the place of occurrence was not visible before he got up on the boat and men came to their sight only after he had advanced about 20/25 nals by boat. It is difficult to rely on the testimony of recognition of accused persons as assailants by this witness. The learned Judge was fully justified in discarding his testimony. P.W. 7 also was at his house and went to the place of occurrence after hearing a cry "I am being killed — I am being killed". He went on the same boat with P.W. 6 and another Padmalal who is not examined in the case. For the reasons already given for discarding the evidence of P.W. 6, we are unable to rely on the testimony of this witness as well and agree with the finding of the learned Sessions Judge in this respect.

7. There remains now the evidence of P. Ws. 4, 8, 9 and 10. P. W. 4 is the son of the deceased and he also received severe injuries on his person. He stated that Majan first dealt a lathi blow on the head of his father. Then all the persons began to assault. Father raised alarm and he rushed towards him. Then Nimar blocked his way and Majan hurt him with a lathi. Then Majan inflicted a "Sulph" on his head. When Abdul Jabbar dealt cut blow, he tried to catch hold

of the same and sustained injury on his hand. He fell down when all assaulted him and he lost his sense. According to him, he regained his sense at Barkhola hospital. In the course of cross-examination he was confronted with an earlier statement which he had made before the police to the effect that he stated to the police that the accused persons first assaulted him getting down from the boat and then he lost his sense. This statement, which he denies, has been proved by the defence through the police officer (P.W. 13). If his earlier statement to the police is correct and he was the first man to be assaulted as a result of which he fell down senseless, his testimony that he had seen the assault on his father cannot be relied upon. Unfortunately there is no charge framed against all these accused persons for assaulting this witness.

8. At this stage we have also to bear in mind the dying declaration of the deceased. The learned Sessions Judge has brushed aside this statement which is marked as Ext. 3 as unimportant. We are, however, unable to treat it in the manner in which the learned Sessions Judge has dealt with this important piece of evidence. The statement of the deceased recorded in Ext. 3 may be set out:

"I went to plough. Junab Ali and his sons and brother and 30/35 persons — I do not know their names — assaulted me with lenja, spear, dao and lathi. Majan hurt me on my head".

It is curious as well as intriguing that the police officer who must have seen this dying declaration took no steps to put Junab Ali and his sons and brother under arrest. Even though the learned Sessions Judge during the course of the trial has considered that this document is not important, the investigating officer had no reason to think about it in the same way while he was commencing investigation in order to track the offenders. This is a most unsatisfactory way of investigating a case under murder charge. P.W. 4 does not say a word about Junab Ali and his sons and brother although the deceased had made such a statement. The doctor (P.W. 6) who recorded the dying declaration stated that the injured spoke in a distinct tone and he faced no difficulty in understanding what he said. We are not impressed with the evidence of P.W. 4 in giving a complete go-by, for reasons best known to him, to the story given by the deceased who was passing away within a short time of making that statement. It is not possible to think that at that hour of impending death the deceased, in the entire circumstances of this case, would implicate Junab Ali, his sons and his brother if they were not really the assailants. It is further intriguing that Lakshyamani Nath (P.W. 1)

does not state a word regarding Junab Ali, his sons and his brother, but instead implicates Majan, his son and nephews. There is therefore, scope for thinking that the servants of Majan have been given a go-by and the master has been brought to the scene to avenge the unfortunate death. There is another infirmity in the dying declaration that Majan as such has not been named therein, but if he is the person he has been described as Mijan. Prosecution has not taken any care to bring to light whether Majan was also known in the village as Mijan. The learned Sessions Judge was not justified for the reasons given by him to discard the dying declaration in the way that he has done. It is not necessary that the dying declaration should be in the form of questions and answers. The declaration should be taken down in the exact words of the person making it. It should be ipsissima verba of the person making it. On the other hand, it may be open to objection if leading questions are put to the declarant for the purpose of eliciting information. It is for the Court to decide in the circumstances of each case whether the statement recorded is the free, voluntary, clear and unambiguous statement of the deceased at the time when he was capable of making that statement. This document has fulfilled that test in the case on the evidence of the doctor who recorded the same. To brush aside this dying declaration is only to deprive the accused of the benefit which they could easily claim in a case of this nature, when some other accused are substituted for the prominent ones mentioned by the deceased. Keeping this aspect in view also we are unable to give any credence to the evidence of P.W. 4 which we discussed above.

9. P.W. 8 has land contiguous west of the land of Gour Netai which is to the adjacent east of the place of occurrence. He was said to be on his land when he heard a cry in the jote land of Ramesh Nath. He saw about 15/20 persons assaulting Ramesh Nath and his son with lathi, lenja, dao etc. He went 10/12 nals towards that direction and his statement is that Majan Mia, Abdul Jabbar, Mijazur and Samjid were assaulting. He also had seen Indraj Ali fighting. He raised a cry "there is bichar". By this time the witnesses came by boat. Then the accused persons left the place before the witnesses came. Lakshyamani also came. He then went to the place of occurrence and found Ramesh and Rabindra lying in an injured condition. His evidence in cross-examination is that one could go to the place of occurrence from his land on foot. There was no water in between. He also admits that his land will be 100 yards away from the place of occurrence

and middle plot was with growing paddy; even the plot of Gour Netai was with standing paddy. He however stated before the police during investigation that he could not go to the place of occurrence immediately as there was standing water in between his field and the place of occurrence. This statement has been proved through the investigation officer. He also had to admit in the course of his cross-examination that he could not state who hurt whom and at which part of the body. He admitted that he came along with Lakshyamani and he saw Lakshyamani going after the accused persons got up on the boat. The evidence which we have noticed above does not inspire any confidence. We are not satisfied that this witness saw the occurrence. He is in the same boat with Lakshyamani so far as the quality of evidence is concerned.

10. P.W. 9 was ploughing on his own land and saw two boats coming. Persons from one boat entered into the land of Ramesh Nath. 10/12 persons started fighting as soon as they entered the land. He recognised only Majan Mia among those persons who were fighting. He recognised no other person. At this stage, the Public Prosecutor in the Court below was given permission to draw the attention of the witness to his earlier statement to the police to the effect that he had stated therein as recognising Abdul Jabbar, Rekman, Sattar and Mijazur. He then admitted that he did state to the police that he had recognised the above four persons as well. He gave no reason why he omitted to implicate these four persons and about his concentrating on Majan Mia. In absence of any satisfactory explanation, it is difficult to rely on the testimony of a witness who has no scruple to implicate any persons to his or somebody else's wish or liking in a serious charge of murder. We are, therefore, unable to rely on the testimony of P.W. 9.

11. We are now left with P.W. 10 who was another person who had land nearby and was said to have seen the occurrence from his land. He stated that there were 25/30 persons armed with lathi, lenja and dao. Ramesh and Rabindra have been hurt. He stated:

"I recognised four/five persons when they were boarding on the boat after fighting—they are Majan, Abdul Jabbar, Mijazur. I recognised these very three persons".

At this stage, the Public Prosecutor was allowed by the Court to draw attention of the witness to his earlier statement to the police and he denied that he had stated therein that Sattar, Sanjid, Kuti, Rekman and others had also fought. The character of his evidence is therefore of

the same type as that of P.W. 9 and the reasons given for discarding the evidence of P.W. 9 equally apply to this witness. This witness has also no scruple to implicate persons indiscriminately in a murder charge.

12. In the result, the evidence of all the witnesses who have deposed to the occurrence is found to be unreliable, and we find it judicially unsafe to convict these three appellants on their testimony. It is true that one person has been killed and another received severe injury while defending their possession about which there is sufficient evidence. We have some justifiable suspicion that the case must have taken shape after some deliberation and that is the only reason why Junab Ali and others have vanished into thin air and other persons who may not have been there have figured prominently in the case. At any rate, the accused are entitled to the benefit of reasonable doubt in this case and they are acquitted of all the charges.

13. The appeal is allowed and the conviction and sentence of all the accused persons are set aside. Accused Majan Mia shall be released from jail forthwith and the other two accused persons who are on bail shall be discharged from their bail bonds.

14. D. M. SEN, J.: I agree.

Appeal allowed.

AIR 1970 ASSAM & NAGALAND 124
(V 57 C 30)

P. K. GOSWAMI AND
M. C. PATHAK, JJ.

Smt. Priti Kona Sengupta and others,
Petitioners v. State of Assam and others,
Respondents.

Civil Rule No. 44 of 1969, D/- 10-9-1969.

(A) Panchayats — Assam Panchayat Act (24 of 1959), Ss. 17 (as amended in 1964), 18, Preamble — Meeting for co-optation of members under S. 17 (2) (i) and (ii) — Government failing to nominate member of unrepresented area under S. 17 (2) (iv) before meeting was held — Meeting is incompetent and unauthorised as body co-opting members was not complete in itself. (Para 8)

(B) Panchayats — Assam Panchayat Act (24 of 1959) — Rules under Rule 55 (3) (as amended) — Reference to Section 17 (1) (ii) in sub-rule (3) should be Section 17 (2) (i) and (ii). (Para 7)

P. K. Gupta and P. Dasgupta, for Petitioners; B. K. Das, for Respondent No. 15; A. M. Mazumdar, Jr. Govt. Advocate, for the State.

CN/EN/487/70/BNP/M

GOSWAMI, J.:— This Rule was obtained by the three petitioners for quashing the proceedings of the meeting of the members of the Badarpur Anchalik Panchayat held on 2-12-68 for co-option of one Scheduled Caste member and two women members in that Panchayat, under Section 17 (2) (i) and 17(2) (ii), respectively, of the Assam Panchayat Act, 1959 (Assam Act XXIV of 1959) as amended, hereinafter called 'the Act'.

2. The petitioners are the defeated candidates in the said election wherein Respondents 24, 25 and 26 were co-opted at the meeting mentioned above. The meeting was convened by the Magistrate prior to nomination of a member of the unrepresented tea area, which admittedly exists within the area of the Anchalik Panchayat. Objection was raised in the meeting on that score, but the President of the meeting (Respondent No. 3) overruled the same and election took place for co-opting the three members with the result as above stated.

3. Mr. Gupta, the learned counsel for the petitioners, rests his case chiefly on the main contention that the election of the co-opted members is vitiated on account of the fact that the Anchalik Panchayat had not been properly constituted without nomination of a member from the unrepresented tea area. The learned counsel for the State followed by the learned counsel for Respondent No. 15 on the other hand, submits that co-option could take place even without the nomination of the members representing unrepresented areas.

4. In order to appreciate the point of controversy between the parties, it will be useful to refer to some material provisions in the Act. The preamble of the Act reads:

"Whereas it is expedient to amend and consolidate the laws relating to Local Self-Government in the rural areas of the State of Assam with a view to establishing Panchayats and investing them with such powers and authority as may be necessary to enable them to function as units of Self-Government;"

The Act is an attempt to bring the rural areas of the State under a scheme of Local Self-Government by establishing Panchayats with powers at various levels. Chapter II provides for establishment and constitution of Gaon Sabha, Gaon Panchayat, Anchalik Panchayat and Mohkuma Parishad. Under Section 3(1), the State Government may, by notification, declare any area to be a Gaon Sabha area for the purpose of this Act. Under Section 4(1), the State Government shall, by notification, establish a Mohkuma Parishad in each sub-division and where there is no sub-division, in each district. Under Section 5(1), in each area declared

as Mohkuma Parishad under Section 4, there may be as many Anchalik Panchayats as may be deemed necessary by the State Government. Under Section 7, all persons whose names are included in the list of voters in the electoral roll of the Assam Legislative Assembly, shall be deemed to constitute a Gaon Sabha for the area on publication of a notification under Section 3. Under Section 9, Gaon Sabhas are to meet at least twice a year. Under Section 11, every Gaon Sabha shall have an Executive Committee called the Gaon Panchayat consisting of nine members to be elected in the manner prescribed. There is no provision for any nomination here. There is, however, provision, for co-option, where necessary, of two women members and one member each from Scheduled Caste and Scheduled Tribe. Section 17 may be quoted:

"17. (1) The Anchalik Panchayat as established under Section 5 shall consist of —

(i) all Presidents of the Gaon Panchayats falling within the jurisdiction of the Anchalik Panchayat;

(ii) one-third of total number of members under the preceding clause subject to a minimum of three to be elected in the prescribed manner from amongst the members of Gaon Sabhas by an electoral college consisting of all members of the Gaon Panchayats falling within the jurisdiction of the Anchalik Panchayat;

Provided that when one-third is a fraction which is half or more than half of a whole number, then the number shall be rounded to the next higher number and if less shall be ignored;

Provided further that if a member of the Gaon Panchayat is elected as a member of the Anchalik Panchayat, he shall immediately cease to be a member of the Gaon Panchayat;

(iii) one representative to be elected, in the manner prescribed, by the Chairman of Co-operative Societies falling within the area of the Anchalik Panchayat from amongst themselves;

(iv) Such number of member or members, as may be nominated by the State Government, from the unrepresented areas like tea-gardens and forest villages and Gram Sabha constituted under the Assam Gram Dan Act (Assam Act I of 1962) falling within the jurisdiction of the Anchalik Panchayat.

(2) (i) Wherever five per cent or more of the members of the Gaon Sabhas comprising the Anchalik Panchayat are Scheduled Castes or Scheduled Tribes, as the case may be, then in case no member belonging to the Scheduled Castes or Scheduled Tribes, as the case may be, is elected to the Anchalik Panchayat the members of the Anchalik Panchayat shall co-opt one member belonging to the

Scheduled Castes or Scheduled Tribes, as the case may be:

Provided that this representation shall continue only as long as special representation for the Scheduled Castes or Scheduled Tribes continues to be provided for in the Constitution of India

(ii) The Anchalik Panchayat shall, from within the area of its jurisdiction, co-opt two women members if no woman is elected, and one woman member if only one is elected.

Section 18, as it stands now, runs as follows:

"The Deputy Commissioner or the Subdivisional Officer, as the case may be, shall call a meeting of the Anchalik Panchayat (which meeting shall be called the first meeting of the Anchalik Panchayat) for the election of a President and Vice-President from amongst its members in the manner prescribed.

Under Section 22(1), the Mohkuma Parishad as established under Section 4 shall consist of several categories of persons mentioned therein including ex officio members. There is provision under this section for the Mohkuma Parishad to co-opt members belonging to the Scheduled Castes or Scheduled Tribes and two women members, where necessary. Section 31 provides that certain irregularities do not vitiate any act of a Gaon Panchayat or Anchalik Panchayat or Mohkuma Parishad etc. Section 35 is an incorporation clause of a Gaon or Anchalik Panchayat. It may be noted that the nomination clause in Section 17 (1) (iv) was for the first time introduced by the Amendment Act VII of 1964.

5. The entire question turns on the construction of Section 17. The Act introduces a three-tier system of Local Self-Government. The effective body at the base is the Gaon Panchayat, which is the executive committee, elected by a method of direct election by the members of the Gaon Sabha. The President of the Gaon Panchayat is also the President of the Gaon Sabha. Next in the hierarchy is the Anchalik Panchayat, a body constituted by a certain member or members elected by a method of indirect election, and other members by nomination under certain conditions as also by co-option under a given situation. It has also some ex officio members with no rights to vote. At the apex is the Mohkuma Parishad which consists of members mostly by their position and office and if and when Section 22, as amended by Act V of 1967, will be wholly brought into force, will have also an elective element. The 1957 amendment has made the Mohkuma Parishad most powerful of the three constituted bodies. The above discloses the

structure of the three-tier Panchayat Raj. As the preamble shows, the whole object is one for introducing Local Self-Government in rural areas. The electorate at the base is the Gaon Sabha which is constituted of all the voters in the electoral roll of the Assam Legislative Assembly for such part of the constituency as is included in the Gaon Sabha area notified by the Government. The scheme is as follows. The entire Gaon Sabha is sought to be represented by its elected executive committee, namely, the Gaon Panchayat which has power to co-opt one or two women members and also one Scheduled Caste or Scheduled Tribe member under certain given situation. There is, however, no provision for nomination in a Gaon Panchayat. The entire focus seems to be on the people inhabiting in the Gaon Sabha area. The Anchalik Panchayat constituted under Section 17, on the other hand, is designed to represent all areas besides all strata of the population residing in those areas. There is emphasis both on the population as well as on the territorial aspect so far as representation in the Anchalik Panchayat is concerned. Mere representation of the people would not be enough. Each determinate part of the Anchalik Panchayat has to be represented. If in the course of the election any areas like tea-gardens and forest villages are completely unrepresented in the Anchalik Panchayat, Government comes to the aid of the unrepresented areas by nominating members therefrom. The Anchalik Panchayat constitutes itself when the body is filled in with all the constituent members enumerated under Section 17(1) (i) to (iii) and under (iv) where necessary. Even this constitution may not make for the full complement if, where a specified percentage of the members of the Gaon Sabhas comprising the Anchalik Panchayat are Scheduled Castes or Scheduled Tribes and the Gaon Panchayat has failed to elect even one member out of them. In such a situation the members of the Anchalik Panchayat co-opt the requisite member or members. Similarly, the Anchalik Panchayat has to co-opt two women members if there be none elected or one only when one has been elected. It is only after that the Anchalik Panchayat can be said to be fully constituted under the law so that its first meeting may be called under Section 18. As seen above, the Anchalik Panchayat is required not only to reflect the people as such but also no area could be left out unrepresented. On this aspect of representation of unrepresented areas, Government nomination achieves what popular election may on occasions fall short of. Co-option, on the other hand, refers to representation of unrepresented people in the body. The co-opting body must be otherwise

complete but for the co-option. In other words, the entire body at the stage of co-option must represent territorially all areas of the Anchalik Panchayat and no territorial area could remain unrepresented. After completion of the election under Section 17(1) (ii), Government is under a legal obligation under Section 17(1) (iv) to nominate members from the unrepresented areas and when this duty has been performed the stage is set for taking steps for co-option under Section 17(2) (i) and (ii). When the entire area of the Anchalik Panchayat is thus territorially represented that body will elect a member from the Scheduled Caste or Scheduled Tribe and one or two women, as the case may be, when such a contingency arises. That will finally complete constitution of the Anchalik Panchayat and the Deputy Commissioner or the Subdivisional Officer will then be able to take steps for calling the first meeting of the Anchalik Panchayat under Section 18.

6. The short question that now arises for consideration is whether prior to the Government nomination of members from the unrepresented area in this case, the Anchalik Panchayat was competent to co-opt the requisite members. Co-option is election of members to a body to complete it. The word 'co-opt' as given in the Webster's Dictionary, means (latin co-optare) to choose, to elect to a board, committee etc., by vote of those already members. The body that co-opts must be otherwise complete except for the co-opted members. Any other deficiency in the body will not in law authorise that body to co-opt. It will even go against the principle of democracy that pervades in the entire scheme of the local self-government envisaged in the Act. Section 17 clearly postulates constitution of the Anchalik Panchayat by complying with all the provisions of Section 17(1) (i) to (iv) before the step is taken for co-option under Section 17(2) (i) and (ii). The purpose and object of the Act and the entire scheme of the provisions together with the setting of Section 17(1)(iv) and 17(2)(i) and (ii) in the Act reinforce the aforesaid conclusion. To leave out some members from the body of the Anchalik Panchayat while co-opting other members to that body would be to deprive a valuable right to other eligible persons in certain unrepresented areas within the Anchalik Panchayat where they exist. This will run counter to the very object of the Act as envisaged in the preamble, for achievement of which this law has been passed. This will introduce an abhorrent undemocratic element into the entire scheme of rural self-government brought into being under the provisions of that Act. Although convenience is not a test, this interpretation

chimes in with convenience as co-option for both women and the Scheduled Castes and Scheduled Tribes could be held together prior to the first meeting contemplated under the Act. The learned Senior Government Advocate submits that the words "the members of the Anchalik Panchayat shall co-opt" appearing in Section 17(2) (i) have to be contrasted with those in Section 17(2)(ii), viz., "the Anchalik Panchayat shall co-opt". According to him the 'members' referred to in clause (i) of sub-section (2) must mean only elected members and have no reference to the members enumerated under Section 17(1) (iv). We are not impressed by the argument. On the terms of Section 17(2) (i), there is no warrant for introducing a limitation in the language of that sub-section by inserting the word "elected" before "members of the Anchalik Panchayat". We are of opinion that these words are equated with the "Anchalik Panchayat" appearing in Section 17(2) (ii). In our judgment, there is not even a case for interpretation as the words are absolutely clear. A verbis legis non est recedendum. From the words of the law there should not be any departure. Even if there be scope for interpretation, that which we have given above is in accord with the object and purpose of the Act in the context of the entire legislation.

7. It may be observed that the vires of Rule 55, as amended, which provides for the procedure in convening and conducting a meeting of the Anchalik Panchayat for co-option, is not challenged before us. We, however, do not find any difficulty in arriving at the conclusion which we have reached even without reference to Rule 55. Assuming, however, the said Rule to be valid, it provides that a meeting of the Anchalik Panchayat has to be convened and each member of the Anchalik Panchayat has to be served with a written notice. This meeting contemplated under Rule 55 at this stage is for the ad hoc purpose of co-option to complete the body and is, therefore, presided over by an officer authorised by the Magistrate who is not entitled to vote and it stands to reason as he is not a member of the Anchalik Panchayat. The entire matter even at this stage is left to the members of the Anchalik Panchayat. The members prior to co-opting have to make oath and affirmation under Section 158. There is no question of quorum in this meeting: We, however, do not fail to notice that Rule 55 although refers to Section 17 in sub-rule (1) mentions Section 17(1) (ii) in sub-rule (3). Sections 17(2) (i) and (ii) are perhaps the appropriate provisions in place of Section 17(1) (ii) in sub-rule (3).

8. In the result, we hold that the meeting of the Anchalik Panchayat held

on 2-12-68 for co-opting of the three members is incompetent and unauthorised under the law on account of the Government's failure at the material time to nominate a member of the unrepresented area under Section 17(1) (iv). The proceedings of the said meeting co-opting respondents Nos. 24, 25 and 26 are hereby quashed in exercise of our powers under Article 226 of the Constitution of India. Writ shall issue accordingly. The petition is accordingly allowed, but there will be no order as to costs.

9. M. C. PATHAK, J.: I agree.

Petition allowed.

**AIR 1970 ASSAM & NAGALAND 128
(V 57 C 31)**

FULL BENCH

**P. K. GOSWAMI, C. J., M. C. PATHAK
AND D. M. SEN, JJ.**

Blman Chandra Pachani, Petitioner v. State of Assam, Opposite Party.

Criminal Revn. No. 115 of 1967, D/- 12-5-1970.

Press and Registration of Books Act (1867), S. 12 — Distribution of pamphlet by its literate author — Author is publisher. AIR 1960 All 450, Diss. from.

An author of a printed book who is literate person and who admits that he has written the subject-matter which is dealt in such printed pamphlet and whose name is mentioned in the title page of the book and further which he having obtained it, passed it on to others, must be held to be publishing the particular printed literature of which he is the author, within the mischief of Section 12 of the Act. The position of such a person cannot be equated with a mere distributor or a mere hawk. He cannot escape liability under Section 12 by merely stating that he is not a person connected with the press or having anything to do with the actual printing. AIR 1960 All 450, Dissented from; AIR 1957 Mad 427, Rel. on (Paras 5 and 6)

Cases Referred: Chronological Paras
(1930) AIR 1960 All 450 (V 47) —

1960 Cri LJ 1037, Abdul Hakim v. State

(1957) AIR 1957 Mad 427 (V 44) —

1937-1 Mad LJ 136, In re. G. Alavandar

A. R. Barthakur and N. H. Saikia, for Petitioner; G. K. Talukdar, Sr. Govt. Advocate, for the State.

GOSWAMI, C. J.:— This matter has come up before this Full Bench on a reference by me while sitting singly in disposing of the revision application.

2. The accused was convicted under Section 12 read with Section 3 of the

Press and Registration of Books Act, 1867 (Act XXV of 1867) hereinafter called 'the Act' and fined Rs. 500/-, in default three months' simple imprisonment.

3. The prosecution case is that the accused-petitioner was distributing some pamphlets, which are marked Exts. III and V in this case, and which are printed in some press without the name of the Printer and Publisher and the place of Printing and Publication, as required under the provisions of Section 3 of the Act. When the matter came up in appeal, the learned Sessions Judge found on the evidence produced by the prosecution that the accused was distributing this printed pamphlet and this is not denied by the accused. In his statement under Section 342, Criminal Procedure Code, when his attention was drawn to the printed books (Exts. III and V) he stated that he wrote a book bearing the name and title appearing on the cover page of the exhibited book, but he has not read these and cannot say whether the exhibited pamphlets were the ones which he had earlier written under the same name and title. In an identical case with reference to another printed document, the accused was convicted under Section 12 read with Section 3 of the Act by a Division Bench of this Court after setting aside the acquittal order passed by the Magistrate, in Govt. Criminal Appeal No. 6 of 1964 disposed of on 8-6-66. In that revision, however, the Court was not called upon to decide the question of applicability of Section 12 read with Section 3 of the Act on the facts of that case. It is because of this reason that I referred this matter to be decided by a larger Bench by framing the question in this form:

"Whether the accused, who is admittedly neither a printer nor a publisher connected with any press, is liable for conviction under Section 12 read with Section 3 of the Act on the facts of the case?"

This is how this matter has come up before this Full Bench.

4. The Act was first made in the year 1867 and it repealed an earlier Act XI of 1835. This Act at the earliest stage was promulgated with the sole object of informing the ruling race, namely the Britishers who ruled us for quite a number of years, about the various writings and thoughts revealed in those writings in the various literatures of the country. Later on, however, this Act has undergone series of amendments and Section 3, as it reads now, is in the following terms:

"3. Every book or paper printed within India shall have printed legibly on it the name of the printer and the place of printing and if the book or paper be published, the name of the publisher and the place of publication".

is competent to the Commissioner to withdraw from the proceedings taken by him. If such an application is made by the Commissioner, we have no doubt that it would be dealt with on the merits by the learned Magistrate. We might also draw attention to the observations made by Chief Justice Chagla in the case referred to above that practical difficulties which the Corporation may face by reason of the absence of powers to compound offences under the Act "should be got over not by resorting to powers which the Municipality does not possess, but by the necessary amendment of the law."

13. In the result, we confirm the order passed by the learned Magistrate and discharge the rule in this petition.

Rule discharged.

AIR 1970 BOMBAY 337 (V 57 C 59)

K. K. DESAI AND VAIDYA, JJ.

Bessaral Laxmichand Chirawala, Petitioner v. Motor Accidents Claims Tribunal, Greater Bombay and others, Opponents.

Spl. Civil Appln. No. 464 of 1965, with Civil Appln. No. 759 of 1965, D/- 28-8-1969.

(A) Motor Vehicles Act (1939), S. 110-A (2) — Motor Vehicles Rules (Bombay) (1959), Rule 291, Form No. Comp. A — Application to Claims Tribunal — Prescribed form does not require to mention anybody as opposite party in title of claim application — Formal defect of failure to mention appropriate names of parties liable to pay compensation does not defeat claims filed under the Act.

Provisions of Section 110-A (2) of the Motor Vehicles Act and Rule 291 of the Rules made under Section 111-A (Bombay) in connection with application for claims for compensation and the prescribed form No. Comp-A do not require any parties to be mentioned as opposite parties in the title of the application for claims for compensation. All the relevant facts are in this connection left to be ascertained by the Claims Tribunal which has been entrusted with the very serious duties of finding out all the parties who may be liable to pay compensation by recording evidence to be produced by the parties concerned. Formal defect of failure to mention appropriate names of the parties who would be liable to pay ultimately compensation to the claimant was never intended to defeat the claims filed under the Act.

(Paras. 10, 15)

Therefore, where the business of the B. E. S. T. Undertaking which is of the ownership of the Bombay Municipal Corporation is continuously being carried on in the name of the undertaking by the Corporation, the claim for compensation in the name of "B. E. S. T. Bombay" amounts to

a claim against the Municipal Corporation. When the formality of the amendment for substitution of the Bombay Municipal Corporation for opposite party is asked for, it is the legal duty of the Tribunal to ascertain facts as regards the ownership of the B. E. S. T. Undertaking itself and thereafter it is permissible for the Tribunal even without an amendment having been granted to make an award for compensation in favour of the petitioner against the Municipal Corporation.

(Para 10)

(B) Civil P. C. (1908), Order 30, Rule 10 — Application against person carrying on business in name other than his own — Municipal Corporation carrying on business of B. E. S. T. Undertaking — Mention of Undertaking in claim application before Motor Accidents Claims Tribunal is merely a misdescription for the real owner of undertaking viz., Municipal Corporation.

(Para 13)

Cases Referred: Chronological Paras
(1933) AIR 1933 Bom 304 (V 20) =

35 Bom LR 569. Amulakchand

Mewaram v. Babulal Kanlal

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B. J. Kapadia with V. K. Tembe and J. G. Pradhan, for Petitioner; K. H. Bhaba i/b. M/s. Mulla and Mulla and Craigie, Blunt and Caroe Attorneys, for Opponents. Nos. 2 to 4.

K. K. DESAI, J.:— In this petition under Article 227 of the Constitution the petitioner questions the legality of the order dated December 10, 1964 made by Motor Accidents Claims Tribunal dismissing the petitioner's application for compensation as against the Bombay Municipal Corporation, being the fourth respondent in this petition.

2. The relevant facts are as follows:—

On October 3, 1962, as a result of collision with a motor transport bus of B. E. S. T. Undertaking, the petitioner was knocked down and suffered from fracture of the neck of the left femur and certain other injuries. Having regard to the fact that the B. E. S. T. Undertaking was of the ownership of the Corporation, the petitioner served a statutory notice under Section 527 of the Bombay Municipal Corporation Act on the General Manager, B. E. S. T. Undertaking. The petitioner then in accordance with the provisions in Section 110-A of the Motor Vehicles Act instituted the application No. 649 of 1962 before the Motor Accidents Claims Tribunal claiming compensation amounting in all to Rs. 86,000/-. In paragraph 15 of the application he mentioned, according to the prescribed form, the name and address of the owner of the vehicle. The name mentioned was "B. E. S. T. Bombay".

3. In paragraph 3 of the written statement filed on or about March 19, 1964 on behalf of the driver Abdul Gafar Ismail and the "B. E. S. T. Undertaking, Bombay" and sworn by the General Manager of the above undertaking, it was contended that the B. E. S. T. Undertaking was not a legal

entity and could not be sued and/or made a party to the application and the claim against the B. E. S. T. Undertaking should, therefore, be dismissed with costs.

4. In consequence of the above contention, by oral application made on June 23, 1964, the petitioner asked for amendment of the application by joining the Bombay Municipal Corporation in the title as the third opposite party. That application was granted on June 23, 1964 subject, however, to the question of limitation. The petitioner was permitted to file an affidavit in connection with the application for amendment and the Municipal Corporation was given liberty to file an affidavit in reply.

5. The petitioner then filed affidavit dated July 4, 1964, whilst on behalf of the driver Abdul Gafar and the B. E. S. T. Undertaking and the Municipal Corporation, an affidavit dated September 29, 1964 was filed by the Accident Officer of the B. E. S. T. Undertaking of the Municipal Corporation. The petitioner stated in paragraphs 5 and 6 of his affidavit that the B. E. S. T. Undertaking was merely a misdescription for the Bombay Municipal Corporation and he had filed, the affidavit by way of application for the formal addition of the Bombay Municipal Corporation as opposite party No. 3 or for substitution of the Bombay Municipal Corporation for opposite party No. 2 (the B. E. S. T. Undertaking).

6. The contention of the opposite parties in their affidavit was that the B. E. S. T. Undertaking was not merely misdescription for the Bombay Municipal Corporation. The joint of the Corporation would be addition of a new party from the date of the amendment to be granted and the amendment should not be granted as the claim on the date of the amendment would be barred by the law of limitation.

7. In connection with these questions raised by the affidavits made on behalf of these three opposite parties, the Motor Accidents Claims Tribunal by the above order dated December 10, 1964 held that the owner of the motor bus was the Municipal Corporation. The B. E. S. T. Undertaking could not have been sued as the owner of the bus. The B. E. S. T. Undertaking was not a legal entity and in the result in effect, opposite party No. 2 did not exist at all and nobody has been sued as the owner of the bus and therefore, there was no question of substituting the Municipal Corporation in place of opposite party No. 2 (B. E. S. T. Undertaking). The further observation was that it could not accept the contention of the petitioner that the B. E. S. T. Undertaking was merely a misdescription for the Bombay Municipal Corporation and the authorities relied upon on behalf of the petitioner in that connection were, therefore, not applicable to the facts of the application before the Tribunal. It further held that the claim as against the Bombay Municipal Corporation was barred by the law of limitation.

It refused to condone delay and dismissed the application for compensation as against the Municipal Corporation.

8. In this petition the contention on behalf of the petitioner is that the B. E. S. T. Undertaking itself is of the ownership of the Municipal Corporation. The bus in question was registered under the Motor Vehicles Act in the name of the Manager, B. E. S. T. Undertaking. The section of and the rules made under the Act relating to the institution of applications for claims before the Motor Accidents Claims Tribunal require an applicant to mention in the application the name of the owner, thereby meaning registered owner only. The form prescribed did not require the petitioner to mention anybody as opposite party in the title of the claim application. The Municipal Corporation which carried on the business of the above Undertaking could under the provision of Rule 10 of Order XXX of the Code of Civil Procedure be sued in its above business name. Having got the bus registered in the name of the Manager of the Undertaking the Corporation was estopped from contending that the claim as instituted originally was not against the Bombay Municipal Corporation. In fact the formality of substituting the Municipal Corporation as opposite party had to be undertaken, so that the matter of the ownership of the B. E. S. T. Undertaking being that of the Corporation was clear on the record and an executable award of compensation could be made in favour of the petitioner against the Corporation. The fact that the whole of the business of the B. E. S. T. Undertaking was of the ownership of the Municipal Corporation was never in doubt and the Tribunal was, therefore, entirely wrong in dismissing the petitioner's application for substitution of the name of the Municipal Corporation in place of opposite party No. 2 (B. E. S. T. Undertaking). The facts were so clear and glaring that the Tribunal should not have held that since the B. E. S. T. Undertaking was not a registered Corporation or a society, the claim application had not been duly instituted against any owner of the bus. That observation of the Tribunal was due to its misapprehension as regards the provisions in the Motor Vehicles Act and the Rules made thereunder in connection with the particulars necessary to institute claims for compensation and also failure to apply provisions in Rule 10 of Order XXX of the Civil Procedure Code to the facts of the case.

9. In reply Mr. Bhabha with some emphasis contended that under the scheme of the Bombay Municipal Corporation Act, the B. E. S. T. Undertaking was not a corporation and not a legal entity and did not exist as any legal person. The Tribunal was, therefore, right in its finding that the claim application being originally instituted against B. E. S. T. Undertaking

as one opposite party had not been instituted against any existing owner. This was so because the Undertaking was not a legal person. There was, under the circumstances, no misdescription at all of any existing person in the claim application. In his submission for the first time upon amendment being granted, new claim application would have been instituted against the Municipal Corporation. Since that was time barred, the Tribunal's findings should be accepted as correct. In support of his submission he relied upon the decision of a Division Bench of this Court in *Amulakchand Mewaram v. Babulal Kanadal Taliwala*, 35 Bom LR 569 = (AIR 1933 Bom 304). Now the question before the Court in that case was in connection with the amendment of a plaint by substitution of the names of members of a joint family in place of the name of the joint family firm which had instituted the suit as the plaintiff. Though the suit had been instituted in the name of the joint family firm in 1926, the application for substitution of the names of the members of the family was made at the hearing held in 1932. That application was granted by the Division Bench by observing that

"..... where you have a suit brought in the name of A. B. & Co., if it be proved that A. B. & Co. is the name of an existing firm or family consisting of certain individuals C, D and E, then the description A. B. & Co. nearly cloaks the identity of C., D. and E who are before the Court under that name. If under the rules C, D and E are not allowed to sue in the name of A. B. and Co., then for the purposes of the suit the description is incorrect and must be altered. But it seems to me that in such a case the proposed alteration does not involve introducing new plaintiffs, but merely involves describing correctly, rather than incorrectly, the plaintiffs already before the Court."

10. Now, it appears to us that since the business of the B. E. S. T. Undertaking as such is being continuously carried on in this city for a considerable number of years in the name of B. E. S. T. Undertaking by the Municipal Corporation, the contention of Mr. Bhabha that when the claim application mentioned the B. E. S. T. Undertaking as the owner of the bus in question, it was not intended that the application was against the Municipal Corporation, cannot be accepted. It is true that the name of the Municipal Corporation was not mentioned in any part of the claim application. It is, however, not true that the business of the B. E. S. T. Undertaking was not continuously existing at all material times. What that business was and whose that business was may have been known or unknown to the petitioner. It was made clear to the petitioner by contentions raised in paragraph 3 of the written statement filed by the Manager of the B. E. S. T. Undertaking for the first time that legal ownership of the bus was in the Municipal Corporation and the

proper party against whom award for compensation must be obtained was the Municipal Corporation. As this business of the B. E. S. T. Undertaking continuously belonged to the Municipal Corporation from the inception, the intent of the petitioner was to sue the Municipal Corporation which was the owner of the Undertaking. This matter required to be clarified and the application for substitution was, therefore, justified. In that connection we have to repeat that provisions in the Motor Vehicles Act and the Rules made in connection with application for claims for compensation do not require any parties to be mentioned as opposite parties in the title of the application. When the formality of the amendment was asked for, it was the legal duty of the Tribunal in this case to ascertain true facts as regards the ownership of the B. E. S. T. Undertaking itself and thereafter it was permissible for the Tribunal even without an amendment having been granted to make an award for compensation in favour of the petitioner against the Municipal Corporation.

11. Before referring to the relevant sections and the rules and the form prescribed, it is necessary to state that Mr. Bhabha relied upon the following observation of the Court in the above cited decision:—

"It seems to me that the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought is the name of a non-existent person, or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, prima facie there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs."

In spite of the above observation and the fact that in law a joint family firm has no existence because it is neither an incorporated body nor a registered society, the Court held that the name of the joint family firm represented the members of the joint family and amendment was granted. We do not see how when the business of the B. E. S. T. Undertaking is continuously being carried on in the name of the Undertaking by the Corporation, the claim for compensation in this case did not in fact amount to a claim against the Municipal Corporation. The fact that the Undertaking is not a registered Corporation did not make any difference to the above situation. The party which was being sued was the owner of the concerned bus and the Undertaking which was the registered owner of the bus was itself of the ownership of the Corporation. There was thus clear misdescription of the party against whom an executable award for compensation could be made by the Tribunal. We see nothing in this judgment which obstructs us

from making the findings which we have already made.

12. Reliance was placed by Mr. Bhabha in support of his contention on the provisions in Section 5 (1) and (2) of the Bombay Municipal Corporation Act. Reliance was placed by Mr. Kapadia on the provisions in (jib) and Chapter XVI-A of the Bombay Sections 3 (mm), 4 (d) and (g), 63 (ja) and Municipal Corporation Act.

13. Under sub-section (2) of Section 5 (the Municipal Corporation of Bombay is made a body corporate and has a perpetual succession and a common seal and can sue and be sued in its name, Section 3 (mm)) defines the Bombay Electric Supply and Transport Undertaking inter alia to mean undertaking managed or conducted by the Corporation for the purpose of providing mechanically propelled transport facilities for the conveyance of the public. Section 4 (g) mentions the General Manager of the Bombay Electric Supply and Transport Undertaking as being one of the Municipal authorities charged with carrying out the provisions of the Act. Under Section 4 (d) the Bombay Electric Supply and Transport Committee is also one of such Municipal authorities. Under sub-clauses (ja) and (jib) of Section 63 the Corporation is authorised to provide inter alia for purchase, maintenance and management of mechanically propelled transport facilities for the conveyance of the public. Chapter XVI-A is headed, "The Bombay Electric Supply and Transport Undertaking" and consists of Sections 460-A to 460-PP which all relate to management of a whole business which is described as the Bombay Electric Supply and Transport Undertaking. It requires to be noticed in this connection that the business of electric supply and transport was carried on until sometime back by a company registered under the Indian Companies Act and called, "Bombay Electric Supply and Tramways Company". The business of this company was acquired by the Municipal Corporation sometime back and with additions and alterations is being carried on by the Corporation since then. The business has been given the name, "The Bombay Electric Supply and Transport Undertaking". It is not, now, correct for the Municipal Corporation to take up the attitude in this legal proceeding by mistake instituted against the Undertaking to submit that the mention of the undertaking in the application is not a misdescription for the real owner of the Undertaking, viz., the Municipal Corporation. It is not necessary to develop this question any further because we have, having regard to the provisions in the Motor Vehicles Act and the Rules for institution of claims applications, already held that it was not necessary to mention the corporation as the opposite party in the title of the application for compensation.

14. The relevant provisions are Sections 110-A and 111-A of the Motor Vehicles Act

and Rule 291 and the form prescribed thereby which is form No. Comp. A. Sub-section (2) of Section 110-A provides:

"Every application under sub-section (1) shall be made to the Claims Tribunal and shall be in such form and shall contain such particulars as may be prescribed." Under Section 111-A the State Government is entrusted with the function of making rules inter alia for the form of application for claims for compensation and the particulars it may contain and as regards the procedure to be followed by the Claims Tribunal. Rule 291 relates to procedure regarding compensation and provides that an application for compensation should be in the form numbered as Comp. A. The form for the claim for compensation thus prescribed appears at page 220 of the Rules published in 1967. This form in its first part provides for mentioning all the description and the residential address of the claimant in the following manner:—

"I, son/daughter/wife/widow of residing at having been injured in motor vehicle accident hereby apply for the grant of compensation for the injury sustained. Necessary particulars in respect of the injury, vehicle, etc., are given below:"

Immediately after the above provision, the form prescribes by serial numbers paragraphs for giving details in the manner following:

"1. Name and father's name of the person injured

2. Full address of the person injured.

3. Age of the person injured.

4. Occupation of the person injured.

8. Place, date and time of the accident.

9. Name and address of Police Station

10. Was the person in respect of whom compensation is claimed travelling by the vehicle involved in the accident? If so, give the names

11. Nature of injuries sustained.

12. Name and address of the Medical Officer.

15. Name and address of the owner of the vehicle.

16. Name and address of the insurer of the vehicle.

In the last part it prescribes:

"I, solemnly declare that the particulars given above are true and correct to the best of my knowledge."

Signature or thumb impression of the applicant."

17. It is quite clear on a reading of the prescribed form that it does not direct the claimant for compensation to include in the application any party as defendant and/or opposite party. We apprehend that all the relevant facts are in this connection left to be ascertained by the Claims Tribunal which has been entrusted with the very serious duties of finding out all the parties who may be liable to pay compensation by recording evidence to be produced by the parties concerned. Formal defect of failure to men-

tion appropriate names of the parties who would be liable to pay ultimately compensation to the claimant was never intended to defeat the claims filed under the Act. The Tribunal has failed to realise the true effect of the provisions in the Act in connection with the form of the applications for compensation and its responsibilities in ascertaining the correct facts regarding the parties who should be liable to pay compensation to the claimants under the applications made in the prescribed form. The Tribunal's judgment is thus entirely devoid of good reasoning and is liable to be set aside.

16. In the result, the impugned order dated December 10, 1964 is set aside. It is directed that the Tribunal should proceed to decide the application for compensation on the footing that the true owner of the B. E. S. T. Undertaking mentioned in paragraph 15 of the application is the Municipal Corporation of Bombay and that the claim was from the inception against the Corporation and the claim was not barred by law of limitation. Contrary findings of the Tribunal are set aside.

17. Application No. 649 of 1962 is restored to the file of the Tribunal. The same will be disposed of by the Tribunal in accordance with law. The rule is made absolute with costs.

18. No order on the civil application.
Rule made absolute.

AIR 1970 BOMBAY 341 (V 57 C 60)

K. K. DESAI AND NATHWANI, JJ.

Dina Dinshaw Merchant, Appellant v.
Dinshaw Ardeshtir Merchant, Respondent.

A. F. O. D. No. 249 of 1967, D/-6-3-1969.

(A) Parsi Marriage and Divorce Act (1936), S. 35(a) — Resumption of cohabitation after desertion must be with the intention of forgetting and remitting the wrong on condition that the spouse whose wrong is so condoned does not thenceforward commit any further matrimonial offence. If a further matrimonial offence is committed, the condonation is cancelled and the old cause of complaint is revived. (1950) Law Reports Probate Division 1 & (1952) Law Reports Probate Division 203, Ref. (Paras 9, 19)

(B) Parsi Marriage and Divorce Act (1936), S. 32(g) — Desertion, what amounts to — Constructive desertion, when takes place.

For offence of desertion, so far as the deserting spouse is concerned two essential conditions must be there, namely, (i) the factum of separation, and (ii) the intention to bring cohabitation permanently to an end (*animus deserendi*). Desertion is a matter of inference to be drawn from the facts and circumstances of each case.

If, in fact there has been a separation, the essential question always is whether the act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. If one spouse by his words and conduct compels the other spouse to leave the marital home, the former would be guilty of desertion, though it is the latter who has physically separated from the other and has been made to leave the matrimonial home. Once it is found that one of the spouses has been in desertion, the presumption is that the desertion has continued. (Para 10)

The parties living under the same roof may have separated and may have ceased to cohabit together; and even in those circumstances can prove that there had been constructive desertion by one spouse as against the other. AIR 1957 SC 176, Foll. (Para 10)

(C) Parsi Marriage and Divorce Act (1936), S. 32(g) — Desertion — Period of.

The question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be questions of fact and the determination must depend upon the circumstances of the particular case, 1940 AC 631, Overruling (1911) PD 191, Ref. (Para 12)

(D) Civil P. C. (1908), S. 11 — Subject matter of two litigations must be same. (Para 13)

(E) Civil P. C. (1908), O. 23, R. 1(3) — 'Subject matter' — First suit for judicial separation — Subsequent suit for divorce on same grounds is not barred.

Subject matter of suit withdrawn and fresh suit must be the same. Unless the relief claimed in the previous suit is the same and/or alike as the relief claimed in the subsequent suit, the subject-matters of the two litigations must be held to be different. AIR 1917 Mad 512 (517) & AIR 1917 Bom 10 (1), Ref. (Para 13)

Where the previous suit for judicial separation is withdrawn, a subsequent suit for divorce on the same grounds on which previous suit for judicial separation was filed is not barred, the relief claimed being different. (Para 14)

The cause of action in respect of desertion and/or constructive desertion remains inchoate till the date of the institution of the suit for divorce on that ground. As claim for divorce was not made in the previous suit, the cause of action and or the bundle of facts on which reliance could be placed for relief of divorce on the ground of constructive desertion remain inchoate and accordingly cannot be held to have been made the subject-matter of the previously instituted and withdrawn suit. (Para 15)

(F) Evidence Act (1872), S. 115 — First suit for judicial separation withdrawn on persuasion of friends — Second suit for divorce on same grounds not barred by estoppel — Order 23, R. 1, Civil P. C. has no application. 1959 (3) All ER 131, Ref. (Para 14)

(G) Parsi Marriage and Divorce Act (1936), S. 46 — Contention — Withdrawal of suit for judicial separation, whether with consent — Question of law.

The question as to whether the suit and the counter-claim had been allowed to be dismissed by consent of the parties for the reasons mentioned by the plaintiff in his evidence and/or for the reasons mentioned by the defendant in her evidence, cannot be a question of law. (Para 19)

(H) Parsi Marriage and Divorce Act (1936), S. 47 — High Court will not substitute its own finding of fact for that of delegates — There would be nothing before the High Court, to enable it to form its own opinion, the delegates not being bound to record their reasons. AIR 1968 SC 466 (470), Explained and distinguished. (Para 21)

(I) Parsi Marriage and Divorce Act (1936), S. 46 — Question of law whether constructive desertion has ended by husband's residence in matrimonial home during relevant period, has to be decided by inference drawn from facts — Decision thus is on facts and is liable to be disposed of finally by delegates. (Para 23)

(J) Parsi Marriage and Divorce Act (1936), S. 47 — Question of law whether constructive desertion has ended, is to be decided by inference drawn from facts — Decision of the question therefore, has to be finally disposed of by delegates — High Court will not interfere. (Para 23)

(K) Parsi Marriage and Divorce Act (1936), S. 47 — Ordinarily High Court in appeal will not refer to evidence of parties on question of fact — High Court, however, referred to evidence because of the contention that the delegates ignored the overwhelming evidence on record on certain issues. (Decision of delegates held was not contrary to overwhelming evidence on record). (Para 26)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 466 (V 53) = 1963-1 SCR 617, Sonavati v. Shri Ram 22
 [1959] 1959-3 All ER 131 = 1960 P 26, Fisher v. Fisher 14
 (1937) AIR 1937 SC 176 (V 44) = 59 Bom LR 322, Bipinchandra v. Prabhawati 10
 [1952] 1952 PD 203 = 1952-1 All ER 1076, Perry v. Perry 8
 [1950] 1950 PD 1, Bertram v. Bertram 8
 [1940] 1940 AC 631 = 1940-2 All ER 331, Cohen v. Cohen 12

- (1917) AIR 1917 Bom 10 (I) (V 4) = ILR 42 Bom 155, Rakhamabai v. Mahadeo 13
 [1917] AIR 1917 Mad 512 (V 4) = ILR 39 Mad 987, Singa Reddy v. Subba Reddy 13
 [1911] 1911 PD 191 = 80 LJP 137, Stevenson v. Stevenson 12

H. D. Banaji i/b. Vacha and Co. Attorneys, for Appellant; S. D. Vimadala and C. N. Daji i/b. Little & Co. Attorney, for Respondent.

K. K. DESAI, J.:— This is the defendant's appeal against the decree for divorce made against her on January 20, 1968, in Parsi Matrimonial Suit No. 33 of 1963. The suit was tried by Mr. Justice Kantawala with the assistance of Delegates under the Parsi Marriage and Divorce Act, 1936. The Delegates found that the defendant was guilty of constructive desertion of the plaintiff without lawful cause and against his wishes for a period of over three years. The learned Judge accordingly passed the above decree. In view of the decree, he dismissed the counter-claim made by the defendant for judicial separation. In view of the decree for divorce, he also found that there was no question of considering the alternative relief for judicial separation prayed for by the plaintiff. The question of the custody of children and permanent alimony was directed to stand over. The learned Judge ultimately, upon a subsequent hearing, ordered that the costs to defend the suit be paid by the plaintiff.

2. The plaintiff's case may be shortly summarised as follows:—

On July 1, 1945, the parties were married according to the rites and ceremonies of the Parsee Zoroastrian religion of Poona. The defendant was then a divorcee. There are four issues of the marriage; the eldest and the two youngest being daughters and the second child being a son named Hosang. The four children were, at the date of the suit, of the respective ages of 16, 14, 12 and 10 years. The plaintiff's married life with the defendant had been one of continuous misery and unhappiness and constant violent quarrels. The defendant was a sadist who indulged in perversity and cruelty. She loved to provoke the plaintiff to breaking point and to violence by constantly nagging, abusing, assaulting and humiliating the plaintiff on various pretexts, and on various occasions, without even the least care for the presence of the children, servants, friends and outsiders. Abuses and insults were hurled on the plaintiff by the defendant almost every day throughout their married life until the plaintiff by reason of the conduct of the defendant, was compelled to live apart from the defendant and cease to cohabit with the defendant as husband and wife.

The family had to change residences because of the temperament of the defendant. The parties resided from June 1, 1954, in a bungalow at 26, Pali Hill at Bandra. As a result of the defendant's above conduct, on December 14, 1955, the plaintiff filed Suit No. 41 of 1955 against the defendant for judicial separation. The acts of cruelty which transpired upto that date were all mentioned in the plaint in that suit. The defendant filed a counter-claim. On September 24, 1956, the suit and the counter-claim were allowed to be dismissed by consent. The plaintiff had agreed to the dismissal of the suit at the intervention of friends and thereafter tried his very best to win over the defendant and make it possible for her to have and keep a happy home. Within a short time the defendant exhibited such conduct as made it clear that she had no intention to have a happy married life with the plaintiff. The defendant gave full vent to her wild temperament and committed further acts of assault and cruelty against the plaintiff. The plaintiff failed to bring any sense to the defendant and did not have a happy or peaceful family life. Between September 24, 1956 and October 1959, the plaintiff's married life was completely shattered by innumerable acts of gross cruelty and callousness on the part of the defendant. As a result of the defendant's conduct the plaintiff was compelled to live separately from the defendant and withdrew himself from the marital relations with the defendant. The plaintiff then felt that he could no longer stand the defendant's cruelty and even felt unsafe to reside in the same house with the defendant. The plaintiff was, in the aforesaid circumstances, compelled to leave his own house and stay with friends. In his Attorneys' letter dated October 20, 1959, the plaintiff recorded the facts of the incident which had occurred that morning. The facts disclosed were about the merciless assault by the defendant on the plaintiff's head with a stone in her hand. A complaint had been lodged by the plaintiff with the Bandra Police Station. The plaintiff was treated at a hospital. When the plaintiff went to the house to fetch his clothes, a further scene was created by the defendant. She hurled a big stone at the plaintiff. She had attempted to prevent the plaintiff from driving away in his car and attempted to break the glasses (i.e. spectacles) which the plaintiff was wearing. It has recorded by this letter finally that the acts of the defendant had compelled the plaintiff to leave the matrimonial home. The plaintiff filed suit No. 45 of 1959 against the defendant for judicial separation on the ground of gross cruelty. The defendant filed a counter-claim for judicial separation. The suit was adjourned from session to session and reached hearing in April 1961. Prior to

that date, the defendant had tried to persuade and/or coerce the plaintiff to withdraw the suit. The plaintiff was suffering, a little before April 1961 from Typhoid and was in bed for a long time, and was prevailed upon for the sake of his four children—who were then minors, to withdraw the second suit. The plaintiff was then assured by the defendant that she would not further harass, annoy, or molest the plaintiff in any manner and "would not interfere with the plaintiff living separately from the defendant." The suit and the counter-claim were thus withdrawn in April 1961 by consent of the parties. In this connection in paragraph 10 of the plaint the plaintiff has stated that though by consenting to the withdrawal of the said suits he had tacitly condoned the various acts of cruelty, the same had become revived by reason of the facts and circumstances as set out in the subsequent paragraphs. The defendant had been guilty of further matrimonial offences and her conduct had revived her previous acts of matrimonial offences. Though the suit was withdrawn, the plaintiff had been since October 1959, compelled to withdraw and had withdrawn himself from matrimonial relations with the defendant and had lived apart against his own wishes and only preserved his marriage for the sake of his children. The plaintiff had continued to reside apart from the defendant in view of her acts of gross cruelty and callous conduct. After October 1959 having regard to the above conduct of the defendant, the plaintiff had except for short visits, resided separate from the defendant with other friends and outsiders. During the short visits that the plaintiff had at the residence at Pali Hill, the defendant did not lose any opportunity to further annoy, harass, humiliate and violently quarrel with the plaintiff. She had such quarrels with the plaintiff even at outside places. The defendant, as above created situations which would lead to brawls and fights with the plaintiff and provoked him by abuses, insults and actions to such an extent that the plaintiff was unable to keep control over himself. After Suit No. 45 of 1959 was withdrawn, the defendant made it a point to invent false accusations against the plaintiff and not only provoked quarrels with him at different times and places, but after February 1962 she continuously lodged complaints against the plaintiff and at the police station. False and frivolous complaints were thus lodged about 9 or 10 times within one week of March 1962. According to the plaintiff, these accusations and complaints were made because the plaintiff had withdrawn himself from the marital relations with the defendant. On the basis of the above allegations of facts the plaintiff, in paragraph 17 of the plaint,

pleaded constructive desertion by the defendant in the following manner—

"The plaintiff says and submits that in the circumstances aforesaid, it had become impossible for the plaintiff to cohabit with and have marital relations with the defendant. By reason of the matrimonial offences aforesaid and/or grossly cruel and callous actions of the defendant, the plaintiff was compelled to stay separately from the defendant and continue to stay and withdraw himself from marital relations with the defendant and has thus ceased to cohabit with her since October 1959 till the date of the suit."

The plaintiff charged the defendant of being guilty of constructively deserting the plaintiff without lawful cause and against his own wishes for a period of over 3 years.

3. The defendant by her written statement and counterclaim generally denied the above allegation of cruelty made in the plaint. Her case was that it was the plaintiff's conduct that had made the defendant's married life with the plaintiff one of continuous misery, torture and unhappiness. The plaintiff had behaved in the most cruel, callous, sadistic and brutal manner towards the defendant. In sub-paragraphs (a) to (n) of paragraph 4 of her written statement she gave various incidents of the plaintiff's conduct, as acts of cruelty upto the date of the first suit. In sub-paragraphs (a) to (i) of paragraph 6 of the written statement she related further incidents as acts of gross cruelty of the plaintiff. She denied having been guilty of the conduct as a result whereof the plaintiff could not live with her. She denied that it was unsafe for the plaintiff to reside in the same house with her. She denied that in October 1959 the plaintiff withdrew himself from marital relations with her. According to her, after the summons in Suit No. 45 of 1959 was served on her, the plaintiff came back to the marital home and resumed cohabitation with the defendant. In that connection in paragraph 8 she mentioned that on November 4, 1959, the plaintiff had returned to the marital home. On November 7, 1959 upon his return from Ahmedabad the plaintiff had gone to the Pali Hill residence and informed the defendant that "he had returned home and was going to stay with the defendant." That night the plaintiff had marital relations with the defendant. She also alleged that the parties had marital relations between November 9 and December 10, 1959 twice. She also gave similar incidents of marital relations between the parties in paragraphs 9 and 10 and the subsequent paragraphs. She recited the various acts of cruelty by the plaintiff in March 1960 in paragraphs 11 and 12 of the written statement. She alleged that she was coerced to withdraw

her counter-claim in Suit No. 45 of 1959 by reason of certain conduct of the plaintiff. In connection with the withdrawal of the suit and the counter-claim in April 1961 she stated that the plaintiff has approached her for a reconciliation, pleading for mercy on the ground that he was about to lose his job in the Tata Mills where he was then employed. The defendant herself was entreated and advised by well-wishers not to proceed with the counter-claim as the plaintiff was willing to have the suit dismissed. This, according to her, was the reason why the suit and the counter-claim were, by consent of the parties dismissed in April 1961. She stated that she was not aware and did not admit that the plaintiff had then suffered from typhoid and had been in bed for a long time as alleged by him. She denied having given any assurances to the plaintiff that she would not interfere with the plaintiff living separately from her. She stated that, on the contrary, the plaintiff assured her that he would live peacefully with her and that he would not assault and abuse her. The plaintiff assured her that he would give a separate car for her use and would find a suitable accommodation in the City Limits. She denied that from October 1959 the plaintiff was compelled to withdraw or had withdrawn himself from marital relations with the defendant or had lived apart against his wishes or otherwise, or only preserved the marriage for the sake of the children. Her case was that the plaintiff continued to live and cohabit with her till March 13, 1962. In sub-paragraphs (i) to (u) of paragraph 19 of the written statement she recites various incidents being the acts of cruelty by the plaintiff during the period January 1962 to July 1962. In paragraph 21 she repeated her denial that the plaintiff withdrew himself from the marital relations with her. She stated that cohabitation between the plaintiff and herself continued upto March 13, 1962. She further denied all the statements in the plaint relating to her conduct, or that the same had made it impossible for the plaintiff to cohabit with her or have any marital relations with her. She denied having been guilty of gross cruelty or callous actions or that for the alleged reasons the plaintiff was compelled to stay separately from her, or to continue to stay separately or withdrew himself from the marital relations with her. She denied that she was guilty of constructive desertion.

4. In the amended sub-paragraphs 25 (a) to (e) of the written statement and counter-claim, she referred to the plaintiff's relations with one Bakhtavar Elavia and to the various incidents of intimacy between the plaintiff and Bakhtavar Elavia. She counter-claimed on the ground of gross cruelty that she was entitled to a decree for judicial separation.

In that connection in paragraph 28 she, in the manner the plaintiff had done in the plaint, stated that by reason of fresh acts of cruelty committed after the withdrawal and dismissal of counter-claim in Suit No. 45 of 1959, the previous matrimonial offences of the plaintiff, viz. the acts of cruelty committed by the plaintiff against the defendant previously had become revived, and that the defendant was entitled to rely upon the same for the purpose of the reliefs claimed by her.

5. In reply to the counter-claim the plaintiff generally denied having been guilty of any acts of cruelty against the defendant.

On the above pleadings separate Issues on (i) the written statement and (ii) the counter-claim were framed by the learned Judge. The main issues arising on the written statement, being Issues Nos. 3 and 4, were as follows:—

"Issue No. 3:—Whether the plaintiff has ceased to live and cohabit with the defendant on and from 1959 as alleged.....?"

Issues No. 4:—Whether the defendant to the suit is guilty of constructive desertion of the plaintiff.....?"

6. Upon appreciation of evidence and the summing up of the learned Judge, the Delegates answered the above issues in the affirmative. In the result, a decree for divorce was passed by the learned Judge. The main issue on the counter-claim, being Issue No. 1, was as follows:—

"Issue No. 1:—Whether the plaintiff to the suit and defendant to the counter-claim has been guilty of such cruelty to the defendant to the suit and plaintiff to the counter-claim, or has behaved in such a way as to render it improper to compel her to live with the plaintiff to the suit and defendant to the counter-claim."

The Delegates answered this issue by majority in the negative. As already stated, having regard to the findings made on the issues arising on the written statement, a decree for divorce having been passed, the learned Judge held that the defendant was not entitled to a decree for judicial separation and dismissed the counter-claim.

7. Mr. Banaji for the defendant has made the following contentions in this appeal:—

(1) The withdrawal by the plaintiff of his Suit No. 45 of 1959 in April 1961 amounted to an abandonment by the plaintiff of his right to rely upon the previous acts of cruelty committed by the defendant. These previous acts of cruelty could not be good cause of action for claim for divorce on the ground of constructive desertion. The reconciliation which resulted into the withdrawal of the above suit in April 1961 brought the previous constructive desertion, if any, completely at an end. In law, the plaintiff lost all rights

to rely upon the previous alleged acts of cruelty. The result of the withdrawal of the previous suit was that it was not open to the plaintiff to contend that constructive desertion had commenced at any date prior to April 1961. This was in law the result of the withdrawal of the suit. This being the true legal position, the trial Court should have himself, as on demurrer or in limine, held that constructive desertion had not existed for a period of three years immediately prior to the date of the suit. The learned trial Judge should not have left the matter of the decision of Issues Nos. 3 and 4 arising on the written statement for the decision of the Delegates as questions of facts; he should have himself held that the result of withdrawal of Suit No. 45 of 1959 in April 1961 was that in law all the prior acts of cruelty and desertion had ceased to be available to the plaintiff and the suit had been filed prematurely and was, therefore, liable to be dismissed. The issues should have been answered in the above manner. In the alternative, the submission was that, having regard to the above position in law, the learned trial Judge should have directed the Delegates that the plaintiff was not entitled to rely upon any acts of cruelty of the defendant prior to April 1961. He should have accordingly directed the Delegates to answer Issues Nos. 3 and 4 in the negative.

(2) The second contention was that the findings of the Delegates on these two issues were wholly opposed to the evidence on record and, therefore, perverse and contrary to law. No reasonable body of delegates could have made the findings. The Delegates have failed to take notice of overwhelming evidence led on behalf of the defendant and also brought out in the cross-examination of the plaintiff's witnesses, which went to prove that the plaintiff and the defendant cohabited together and had marital relation at the Pali Hill residence upto March 1962. This court, therefore, should take notice of that evidence and hold that the defendant was never guilty of any constructive desertion; and, on the contrary, the plaintiff and the defendant lived and cohabited together till March 1962.

(3) A similar third contention was that there was overwhelming evidence tendered on behalf of the defendant about the plaintiff's acts of gross cruelty continuously upto the date of the institution of the counter-claim and thereafter. Having regard to that evidence, it was impossible for the Delegates to make a finding in the negative against the defendant on Issue No. 1 on the counter-claim, on the contrary, the finding of the Delegates was perverse and was such as no reasonable body of Delegates could have arrived at. For this reason that finding should be set aside and this court should substitute its

own finding in connection with the question of facts of gross cruelty by the plaintiff, and make a decree for judicial separation in favour of the defendant.

8. In developing the first contention, reliance has been placed on the law regarding the facts necessary to be proved for establishing constructive desertion, and the facts leading to the withdrawal of Suit No. 45 of 1959 in April 1961. Before referring to the authorities cited at the Bar it requires to be recorded that the contention was not raised as mere question of law in the trial Court. In issue, that the suit as instituted was premature (as a result of the withdrawal of Suit No. 45 of 1959) was not raised. On the contrary, it appears from the summing up of the learned Judge that the contention on behalf of the plaintiff was that the previous acts of cruelty alleged in the previous two suits revived as a result of the conduct of the defendant subsequent to the withdrawal of Suit No. 45 of 1959. Reliance in that connection was placed on behalf of the plaintiff on the cases of *Bertram v. Bertram*, (1930) PD 1 and *Perry v. Perry*, (1952) PD 203. The learned Judge referred to these two authorities and pointed out that resumption of cohabitation after desertion by one spouse must mean resuming a state where a matrimonial home is again set up and that involves bilateral intention on the part of both spouses so to set up that home. He explained in short details the ratio of the above two decisions on the question of reconstitution of marital home by consent of parties. On behalf of the defendant, it appears to have been conceded that to bring the previous (constructive) desertion to an end the reconciliation between the parties must be by an agreement not only to live under the same roof, but to do so with intention to break the separation and to live together as husband and wife.

9. As pointed out by the learned Judge, the question that arose for decision by the Delegates was whether the reconciliation was "with the intention of forgetting and remitting the wrong on condition that the spouse whose wrong is so condoned does not thenceforward commit any further matrimonial offence." As pointed out by him, the law was that if a further matrimonial offence was committed, the condonation was cancelled and the old cause of complaint was revived. There appears to have been no dispute at the Bar that the position in law was as above summarised by the learned Judge in his summing up.

10. There was also no dispute between the parties as regards what constituted 'constructive desertion' in law. Both sides appear to have relied in that connection on the observations of the Supreme Court in the case of *Bipinchandra v. Prabha-*

vati", 59 Bom LR 322 = (AIR 1957 SC 176). In his summing up the learned Judge had pointed out to the Delegates the law in this connection as expounded in the above cases. As had been observed in that case, for the offence of desertion, so far as the deserting spouse is concerned two essential conditions must be there, namely, (i) the factum of separation, and (ii) the intention to bring cohabitation permanently to an end (*animus deserendi*). Desertion is a matter of inference to be drawn from the facts and circumstances of each case. If, in fact there has been a separation, the essential question always is whether the act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. If one spouse by his words and conduct compels the other spouse to leave the marital home, the former would be guilty of desertion, though it is the latter who has physically separated from the other and has been made to leave the matrimonial home. Once it is found that one of the spouses has been in desertion, the presumption is that the desertion has continued. In this connection in paragraph 125 in Section 6, under heading "Desertion" at page 195 in "Rayden on Divorce" Tenth Edition, the following relevant passage appears:—

"..... In calculating the period for which the respondent has deserted the petitioner without cause, and in considering whether such desertion has been continuous, no account shall be taken of any one period (not exceeding three months) during which the parties resumed cohabitation with a view to a reconciliation....."

The period of three months is the result of legislative history to be found in the Matrimonial Causes Act, 1965, and the Matrimonial Causes Act, 1963. Paragraph 146 at page 217 deals where parties live under the same roof. It is stated:—

"..... There may be an *animus deserendi* without a separation, as where the parties, though at arm's length, live as one household under the same roof. There would, however, be the factum of separation if in fact the parties lived as two households under the same roof, even where the spouses live, because of compulsion, in the same bedroom....." At paragraph 133 as regards constructive desertion the following appears:—

"..... If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion....."

At paragraph 151, the following appears:

"..... There are many cases of husbands and wives, not insane, but either sick in mind or body, or so stupid, selfish or that they plainly do not appreciate or

foresee the harm which they are doing to the other spouse, they being so self-centred that nothing would ever get the truth into their heads; cruelty can be proved against such a person if his acts are sufficiently grave and really imperil the other spouse, in such case; cruelty is found because the facts are such that, after making all allowances for his disabilities and for the temperament of both parties, it must be held that the character and gravity of his acts are such as to amount to cruelty Where desertion is once established, but, the separation is enforced through other circumstances, the intention to continue desertion must be proved by positive evidence or by negative inference."

Now, as already stated above, there is no dispute between the parties as regards the facts necessary to be proved to establish constructive desertion. There can be no dispute that the parties living under the same roof may have separated and may have ceased to cohabit together; and even in those circumstances can prove that there had been constructive desertion by one spouse as against the other.

11. The first question raised by Mr. Banaji was that the withdrawal of Suit No. 45 of 1959 had the legal consequence of ending the alleged constructive desertion by the defendant during the previous period. In that connection the argument was two-fold; (1) that in law the plaintiff could not rely upon the previous acts on the ground of estoppel and/or the principles to be found in Section 11 and O. 23, R. 1 of the Code of Civil Procedure and (2) that the withdrawal was the result of such reconciliation as ended the previous separation and also the animus deserendi, the intention to bring cohabitation permanently, to an end.

12. Towards proving the ground of estoppel, Mr. Banaji relied upon the decision in the case of *Stevenson v. Stevenson*, (1911) PD 191. He candidly admitted that the observations of the appeal Court in that case were overruled by the House of Lords in *Cohen v. Cohen*, 1940 AC 631. It appears to have been held in the case of *Stevensons* that the institution and prosecution of a petition for judicial separation precluded the petitioner from contending that the period of desertion was running during the time the petition was being maintained. The background of that finding appears to be that the institution of the petition for judicial separation was a compulsion on the other spouse not to reunite with the petitioner in the matrimonial home. The spouse so compelled could not be held to be deserting such a petitioner. In the case of *Cohens*, Lord Justice Romer observed that "the decision in *Stevenson v. Stevenson* in laying down a general principle applicable to all

cases in which a deserted spouse presents a petition for divorce or judicial separation was wrong and should be overruled. The question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be questions of fact, and the determination must depend upon the circumstances of the particular case."

13. Now, having regard to the above observations, there is nothing that is in the case of *Stevensons* on which the contention made by Mr. Banaji can be upheld. As regards the principles of res judicata contained in S. 11, Civil P. C., it must at once be stated that these principles can never be made applicable in a case which has not been heard and finally disposed of and/or adjudicated upon by a Court of competent jurisdiction. Further, to apply the principles contained in Section 11 as well as the provisions under O. 23, R. 1 of Civil P. C., it would be absolutely essential that "the subject-matter" of the two litigations in question must be the same. The relevant provision in sub-rule (3) of Order 23 runs as follows:—

"(3) Where the plaintiff withdraws from a suit, or abandons part of a claim without the permission referred to in sub-rule (2), he shall be liable and shall be precluded from instituting any fresh suit in respect of such subject-matter"

The phrase "subject-matter" as contained in this sub-rule (3) has caused certain difficulties of construction. But it has now been clarified that unless the relief claimed in the previous suit is the same and/or alike as the relief claimed in the subsequent suit, the subject-matters of the two litigations must be held to be different. (See in this connection the decision of the High Court of Madras in the case of *Singa Reddi v. Subba Reddy*, ILR 39 Mad 987 at p. 996 = (AIR 1917 Mad 512 at p. 517) and the observations of the Chief Justice of this Court in the case of *Rakhmabai v. Mahadeo*, ILR 42 Bom 155 = (AIR 1917 Bom 10 (1)).

14. There is no dispute between the parties that Suit No. 45 of 1959 was only for judicial separation. There is no dispute as regards the fact that the acts of cruelty alleged in that suit have been relied upon for the relief of divorce claimed in the present suit. As relief of divorce was not claimed in the previous suit, we are unable to hold that the present suit is in respect of the subject-matter for which the previous suit had been instituted. We are unable to accept Mr. Banaji's contention that on the ground of estoppel the plaintiff was not entitled to rely upon the previous acts of cruelty

and/or the constructive desertion which were alleged in the previous suit. In this connection reliance has been rightly placed on behalf of the plaintiff on the case of *Fisher v. Fisher*, 1959-3 All ER 131. It is not necessary to refer to the facts in that case. So far as we are concerned, it has been held under O. 23, R. 1 that when a suit for a different relief is filed, it cannot be held to be a suit for the same subject-matter.

15. In this connection it may be noticed that the cause of action in respect of desertion and/or constructive desertion remains inchoate till the date of the institution of the suit for divorce on that ground. As claim for divorce was not made in the previous suit, the cause of action and/or the bundle of facts on which reliance could be placed for relief of divorce on the ground of constructive desertion had remained inchoate and accordingly cannot be held to have been made the subject-matter of the previously instituted and withdrawn suit No. 45 of 1969.

16-17. In connection with the facts which led to the withdrawal of the previous suit, we have already referred to the statements made by the parties in the plaint and the written statement. The plaintiff's case was that he had withdrawn himself from the marital relations with the defendant as from October 1959. After that suit was filed the defendant tried to coerce the plaintiff to withdraw the suit in various manners. After the suit was adjourned from session to session but some time before the suit reached hearing in April 1961, he had suffered from typhoid and was in bed for a long time. The plaintiff was prevailed upon for the sake of his four children, who were then minors, to allow the suit to be withdrawn. The plaintiff had been assured by the defendant that she would not harass him and would not interfere with the plaintiff's living separately from her. Though the plaintiff had by withdrawal of the suit tacitly condoned the various acts of cruelty, the same had become revived by reason of the facts and circumstances set out in the paragraphs in the plaint after paragraph 10. (After going through the evidence of the plaintiff and the defendant, his Lordship continued).

18. On the basis of these facts the contention was that the withdrawal of the suit was the result of a reconciliation and an agreement between the parties to continue in marital cohabitation with each other, without any separation, in the same home. The condonation and the reconciliation agreement had the effect of completely wiping out the defendant's acts of cruelty alleged by the plaintiff to have taken place before April 1961. The question of constructive desertion being an inference of law from the fact recited in the evidence, the learned Judge, according to

Mr. Banaji should have held as a matter of law that the plaintiff had ceased to be entitled to rely upon all those previous alleged acts of cruelty. It is difficult to appreciate this submission that the question was of law.

19. The question as to whether the suit and the counter-claim had been allowed to be dismissed by consent of the parties for the reasons mentioned by the plaintiff in his evidence and/or for the reasons mentioned by the defendant in her evidence, cannot be a question of law. In fact, as already stated above, it appears to have been conceded before the learned Judge on behalf of the defendant that the true position in law was that the condonation and/or reinstatement agreed to between the parties may be on condition that the spouse whose wrong was condoned does not thenceforward commit any further matrimonial offence; and that if a further matrimonial offence is committed, the condonation stands cancelled and the old cause of complaint could stand revived. The learned Judge explained this position in law to the Delegates and asked them to decide the question about the fact of the agreement of withdrawal of the suit and the counter-claim on the footing of the above being the position in law and upon an appreciation of evidence which he discussed in his summing up. The learned Judge specifically pointed out that it was the case of the wife that after the incident of October 20, 1959, the husband had resumed cohabitation and they had lived as husband and wife right upto about March 13, 1962. Then he explained the relevant incidents which took place in February, March, May, November and December 1960 and also in February and March 1962 as also in November and December 1959. He drew the attention of the Delegates to the entries regarding the household expenses incurred by the plaintiff and the payments made by the plaintiff in that connection to the defendant. He referred the Delegates to the evidence which Appa Daivi had given. Now, it is not possible to accept the contention that this question should have been decided by the learned Judge as a question of law. He rightly pointed out all relevant evidence and the relevant law in that connection to the Delegates. He rightly left the question of the effect of the withdrawal of the suit and the counter-claim to be decided by the Delegates. We are unable to accept the submission of Mr. Banaji that we should substitute our own finding on this question in the place of the finding that the Delegates must be assumed to have made. The findings which Mr. Banaji wants us to give may be stated as follows: that there is evidence on record that the plaintiff ceased to reside separately from the defendant between May 1960 and March 1962. The plaintiff in

fact had agreed to condone all acts of cruelty by the defendant prior to April 1961. The plaintiff was having marital relations with the defendant from and after May 1960 continuously till the date of the dismissal of the suit in April 1961. That was the effect of the admission of the plaintiff in connection with his having been in the family house at the time when the Navjot ceremony was performed in December 1960; and of the book entries showing that the plaintiff was paying for the household expenses to the defendant, and of the documentary evidence in the shape of the letter (Exhibit 12) and the letter along with which he had sent sweets to his children on his birthday, May 16, 1960; that the dismissal of the suit and the counter-claim was with an agreement that the plaintiff and defendant were to live peacefully as husband and wife.

20. Mr. Banaji has submitted that under Section 47 of the Parsi Marriage and Divorce Act, we have jurisdiction to substitute our own findings to the above effect in the place of the findings of the Delegates. That section runs as follows:

"Sec. 47. An appeal shall lie to the High Court from— (a) the decision of any Court established under this Act, whether a Chief Matrimonial Court or District Matrimonial Court, on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits and on no other ground and". The submission of Mr. Banaji was that the finding about constructive desertion is always an inference of law from facts. The finding of the delegates on the above facts related to the finding that the defendant was guilty of constructive desertion. Therefore, the decision of the Delegates was contrary to law. The further submission of Mr. Banaji was that the finding of the Delegates was contrary to overwhelming evidence and was such as no reasonable body of Delegates could arrive at having regard to the evidence. The finding was, therefore, arrived at, by defective procedure and investigation of the case, which had produced an error and defect in the decision of the case upon the merits. Now, in connection with this submission it first requires to be noticed that the Parsi Marriage and Divorce Act is special law and enacts procedure for decision of matrimonial disputes, including the question of divorce amongst the Parsis. Admittedly the Act clearly provides by Section 46 that in suits under this Act all questions of law and procedure shall be determined by the presiding Judge; but the decision on the facts shall be the decision of the majority of

the delegates before whom the case is tried. Even as regards appeals to the High Court, jurisdiction has been circumscribed by the phrase "on no other ground" in the last part of sub-section (1) of Section 47. The word "law" appears in both the above sections. Now, it is true that it is well settled that the findings of facts arrived at without any evidence at all on record may in law be treated as "erroneous". In a particular exceptional case, it may be proved in an appeal before the High Court that the findings of the delegates had resulted from misconduct. Towards proving misconduct, reliance may be placed on the fact that the finding was impossible having regard to overwhelming evidence in favour of the party alleging misconduct. On such an argument being made, the question of misconduct may be decided by this Court and consequently a conclusion may be arrived at that the findings of the delegates were incorrect.

21. However, on the plain language of Sections 46 and 47, it is clear that all questions of facts are liable to be generally disposed of by the decision of the majority of the Delegates. In this connection, it is relevant to remember that in respect of such decision there will be nothing on the record at any time by way of reasoning on the basis whereof the same is arrived at. The High Court, therefore, in an appeal before it, will not be in possession of any material on an analysis whereof it could make a finding that the reasoning for the decision was incorrect. The scheme of the Act, which does not require the delegates to record the reasoning for their decision, indicates that the Legislature never desired that the Court of Appeal should substitute its own findings on questions of fact. The above scheme of Sections 46 and 47, we apprehend, is enacted by the Legislature at the behest of the Parsi community. This scheme is emphasised by the phrase "on no other ground" as contained in the part of sub-clause (a) of Section 47.

22. In this connection Mr. Banaji relied upon the fact that the provisions in Section 100 of the Code of Civil Procedure regarding second appeals are in language similar to the language in Section 47. He also relied upon the decision of the Supreme Court in the case of Sonavati v. Shri Ram, AIR 1968 SC 466 at p. 470. The argument for the appellant in that case was that the finding of the first appellate Court that one Pritam Singh was in cultivatory possession in 1359 Fasli was binding upon the High Court in second appeal. The Supreme Court negatived that contention on the ground that the appellate Judge had in arriving at his conclusion ignored very important evidence on record and on that

account the conclusion was not binding on the High Court. The effect of the above observations of the Supreme Court is that where the first appellate Court ignores important evidence on record in arriving at certain conclusions, its findings on question of fact may not be binding on the High Court. In making the above proposition the Supreme Court appears to have relied upon its finding that "possession of a person in wrongful occupation cannot be deemed cultivatory possession." In the aforesaid manner the Supreme Court considered the question as question of law and then made the above observations. It has been observed for a number of years in diverse reports of cases as regards the true construction and effect of Section 100 that appeal does not lie on the ground of an erroneous finding of fact. A second appeal would lie if it could be shown that the first appellate Court misdirected itself on a point of law in dealing with the evidence, or when it refused altogether to consider the material evidence on the erroneous ground that it was immaterial. Having regard to the phrase "on no other ground" as contained in Section 47 of the Act, it is difficult to hold that the decision of the delegates on the question of fact is liable to be set aside by the High Court in an appeal. It is difficult to hold that it could be proved in an appeal before the High Court that in arriving at their decision the delegates had failed to consider the material evidence on record. The law having not required the delegates to record the reasoning of their decision, it would be impossible for the High Court to make such a finding. For the same reason, it would be impossible for the High Court to set aside any decision of the delegates on questions of fact on the ground of the same being perverse, or as being unreasonable. As already stated, unless a finding is made that the delegates misconducted themselves in arriving at their decision in respect of questions of fact, the High Court will not be justified in interfering with such decision.

23. This being the true effect and construction of the scheme of Sections 46 and 47, we are unable to accept Mr. Banaji's submission as regards each of the three contentions made by him. Now, in connection with the above finding, it requires to be recorded that on the question of the delegates' findings being perverse, we permitted Mr. Banaji to rely upon the evidence of the plaintiff and his witnesses. He desired to prove by relying upon this evidence that the plaintiff has lived and cohabited with the defendant between May 1950 and March 1962. We did not think that it was permissible and refused to allow Mr. Banaji in that connection to read the evidence tendered on behalf of the defendant. Apparent-

ly the question of law that constructive desertion had ended by the stay of the plaintiff at the residence at Pali Hill during the above period was always liable to be decided by inference to be drawn from the evidence of facts and incidents that transpired during the above period. The decision of that question was thus to be a decision on the facts and the same was, under Section 46, liable to be finally disposed of by the decision of the majority of the delegates. In that connection the important facts appearing in the evidence of the witnesses tendered on behalf of the parties, including the case regarding the plaintiff's stay at the Pali Hill residence and the celebration of Navrot of his two younger daughters in December 1960, the fact of the letter dated July 4, 1960, (Exhibit 12) the fact of the contents of Exhibits 11 and 12, the fact of the picnic at Ellora and Ajanta in which the plaintiff participated, the fact of the arrests of the plaintiff from the residence at Pali Hill twice in March 1962, and all other relevant facts were pointed out by the learned Judge in his summing up to the delegates. The learned Judge also pointed out the facts relating to the plaintiff's relations with Bakhtavar, and that the plaintiff had related in his evidence three incidents as acts of cruelty by the defendant having taken place between April 1961 and the date of the institution of the suit. After all the relevant facts were thus pointed out, the delegates were at liberty to hold that there was sufficient evidence on record and the plaintiff had proved that his stay at the Pali Hill residence was not with intent to restore the matrimonial home with matrimonial relations between the plaintiff and the defendant; that in spite of such stay and in spite of the plaintiff having resided under the same roof and having incurred household expenses and having partaken in some celebrations and picnics, the animus deserendi and the separation had not come to an end. It was permissible for the delegates to hold that the subsequent conduct of the defendant was such as entitled the plaintiff to rely upon her previous acts of cruelty and to prove that the constructive desertion had commenced and continued from before three years prior to the date of the institution of the suit.

24-25. In connection with the above finding, we have read the evidence tendered on behalf of the plaintiff in extenso. (His Lordship went through the evidence and continued.)

26. Ordinarily in an appeal under the Act, this Court being not concerned, reference to the evidence of the parties on question of facts would be unnecessary. In this case, however, we have referred to the above statements of the plaintiff

in his evidence in connection with the second and the third contention that the delegates ignored the overwhelming evidence on record in arriving at their decisions on Issues Nos. 3 and 4 arising on the defences and on Issue No. 1 arising on the counter-claim. We are bound to record that it is impossible to hold that there was no evidence on record on the basis whereof the delegates could have made their findings in respect of these issues. It is also impossible to hold that the delegates did not attach importance to the evidence tendered on behalf of the defendant. All the evidence, including what we have quoted above, was before the delegates. They were at liberty to accept such of the evidence tendered on behalf of the plaintiff as according to them was true and to reject such of the evidence as tendered on behalf of the defendant as according to them was untrue and unreliable. It was permissible for the delegates on evidence on record to hold that though the plaintiff had stayed at the Pali Hill residence between May 1960 and March 1962, the constructive desertion by the defendant of the plaintiff had continued. The plaintiff had not resumed the marital relations with the defendant. The plaintiff had not reconciled himself to anything except to withdraw the prior Suit No. 45 of 1959 for the sake of love and affection for his children. The delegates were entitled to hold that there was evidence that the defendant's conduct had continued to be such as the plaintiff could not continue his marital relations with her and that there was constructive desertion, on the part of the defendant, of the plaintiff. It is difficult to hold that in that connection the delegates ignored the evidence of relationship between Bakhtavar and the plaintiff. It is difficult to hold that in arriving at their decision the delegates did not consider the correctness or otherwise of what is mentioned by Mr. Banaji as overwhelming evidence of cruelty by the plaintiff against the defendant. It is difficult to make a finding that the decision of the delegates is contrary to the overwhelming weight of documentary evidence on record. We are unable to accept Mr. Banaji's submission that we are entitled to substitute our own conclusions on questions of facts decided by the delegates. We are unable to accept his submission that the decision of the delegates is perverse or so unreasonable as ordinarily the delegates could not have arrived at.

27. Under the circumstances, all the contentions made by Mr. Banaji are rejected. The appeal will accordingly stand dismissed.

28. The respondent-plaintiff will pay Rs. 4000/- towards costs of the appellant-defendant.

29. There will be liberty to the Taxing Master to grant an amount exceeding Rs. 1000/-, if he so thinks fit, to the Attorneys of the respondent-plaintiff by way of instructions.

Appeal dismissed.

AIR 1970 BOMBAY 351 (V 57 C 61)

PALEKAR AND VAIDYA, JJ.

Roopchand Raghavji Phande and others, Petitioners v. Shri Abhyankar, Assistant Commissioner of Sales Tax, Sangli, and others, Respondents.

Spl. Civil Appln. No. 2050 of 1969, D/- 8-12-1969.

(A) Sales Tax — Bombay Sales Tax Act (3 of 1953), S. 26(3) — Dissolved firm can be assessed in respect of pre-dissolution turnover — Section 26(3) can be looked into to see intention of legislature, even if declared ultra vires by Gujarat High Court in AIR 1965 Guj 60 — Impediment to assessment is set at rest in enacting Section 19(3) in Bombay Sales Tax Act, 1959.

Clause (3) in Section 26 is a clear indication of the intention of the Legislature to keep alive, notwithstanding its dissolution, the personality of the firm for the purposes of its liability to pay tax incurred by it prior to its dissolution or any other liability incidental or consequential to that liability under the provisions of the Act. The personality of the firm is preserved in spite of its dissolution for the purpose of assessment. AIR 1931 Bom 333 & (1968) 22 STC 165 (Bom) & (1955) 6 STC 657 (Andhra) & AIR 1956 SC 1295, Distinguished. (Paras 20, 30)

Merely because Section 26(3) is declared ultra vires, by Gujarat High Court in AIR 1965 Guj 60 the words used by the Legislature cannot be considered as wiped off the Section for all purposes. Court can take into consideration the words to find out the intention of the Legislature. Further, any doubt or impediment arising out of the provisions of the Bombay Sales Tax Act, 1953, is completely set at rest by the same Legislature while enacting the Bombay Sales Tax Act, 1959, in which express provision, was made by enacting Section 19(3) that a firm was liable to be assessed even after its dissolution.

(Para 30)

In dealing with matters of construction a subsequent legislation may be looked into in order to see what is the proper interpretation to be put upon the earlier Act. It would be legitimate to rely on the provisions of Section 19(3) and hold that the Legislature always intended and did provide a machinery for enforcing the liability of a firm which was a dealer under the earlier enactment. 1962 AC

EN/FN/C477/70/RGD/P.

343 & 1926 AC 143 & AIR 1966 SC 1993 (1998), R.C. 1966, en. (Para 33)

This provision is further clarified by the provisions contained in Section 34. Furthermore, the words "including any penalty" in Section 19(3) of 1950 Act show that even after the assessment if the tax assessed is not paid by the firm, it was liable to be proceeded against under the provisions of the Act providing for a penalty. AIR 1966 SC 1295, Expl. and Distinguished: AIR 1961 SC 609 & AIR 1962 SC 970, Relied on. (Para 34)

(B) Civil P. C. (1908), Preamble — Interpretation of statutes — Taxing statute — Machinery provisions to be liberally and reasonably applied. AIR 1940 PC 124 & AIR 1963 SC 1062 (1965), Relied on. (Para 28)

(C) Constitution of India, Article 226 — Procedure — Declaring enactment ultra vires — Notice to Advocate-General is essential.

Normally the High Court would not declare a Section of the legislature ultra vires even when the Court is required to do so without giving notice to the Advocate-General in that behalf. When the petitioners did not at any time move the Court for issuing such a notice, it is not possible for the Court to proceed on the footing that the Section is ultra vires. (Para 30)

(D) Civil P. C. (1908), Preamble — Interpretation of statutes — Section 26(3), Bombay Sales Tax Act 1953, declared ultra vires by Gujarat High Court in AIR 1965 Guj 60 — Bombay High Court can look into section for collateral purpose to find out what was intended by Section 26(3) with regard to a firm as a legal entity after its dissolution for purpose of enforcing its tax liability for period before dissolution. (Para 30)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 670 (V 55) — 1968-63 ITR 240, Commr. of I. T. M. P. Nappur and Bhandara v. Dewas Cine Corp. 20

(1969) 1968-21 STC 263 — 1968 J&B LJ 97 (SC), Addl. Tahasildar v. Gendalal 26

(1969) 1968-68 ITR 425 — 1963-I 1TJ 257 (Bom), Commr. of I. T. (Central) Bombay v. Devidayal and Sons 25

(1968) (1968) 22 STC 165 (Bom), Commr. of Sales Tax v. Alimullah, Haji Salamat 24

(1967) 1967-1 AC 472 — 1967-1 All ER 42 (HL), Shop and Store Development Ltd. v. Commr. of Inland Revenue 27

(1966) AIR 1966 SC 1295 (V 53) — 1966-17 STC 326, State of Punjab v. Jullundur Vegetables Syndicate 26, 24

(1966) AIR 1966 SC 1995 (V 53) — 1966 Cri LJ 1538, State of Bihar v. S. K. Roy 33

(1965) AIR 1965 SC 145 (V 52) — 1965-16 STC 318, State of Rajasthan v. Ghasilal 33

(1965) AIR 1965 Guj 60 (V 52) — (1965) 16 STC 329, State of Gujarat v. Ramanlal Sankatchand and Co. 30

(1964) AIR 1964 SC 625 (V 51) — 1964-51 ITR 285, Commr. of I. T. A. P. v. Raja Reddy Mallaram 36

(1964) AIR 1964 SC 1095 (V 51) — 1964-51 ITR 823, Shivram Poddar v. I. T. Officer, Central Circle No. 2, Calcutta 36

(1963) AIR 1963 SC 1062 (V 50) — 1963-3 SCR 893, Gursahal Saigal v. Commr. of I. T. Punjab 28

(1962) AIR 1962 SC 970 (V 40) — 1962-44 ITR 739, Commr. of I. T. v. Angidi Chettiar 35, 36

(1962) 1962 AC 343 — 1961-2 All ER 882, Payne v. Bradley 33

(1961) AIR 1961 SC 609 (V 48) — 1961-41 ITR 425, C. A. Abraham v. I. T. Officer Kottayam 26, 35, 36

(1958) AIR 1958 SC 560 (V 45) — 1958-9 STC 353, State of Madras v. Gannon Dunkerley & Co. 30

(1955) 1955-6 STC 857 (Andhra), Dy. Commr. of Commercial Taxes, Guntur Division, Guntur v. K. Bakthavatsalam Naidu 25

(1940) AIR 1940 PC 124 (V 27) — 67 Ind App 239, Commr. of I. T. v. Mahaliram Ramdas 28

(1931) AIR 1931 Bom 333 (V 18) — 33 Bom LR 388, Commr. of I. T. Bombay v. Ellis C. Reid 23

(1928) 1928 AC 143 — 13 Tax Cas 400, Ormond Investment Co. v. Betts 33

(1925) 1925-10 Tax Cas 83 — 1926 AC 31, Whithney v. Commr. of Inland Revenue 28

S. P. Mehata with I. M. Munim, V. H. Patil and V. P. Metha, for Petitioners; R. K. Joshi, I/b. Little and Co., Attorneys, for Respondents.

VAIDYA, J.:— These two petitions under Article 220 of the Constitution of India raise an important question relating to assessment of a dissolved partnership firm under the Bombay Sales Tax Act, 1953, and the Bombay Sales Tax Act, 1959. Miscellaneous Application 564 of 1965 is a petition filed on the Original Side of this Court which is directed, at the instance of the petitioners therein, to be heard along with the Special Civil Application No. 2050 of 1969 filed on the Appellate Side of this Court.

2. Miscellaneous Application No. 564 of 1965 is filed by M/s. Muralilal Mahabirprasad, petitioner No. 1, a dissolved firm, and its former partners, petitioners 2 to 5. The firm was constituted under

a deed of partnership dated December 3, 1953. It carried on business as Importers, Commission Agents, Indenting Agents, del Credere Agents and Financiers, at 30 Commercial Chambers Masjid Bunder Road, Bombay 3, and also as wholesale dealers in colours, chemicals, dyes, spices, condiments and as general merchants. The petitioners alleged that the firm was dissolved under a deed of dissolution dated May 20, 1962. Petitioners 2 to 5 and one Sultanchand Lala Sardarimal Jain (who died on 10th March 1965) were the partners of the firm. It was registered as a dealer both under the Bombay Sales Tax Act, 1950 (1952?) and the Bombay Sales Tax Act 1953. According to the petitioners the firm discontinued its business from May 1961 and the winding up of the business was done by petitioner No. 5 with the assistance of petitioners 2 to 4 who were ordinarily residing in Delhi.

3. The said turnovers of the said firm were assessed by the Sales Tax authorities for the periods from July 1953 to March 31, 1958 on the basis of the returns filed by the firm under various assessment orders passed prior to its dissolution, the last order being dated October 11, 1960 in respect of the period from April 1, 1957 to January 11, 1958. On November 10, 1960, the Sales Tax Officer (VIII), Enforcement Branch, Bombay, visited the office of the petitioners' firm and seized its stock-books, account-books for 1958-1961 and other documents. These seized documents were inspected and verified by the said officer in his office between November 10, 1960 and November 20, 1963 for the purposes of assessment of the firm for the period from 1/4/1958 to 31/3/1961 calling the representatives of the firm from time to time. The firm was represented in these proceedings by a Sales Tax Practitioner. It is further alleged in the petition that the Sales Tax Officer, B-II Ward, had called upon the firm by his letter dated June-1, 1961 to produce its deed of dissolution on June 13, 1961, and accordingly the firm produced the said deed of dissolution after the said date and also surrendered their certificate of registration, authorisation and licences under the Bombay Sales Tax Act and also the Central Sales Tax Act, to the Sales Tax Officer, B-II Ward, Bombay on June 13, 1962, and as the firm had already closed its business as stated above in or about May 1961, the Sales Tax Officer, B-II Ward had by his order dated June 26, 1962 cancelled the Central Sales Tax Registration Certificate as well as the registration certificate, authorisation and licence under the Bombay Sales Tax Act, of the firm.

4. In spite of this, however, on November 20, 1963, the Sales Tax Officer (VIII), Enforcement Branch, who is respondent No. 1 in this petition, sent a

notice to the firm to explain several items and discrepancies discovered in the books of accounts by him as a result of the verification of the seized account-books and other documents. Another notice was also sent on the said day to the firm purporting to be under Section 15 of the Bombay Sales Tax Act, 1953, calling upon the firm to show cause why the assessment already made for the period from 1/4/1957 to 31/3/1958 should not be reopened and reassessment made regarding the turnovers which had escaped assessment. It is alleged in the petition that on April 13, 1964, petitioner No. 1 sent a reply through their advocate contending that all transactions were not of the firm but many of them were on behalf of the constituents for whom the firm was acting as Commission Agents.

5. On December 8, 1964, however, a further show-cause notice was served on the firm to explain several discrepancies in the books of accounts of the firm. A reply to that notice was sent by the firm on December 21, 1964 stating that the transactions were old, their employees had left their service, they had explained most of the transactions and that they would explain the remaining entries at the final hearing after taking full extracts thereof. It is further alleged in the petition that as Sultanchand Lala died suddenly in Delhi due to heart-attack on March 10, 1965, the partners of the firm had to go to Delhi, and hence on April 3, 1965, a letter was addressed to the respondent No. 1, the Sales Tax Officer (VIII), Enforcement Branch, requesting him to fix up the matter for hearing in May 1965, that respondent No. 1 issued a notice thereafter on May 26, 1965 addressed to the petitioner No. 1 firm intimating that the case would be taken up for hearing from day to day from June 14, 1965 and the partners should be present and no adjournment would be granted. According to the petitioners, the said notice was served on a wrong firm by name M/s. Murarilal Balkrishan by hand-delivery, but realising the mistake, a copy of the notice was sent by registered-post to the old address of the petitioner-firm which was received by an unauthorised person and not by or on behalf of petitioner No. 1 firm. It is also alleged that on June 17, 1965, another notice was sent by respondent No. 1 to the firm and it was returned by postal-authorities with the endorsement "Addressee had left", the said notice dated June 17, 1965 called upon the petitioner No. 1 to attend the office of the respondent No. 1 on July 8, 1965.

6. Thereafter on August 31, 1965, respondent No. 1 passed five orders. The first was an assessment order for the period from April 1, 1957 to March 31,

1958, by which the respondent No. 1 held that Rs. 1,95,582.47 P. was to be paid by the petitioner No. 1-firm as sales tax in respect of suppressed sales and purchases which escaped assessment (the firm having elected to pay sales-tax). The second order was passed in respect of the period from April 1, 1958 to March 31, 1959, by which the petitioner-firm was held liable to pay sales-tax of Rs. 2,20,070.08 P. and deducting therefrom Rs. 13,518.13 P. which the firm had paid along with the returns, the petitioner-firm was directed to pay the balance of Rs. 2,06,551.95 P. In the said order, the respondent No. 1 gave detailed reasons for all the orders and gave a summary of the verification made by him of the books of accounts and other documents of the petitioner No. 1-firm. The third order was in respect of the period from April 1, 1959 to December 31, 1959, and by this order the respondent No. 1 found that the petitioner No. 1-firm had suppressed transactions worth Rs. 32,82,340/- in respect of sales and Rs. 32,88,442/- in respect of purchases. The petitioner No. 1-firm was called upon to pay the balance of tax amounting to Rs. 1,60,074.53. By his fourth order which related to the period from January 1, 1960 to March 31, 1960 the petitioner-firm was held to be liable to pay Rs. 18,960.00, and after deducting Rs. 2,202/- paid by the petitioner No. 1-firm the balance was ordered to be paid by the petitioner No. 1-firm. The fifth order related to the period from April 1, 1960 to March 31, 1961 by which the petitioner No. 1-firm was held liable to pay total tax of Rs. 1,02,083.70 and was directed to pay the balance after deducting Rs. 12,283.29 which the firm had paid along with the returns. Thus, under these five assessment orders, a total sum of Rs. 6,56,365.47 was found due on the sales and purchases suppressed by the petitioner No. 1-firm from the sales-tax authorities as against Rs. 32,908.85 which was paid by them with the returns, and the petitioner No. 1-firm was held liable to pay the balance of tax of Rs. 6,70,639.96 including the balance of proper taxes payable on the sales which were shown in their returns by the petitioner No. 1-firm.

7. The petitioners alleged in the petition that the said five assessment orders with their respective demand notices in respect of the respective periods were sent by registered-post to the petitioner No. 1-firm's office address on October 6, 1965, but they were not received by the petitioner No. 1-firm. On October 22, 1965 the notices were affixed by a Sales-Tax Inspector to the former office of the dissolved petitioner No. 1-firm. As petitioner No. 5 was out of India from October 2, 1965 till November 7, 1965, petitioner No. 4 was informed by a trunk-call

by the Firm of Messrs Murarilal Balkissan who were occupying the premises of petitioner No. 1-firm about the pasting of the notices to the office-premises. Thereafter the petitioners inquired about the matter and came to know about the assessment orders and demand-notices issued against the petitioner No. 1-firm calling upon them to pay the dues before November 17, 1965. The petitioners therefore, filed the petition under Article 226 of the Constitution on the Original Side of this Court on November 24, 1965.

8. The petition was declared by petitioner No. 5. Petitioner No. 4 also filed an affidavit in support of the petition, declaring that he was one of the partners in Messrs. Murarilal Balkissan, but that Firm, though occupying the premises formerly occupied by petitioner No. 1, was a different firm, and Ramavtar, who was the person who had received the notice addressed to petitioner No. 1-firm, was never an employee of the dissolved petitioner No. 1-firm. The petition challenged the assessment orders and the demand notices on several grounds set out in para 17 of the petition which may be summarised as falling under three main heads, viz. (i) that the Sales Tax authorities had passed the impugned order without giving a fair and proper opportunity to the petitioner No. 1-firm notwithstanding that the petitioner No. 1-firm had done everything to co-operate with the sales-tax authorities in the course of the verification of the documents and accounts-books since the time of the seizure on 10th November 1960, and further that the orders passed were arbitrary and in violation of principles of natural justice; (ii) that since the suit firm was dissolved prior to the various assessment orders, the said assessment and re-assessment made by the respondent No. 1 were without jurisdiction and contrary to the provisions of the Bombay Sales Tax Act, 1953 and the Bombay Sales Tax Act, 1959; and (iii) that the said order were passed by the respondent No. 1 without applying his mind properly to all the documentary evidence before him and on the basis of mere guess work and conjectures without any legal evidence before him.

9. The petition was filed against the respondent No. 1, the Sales Tax Officer (VIII), Enforcement Branch, Greater Bombay, respondent No. 2, the Commissioner of Sales Tax; and respondent No. 3, the State of Maharashtra. The petitioners prayed that a writ in the nature of certiorari or any other appropriate writ under Article 226 of the Constitution may be issued against the respondents quashing and setting aside the aforesaid five orders dated 31st August 1965 and the corresponding demand-notices dated 30th

September 1965 and also for an injunction or direction against the respondents from enforcing the said orders.

10. The petition was resisted by the respondents who rely on an affidavit in reply filed by the respondent No. 1. In his affidavit, he contends that the assessment orders and demand notices were issued in exercise of the powers vested in him under the provisions of the Bombay Sales-tax Act, 1953 and the Bombay Sales Tax Act, 1959, and he had passed the assessment orders and issued the demand notices after duly following the procedure prescribed under the said Acts. Although in the affidavit, he stated that the fact of the dissolution of the petitioner No. 1-firm was not brought to his notice and no intimation about the dissolution of the said firm was given to the Sales Tax Department as required by the said Sales Tax Acts, it is not disputed on behalf of the respondents now before us that the deed of dissolution was produced before the Sales Tax Officer, B-II Ward and that the said Sales Tax Officer had directed the cancellation of the registration and licences and authorisation issued to the petitioner No. 1-firm as stated by the petitioners in their petition. Respondent No. 1 has further stated that the initial notices having been served on the petitioner No. 1-firm relating to the assessment and reassessment proceedings before him, it was the duty of the petitioner No. 1-firm to be present at the hearing before the Sales Tax authorities at the time specified for hearing and to take adjournments from time to time. He has given the summary of the proceedings and contended that full opportunities were given to the petitioner No. 1-firm for remaining present and making submissions and representations with regard to the orders which he proposed to pass, and in spite of this, the petitioner No. 1-firm failed to remain present before him after March 11, 1965 and hence he had to pass the orders ex parte against petitioner No. 1-firm. He has further contended that the orders which he had passed were all validly passed after taking into consideration all the submissions and representations made on behalf of the petitioner No. 1-firm by its representatives, and after applying his mind to all the transactions noted in the books of accounts and other documents which were seized from the petitioner No. 1-firm in accordance with law. On behalf of the petitioner No. 1-firm a further affidavit in rejoinder was filed by petitioner No. 5 reiterating the contentions in the petition.

11. In view of these pleadings, the questions involved in the petition are, (i) whether the impugned assessment orders and demand notices were authorised under the Bombay Sales Tax Act, 1953

and the Bombay Sales Tax Act, 1959, after the dissolution of the petitioner No. 1-firm on May 20, 1962; (ii) whether the respondent No. 1 followed the procedure laid down by law in passing the said orders and issuing the said demand notices; and (iii) whether the assessment and reassessment made against the petitioner No. 1-firm is proper and based on the turnovers of the petitioner No. 1-firm as stated in the said orders. Although the petitioners approached this Court under Art. 226, they had also filed appeals against the assessment orders, and those appeals are admittedly pending before the Assistant Commissioner of Sales Tax, and hence it will not be proper for this Court at this stage to decide the second and third questions involved in the petition. The only question, therefore, which survives is with regard to the right of the Sales-tax authorities to assess or reassess a dissolved firm in respect of its pre-dissolution turnovers under the Bombay Sales Tax Act, 1953 and the Bombay Sales Tax Act, 1959. It is a question which goes to root of the proceedings against the petitioners under the said Acts.

12. In Special Civil Application No. 2050 of 1969 the four petitioners are four out of the six partners of a dissolved firm Messrs. Ramchand Motichand Phade. The firm was constituted under a deed of partnership dated April 14, 1959 and was carrying on business in sugar, oil and oil seeds at Akluj, Taluka Malshiras, District Sholapur. The firm was dissolved with effect from October 28, 1962 under a deed of dissolution dated November 1, 1962, and discontinued its business. Prior to its dissolution, it was registered as a dealer under the Bombay Sales Tax Act and had filed returns and paid the taxes and was also assessed in respect of the periods from 1-4-1955 to 31-3-1956, 1-4-1956 to 31-3-1957, and 1-4-1957 to 31-3-1958. In spite of this on February 3, 1966, two show-cause notices were issued to the firm, one under Section 31 of the Bombay Sales Tax Act, 1953, to show cause why the assessment orders passed against the firm should not be revised as it was found that the firm had sold some goods in contravention of the undertaking given by it in the certificates furnished by it in Form 'J', and as such, it was liable to pay the purchase-tax on the transactions covered by Form 'J'. The second notice was issued under Section 39-A of the said Act to show cause why penalty should not be levied on the firm for contravening the undertakings given in the said certificates in 'J' Form. In reply to the said notices, the four petitioners admitted that there were some sales in contravention of the said undertaking in Form 'J' but contended that it was not a fit case for levying a penalty under Section 39-A. The Assistant Commissioner of Sales Tax, Central

Division, Range III, Sangli, the Respondent No. 1 in the petition, however, rejected the contentions of the petitioners and passed three orders on March 31, 1966. By the first order which covered the period from 1-4-1955 to 31-3-1956 he held that during the period the firm was also liable to pay the purchase-tax in respect of purchases worth Rs. 96,000/- made from the Brihan Maharashtra Sugar Syndicate, and this liability was admitted by the dealer who appeared for the firm before him, and the dealer had no objection to the revision of the assessment order previously passed. After considering the submissions made on behalf of the firm, he ordered that a penalty of Rs. 3,000/- and purchase-tax of Rs. 3,000/-, totalling Rs. 6000/-, was to be recovered from the firm. The second order related to the period from 1-4-1956 to 31-3-1957. By that order the respondent No. 1 held that the firm was liable to pay the purchase tax amounting to Rs. 11,952/- and penalty of Rs. 11,952/-, totalling Rs. 23,904/-. The third order related to the period from 1-4-1957 to 31-3-1958, and for the reasons stated in the first order, the respondent No. 1 ordered that purchase-tax of Rs. 3,251.85 should be paid by the firm in respect of the purchases which had escaped assessment together with a penalty of Rupees 3,251.85, totalling Rs. 6,502.70. Feeling aggrieved by the said orders, petitioner No. 2, who described himself as a partner of Messrs. Ramchand Motichand Phade, has filed three appeals on June 22, 1966 before the Deputy Commissioner of Sales Tax, Central Division, Poona, Respondent No. 2, and the said appeals are pending before the Deputy Commissioner since that date.

13. The petitioners have moved this Court under Article 226 contending that the assessment-orders were passed without jurisdiction by respondent No. 1. Inasmuch as, there was no specific provisions under the Bombay Sales Tax Act, 1953 authorising the Sales Tax authorities to assess a partnership firm after its dissolution, and that after the dissolution of the partnership firm, no action whatsoever could be validly initiated in the name of the firm, and in spite of this, respondent No. 2 was prolonging the passing of the orders on the appeals even after bearing the appeals as far back as February 20, 1967, and once again, exhaustively, on December 12, 1968. The petitioners further contended that in any event the case being one which would be reassessed under Section 15, the respondent No. 2 could not exercise his powers of revision under Section 31 of the Bombay Sales Tax Act, 1953, and hence the respondent No. 2 ought to have set aside the orders passed by the respondent No. 1, but the respondent No. 2 was postponing the passing of the orders in appeal filed

by the petitioners. The petitioners, therefore, prayed that a writ may be issued to the respondent No. 2 by this Court in exercise of its powers under Articles 226 and 227 of the Constitution of India quashing and setting aside the orders passed by respondent No. 1, or in the alternative, a writ in the nature of mandamus be issued against the second respondent asking him to give his decision in the said appeals heard by him as soon as it was possible. The petitioners further prayed for a writ directing the respondents to refund Rs. 36,407.70 which they had paid before filing the aforesaid appeals. The petitioners have joined the State of Maharashtra as Respondent No. 3 in this petition.

14. The respondents have resisted the petition relying on an affidavit in reply filed by the Commissioner of Sales Tax, Maharashtra State. In that affidavit, it is inter alia contended that the appeals were not being decided by the respondent No. 2 because the question of the validity of assessment of dissolved firm was a subject-matter of a reference made by Maharashtra Sales Tax Tribunal to this Court, and the reference and several other petitions are pending in this Court involving the same question. He submits that although the firm of Messrs. Ramchand Motichand Phade was dissolved with effect from October 28, 1962, it could still be assessed in view of the provisions of Section 19 of the Bombay Sales Tax Act, 1959, which, according to the respondents, was an express provision authorising the assessment of a firm even after its dissolution under the earlier law i.e., the Bombay Sales Tax Act, 1953. Respondent No. 2 denied the other contentions made on behalf of the petitioners and submitted that the petition was liable to be dismissed with costs.

15. Even in this petition, as appeals are already filed by the petitioner No. 2 against the assessment orders pending before the respondent No. 2, we shall deal only with the question of the right of the Sales Tax authorities to assess a firm after its dissolution in respect of its pre-dissolution turnovers. As this question is common to the two petitions, they shall be disposed of by a common judgment.

16. Thus the common ground on which the petitioners have challenged the impugned orders in the two petitions is that there is no provision authorizing the Sales Tax authorities for assessing a dissolved firm under the provisions of the Bombay Sales Tax Act, 1953 and the Bombay Sales Tax Act, 1959. There is no dispute that the firms in the respective petitions were in fact dissolved by deeds of dissolution long before the impugned orders of assessment, reassessment and orders of penalty were respectively passed against them by

the Sales Tax Officer. But what is contended on behalf of the respondents is that the dissolved firms continued to be assessable units in respect of their liability to pay the taxes under the Bombay Sales Tax Act, 1953 and the Bombay Sales Tax Act, 1959, on the turnovers of the firm prior to the dissolution. It is, therefore, necessary to consider the provisions in the two Acts, if any, on the subject of assessment of a dissolved firm.

17. The material provisions of the Bombay Sales Tax Act, 1953, referred to in the course of the arguments as relevant are the following:—

Section 2(6) defines a "dealer." It reads:

"Dealer means any person who carries on the business of selling or buying goods in the Pre-Reorganization State of Bombay excluding the transferred territories, whether for commission, remuneration or otherwise and includes a State Government which carries on such business and any society, club or association which sells goods to, or buys goods from, its members."

Section 5 as far as is relevant is as follows:—

"(1) Every dealer whose turnover either of all sales or of all purchases made during—

(a) the year ending on the 31st March 1954, or

(b) the year commencing on the 1st April 1954 has exceeded or exceeds—

(i) in the case of a dealer who brings any goods into the State of Bombay or to whom any goods are despatched from any place outside the State of Bombay whether by land, water or air, Rs. 10,000/- provided that the aggregate value of the goods so brought or despatched during the said period is not less than Rs. 2,500/-;

(ii) in the case of a dealer who produces, collects, extracts, manufactures or processes any goods Rs. 10,000/- provided that the value of the goods produced, collected, extracted, manufactured or processed during the said period is not less than Rs. 2,500/-;

(iii) in the case of any other dealer Rs. 25,000/- shall be liable to pay the tax under this Act on his turnover of sales and his turnover of purchases made on or after the appointed day....."

Then Section 14 so far as relevant is as follows:—

(1) The amount of the tax due from a registered dealer shall be assessed separately for each year during which he is liable to pay the tax.....

(2) If the Collector is satisfied without requiring the presence of a dealer or the production by him of any evidence that the returns furnished in respect of any period are correct and complete, he shall assess the amount of the tax due from the dealer on the basis of such returns,

(3) (a) If the Collector is not satisfied without requiring the presence of a dealer who has furnished his returns or the production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at a place specified therein either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns or such other evidence as may be specified in such notice,

(b) On the date specified in the notice or as soon afterwards as may be, the Collector shall, after considering such evidence as the dealer may produce and such other evidence as the Collector may require on specified points, assess the amount of the tax due from the dealer,

Then Section 15 is as follows:—

(1) If in consequence of any information which has come into his possession the Collector is satisfied that any turnover in respect of sales or purchases of any goods chargeable to the tax has escaped assessment in any year or has been underassessed or assessed at a lower rate or any deductions have been wrongly made therefrom, the Collector may, in any case where such turnover has escaped assessment or has been underassessed or assessed at a lower rate for the reason that the provisions of sub-section (1) of Section 2 of the Bombay Sales Tax (Validating Provisions) Act, 1957 were not then enacted, at any time, within eight years, and in any case whether he has reason to believe that the dealer has concealed the particulars of such sales or purchases or has knowingly furnished incorrect returns, at any time within eight years and in any other case at any time within five years, of the end of that year, serve on the dealer liable to pay the tax in respect of such turnover a notice containing all or any of the requirements which may be included in a notice under sub-section (3) of S. 14 and may proceed to assess or reassess the amount of the tax due from such dealer and the provisions of this Act shall apply accordingly as if the notice were a notice served under that sub-section:—"

Section 16 is as follows:—

(1) The tax shall be paid in the manner hereinafter provided at such intervals as may be prescribed.

(2) Before any registered dealer furnishes the returns required by sub-section (1) of Section 13, he shall, in the prescribed manner, pay into a Government treasury the full amount of the tax due from him according to such returns.

(3) Before any registered dealer furnishes a revised return in accordance with sub-section (2) of S. 13 which shows a

greater amount of tax to be due than was payable in accordance with the original return, he shall pay into a Government treasury the extra amount of the tax.

(4) If the tax is not paid by any dealer within the prescribed time, the dealer shall pay, by way of penalty in addition to the amount of tax a sum equal to

(i) one per cent of the amount of tax for each month for the first three months after the expiry of the prescribed time, and

(ii) two and one-half per cent for each month subsequent to the first three months as aforesaid,

during which he continues to make default in the payment of the tax.

Provided that where the tax has not been paid by any dealer within the prescribed time but the dealer has filed an appeal or an application for revision in respect of such tax, the authority hearing the appeal or the application for revision may direct that the penalty in respect of any period shall be paid at such rate as it may think fit, the rate being not less than one per cent, and not more than two and one-half per cent, of the amount of tax for each month:

Provided further that the Collector, may, subject to such conditions as may be prescribed remit the whole or part of the amount of the penalty payable by a dealer in respect of any period under this sub-section.

(5) (i) The amounts of tax—

(a) due where the returns are furnished without full payment thereof, or

(b) assessed for any period under Section 14 or under Section 15 less the sum, if any, already paid by the dealer in respect of such period, or

(ii) the amount of the penalty payable under sub-section (4)

shall be paid by the dealer into a Government treasury by such date as may be specified in a notice issued by the Collector for this purpose and the date to be so specified shall be not less than thirty days from the date of service of such notice;

Provided that the Collector may, in respect of any particular dealer and for reasons to be recorded in writing extend the date of such payment or allow such dealer to pay the tax due and the penalty if any, by instalments.

(6) Any amount of the tax together with the penalty, if any, which remains unpaid after the date specified in the notice issued under sub-section (5) shall be recoverable as an arrear of land revenue." Section 26 so far as is relevant is as follows:

(1)

(2)

(3) (i) When a firm liable to pay the tax is dissolved, or

(ii) Where an undivided Hindu family liable to pay the tax is partitioned, such firm or family as the case may be shall be liable to pay the tax on the goods allotted to any partner or member thereof as if the goods had been sold to such partner or member unless he holds a certificate of registration or obtains it within the prescribed period.

(4)

18. A full and fair consideration of these provisions shows that under the Bombay Sales Tax Act, 1953, a firm was regarded as an assessable unit if it was a dealer. Although the Act did not contain a definition of the word "person" used in Section 2 (6), the definition of that word contained in Section 3 (35) of the Bombay General Clauses Act, 1904, would be attracted in interpreting the word "dealer" as defined under the Bombay Sales Tax Act, 1953. The said Section 3 (35) defines "person" as follows:—

"'person' shall include any company or association or body of individuals, whether incorporated or not."

Again the firm as a dealer incurred a liability to pay a tax on its turnover subject to the conditions laid down in Section 5. It was liable to be assessed for determining the taxes due from it as long as its business continued. Section 26 (3) clearly shows the intention of the Legislature to make the firm liable for assessment, reassessment and penalties under the Bombay Sales Tax Act, 1953 even after its dissolution. In our opinion, this is a conclusion which clearly emerges on a careful consideration of the relevant provisions, scheme and object of the Bombay Sales Tax Act, 1953.

19. The liability under the Act is imposed under Section 5 on a dealer. That section, which is the charging section under Act, makes a dealer liable to pay the tax under the provisions of the Act on his turnovers of sales and purchases. Section 6 lays down—

"(1) Subject to any rules made under Section 18-B there shall be paid by every dealer who is liable to pay tax under this Act,

(i) Sales tax or purchase-tax on his sales or purchases in accordance with the provisions of Section 7-A,

(a) a sales tax on his sales levied in accordance with the provisions of Section 8,

(b) a general sales tax on his sales levied in accordance with the provisions of Section 9, and

(c) a purchase tax on his purchases levied in accordance with the provisions of Section 10,

(d) a tax on his purchases levied in accordance with the provisions of S. 10-AA.

These sections are contained in Chapter III which deals with the "Incidence and levy of tax". Chapter IV deals with "Re-

gistration of and Grant of Licences and Authorizations to Dealers." Chapter V deals with "Returns, Assessment, Payment, Recovery and Refund of the tax and levy of tax on purchases", and Section 13 therein requires every registered dealer and any other dealer who is called upon by the Collector to furnish such returns by such dates and to such authority as may be prescribed. So far as the facts of these petitions are concerned, it is not in dispute that the two firms had filed their returns in respect of the relevant periods even prior to their dissolution under Section 13. Section 13 requires the returns to be filed at the end of the quarter. Section 14 of the Act deals with the assessment of taxes payable by the dealers either accepting the returns by the dealers or after further verification. It seems to us that the "registered dealer" referred to in this section must be understood to mean a dealer who is liable to pay the taxes. Section 15 again refers to the reassessment of a dealer in respect of sales or purchases of any goods chargeable to the tax which escaped assessment in any year or has been underassessed or assessed at a lower rate, or any deductions have been wrongly made therefrom. It empowers the Collector to assess or reassess the turnovers at any time within eight years in respect of certain turnovers which escaped assessment for the reason that the provisions of sub-section (1) of Section 2 of the Bombay Sales Tax (Validating Provisions) Act, 1957, were not enacted, and in any other case at any time within five years of the end of that year in which the turnovers had escaped assessment or were wrongly assessed. The section requires the Collector to serve a notice on the dealer liable to pay the tax. It is difficult to assume that the Legislature could have given these powers to the Collector to reassess the dealers liable to pay the tax without regard to the fact that when dealers are firms they may be dissolved at any time within the said period of five years. Section 16 which refers to payment and recovery of taxes, non-payment of taxes and penalty to be payable in respect of such non-payment, also refers to a registered dealer. Chapter VI of the Act deals with the "liability to produce accounts, to supply information and to pay the tax in the case of transfer of business", and imposes all these duties under Sections 22, 23, 24 and 25 on the dealers. What was meant by the Legislature in referring to the dealer in all these sections is clearly indicated in Section 26 which deals with the subject of the liability of a transferee of business to pay tax. Clause (1) of that section deals with a case where the entire ownership of the business of a dealer is transferred and holds both the transferor and the transferee jointly and severally liable to pay the tax.

Clause (2) of that section deals with a case of a transfer of a part of the business, Clause (3), which is already quoted above, deals with the liability to pay the tax after dissolution of a firm or a partition of Hindu joint family. The Legislature knew very well that after the partition of a Hindu joint family, the joint family, ceases to exist as such, and after the dissolution of a firm who was the dealer under the ordinary law, the firm would cease to exist as a firm under the general law except for the purpose of winding up and for making the former partners liable to third parties till publication of the notice of dissolution as required by law.

20. In spite of this position under the general law, the Legislature when enacting clause (3) of Section 26 laid down that even after the partition of the undivided Hindu family the family shall be liable to pay the tax on the goods allotted to any member thereof as if the goods had been sold to such member unless he holds a certificate of registration. Similarly, even after the dissolution of a firm, the firm is made liable to pay the tax on the goods allotted to any partner notwithstanding its dissolution. In our judgment, this clause in Section 26 is a clear indication of the intention of the Legislature to keep alive, notwithstanding its dissolution, the personality of the firm for the purposes of its liability to pay tax incurred by it prior to its dissolution or any other liability incidental or consequential to that liability under the provisions of the Act. The personality of the firm is preserved in spite of its dissolution by laying down that the firm will be liable to pay tax on the goods allotted to any partner. We do not think that it would be straining the language of provisions of this Act to say that the entire machinery of enforcing the liability to pay the tax set up under the Bombay Sales Tax Act, 1953, indicates that once a dealer incurs a liability to pay tax, that dealer whether a firm or individual or corporation continues to be regarded as separate assessable unit for all purposes of the Act. Once the liability to pay the tax is preserved the machinery which deals with all dealers would be available to the Sales Tax authorities to enforce that liability against even a dissolved firm.

21. This conclusion of ours is supported by a consideration of Chapter VIII of the Act which deals with "offences and penalties," Section 36 of which inter alia, lays down that a dealer, who fails to furnish any return or statement as required by Section 13 or furnishes a false return or statement, or who fails to keep a true account of the value of the goods brought and sold by him as required by Section 22, or fails to comply with any requirement made of him under Section 23, or who knowingly produces in-

correct account, registers or documents, or knowingly furnishes incorrect information, is liable to be prosecuted. Section 36-A provides—

"(1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:"

It will be difficult to hold that this liability to be prosecuted for the offences under the Act, which is imposed not only on the firm but also on its partners who were in charge of and responsible for the firm for the conduct of its business, would come to an end and the moment the firm comes to an end by a dissolution.

22. It is true that the Bombay Sales Tax Act, 1953, does not expressly state that a firm will be deemed to be in existence for the purposes of assessment, recovery of tax and penalties etc. On a proper consideration of the entire scheme of the Act and the aforesaid provisions, in our opinion, it must necessarily lead to the conclusion that the Legislature clearly intended that once a firm was a dealer as defined in the Act liable to pay the tax, it was liable to pay the taxes and liable to be assessed as a separate assessable unit or legal entity even after its dissolution. It is manifest on a fair reading of the Act as a whole that a Vinculan juris is established between a firm who is liable to pay tax under the Act and the Sales Tax authorities who have to assess and recover taxes for which the firm is liable. The dissolution of the firm by acts of the partners cannot put an end to the liability of the firm and its existence as an assessable unit under the provisions of the Act. The liability of the firm is to file returns for payment of taxes, to be assessed and reassessed if certain turn-overs have escaped assessment, to pay taxes or penalties imposed by the authorities on the firm under the provisions of the Act and to furnish information called for by the authorities. There is even the liability to be prosecuted in case of certain defaults by the partners. All these liabilities necessarily imply that the law keeps the firm alive as a legal entity or an assessable unit, notwithstanding its dissolution, for all the purposes of the Act in respect of its predissolution liability to pay taxes and all matters incidental and consequential to the making of that liability effective. This is clearly indicated as stated above by words of Section 26 (3).

23. It is, however, contended on behalf of the petitioners that such an interpreta-

tion would be contrary to the well-known strict rules of interpretation of a taxing statute. Reliance was placed on the said rules as enunciated and followed in several cases. The first case relied upon on behalf of the petitioners was Commr. of I. T., Bombay v. Elis C. Reid, 33 Bom LR 388 = (AIR 1931 Bom 333), which was a case under the Indian Income-Tax Act, 1922. In that case an assessee had been asked to file a return of his income under Section 22 (2) of the Indian Income-tax Act, 1922, but he died before he did so, and it was held that it was not competent to the Income-tax Officer to make an assessment under Section 33 (4) of the Income of the deceased after the assessee's death. Beaumont, C. J. referred to the definition of the word "assessee" given in Section 2(2) of the Income-tax Act which read: "Assessee" means a person by whom Income-tax is payable", and came to the conclusion that that definition in terms only applied to a living person, the words being "a person by whom income-tax is payable", and not "a person by whom or by whose estate income-tax is payable", and then observed after referring to the charging Section 3 of the Act

"There appears to be nothing in that charging section to suggest that a man who has once become liable to tax can avoid payment by dying, and must confess that I do not myself see any intelligible reason why when tax is once charged upon a subject in respect of a period during which he was alive and enjoying the benefits of the proceeds of taxation, he should escape liability by dying before the tax has been assessed or paid. But one has to look at the rest of the Act to see whether there are any appropriate provisions for collecting tax from the estate of a deceased person. I think there is nothing else material in the Act till one comes to Sections 22 and 23 which are the sections dealing with the procedure for assessment."

He then proceeded to consider the provisions of the Act and held that there was throughout the Act no reference to the deceased of a person on whom the tax had been originally charged, and it was very difficult to suppose the omission to have been unintentional, and then went on to observe—

"It must have been present to the mind of the legislature that whatever privileges the payment of income-tax may confer, the privilege of immortality is not amongst them. Every person liable to pay tax must necessarily die and, in practically every case, before the last instalment has been collected, and the legislature has not chosen to make any provisions expressly dealing with assessment of, or recovering payment from, the estate of a deceased person."

He further observed:

"In my judgment, in construing a taxing Act the Court is not justified in straining the language in order to hold a subject liable to tax. If the legislature intends to assess the estate of a deceased person to tax charged on the deceased in his lifetime, the legislature must provide proper machinery and not leave it to the Court to endeavour to extract the appropriate machinery out of the very unsuitable language of the statute....." Strong reliance is placed on the last quoted observation of the learned Chief Justice by the learned Counsel for the Petitioner who contend that one has to extract the appropriate machinery for enforcing the liability of a dissolved firm in respect of its pre-dissolution turnovers, even in the present cases. In our opinion, there is no merit in this contention and the above case decided by the learned Chief Justice Beaumont and Mr. Justice Barlee can be easily distinguished. In that case also, with respect, the Court considered the provisions of the Act and found no reference to the estate of the person on whom the tax had been originally charged. That is not the position in the present cases. We have already referred to the relevant provisions of the Act and particularly Section 26(3) which specifically deals with the dissolution of the firm and it cannot be contended that the Legislature did not provide a machinery for imposing liability which it had imposed on a firm prior to its dissolution.

24. The learned Counsel for the petitioners also relied on the decision in Commissioner of Sales Tax v. Allimullah Haji Salamat, (1968) 22 STC 165 (Bom) in which a Division Bench of this Court held that no assessment proceedings can be initiated against a person as the legal representative of the deceased, in the absence of any specific statutory provision in that behalf under the Bombay Sales Tax Act, 1953. It is urged that similarly, in the absence of specific statutory provision providing for assessment of a dissolved firm, it is not open to us to hold that a dissolved firm could be proceeded against either by way of reassessment or assessment after its dissolution. With respect, that decision was right on the facts of the case, because there was no provision under the Bombay Sales Tax Act, 1953 imposing a liability to pay taxes on the legal representative of a deceased dealer. That, however, is not the position so far as the firm is concerned as pointed out above. It is made liable to pay tax after its dissolution. Hence the case is distinguishable.

25. Reliance was also placed on a decision in Dy. Commr. of Commercial Taxes, Guntur Division, Guntur v. K. Bakthavatsalam Naidu, (1955) 6 STC 657 (Andhra) in which a Division Bench of the Andhra High Court consisting of Subba Rao, C. J.

and Satyanarayana Raju, J., as they then were, held that under the Madras General Sales Tax Act a firm was a 'dealer' and therefore, in respect of a transaction done by a firm, which was in existence during the assessment year but was dissolved subsequently, it was the firm that was to be assessed to tax and not any of its partners in their individual capacity. That decision again turned upon a construction of the particular provisions in the Madras General Sales Tax Act, 1939, which did not charge the partners of the firm but charged only the firm, and hence it cannot help the petitioners in their contention.

26. Support was also sought from the decision of the Supreme Court in State of Punjab v. Jallundur Vegetables Syndicate, (1966) 17 STC 326 = (AIR 1966 SC 1295), in which the Supreme Court laid down as follows:—

"It is a settled rule of construction that in interpreting a fiscal statute the Court cannot proceed to make good the deficiencies, if there be any, in the statute; it shall interpret the statute as it stands and in case of doubt, it shall interpret it in a manner favourable to the tax-payer: See C. A. Abraham v. Income-tax Officer, Kottayam, (1961) 41 ITR 425 at p. 431 = (AIR 1961 SC 609 at pp. 612-13)....." Applying this rule of construction, the Supreme Court examined the East Punjab General Sales Tax Act, 1948, and the rules made thereunder and came to the conclusion that the Act and the Rules did not make any provision for assessment of a firm after its dissolution. It was in view of that conclusion that Subba Rao, J., as he then was, speaking for the Court, held that the impugned assessment order on the dissolved firm could not be supported under the provisions of the Act, and confirmed the order of the High Court of Punjab quashing the assessment order. But the judgment in that very case shows that the Supreme Court observed that Sec. 16 of the East Punjab General Sales Tax Act, 1948, which was relied on behalf of the State of Punjab, did not expressly state that a dealer, if it happens to be a firm, continued to have legal existence even if it had ceased to be a firm, nor did the section permit a necessary implication to that effect. It is, therefore, difficult to appreciate how this decision of the Supreme Court can help the petitioners in contending that even where a firm is charged with a liability to pay the tax expressly as under S. 5 of the Bombay Sales Tax Act, 1953, and a machinery for enforcing that liability is by necessary implication provided in the Act itself, a dissolved firm could not be assessed. Similarly, the Supreme Court decision in Addl. Tahasildar v. Gendalal, (1968) 21 STC 263 (SC) which merely followed the earlier deci-

sion in (1966) 17 STC 326 = (AIR 1966 SC 1295) does not advance the case of the petitioners any further.

27. In holding that the Bombay Sales Tax Act, 1953, provided for a complete machinery for enforcing the liability of a dissolved firm, particularly in view of the clear indication of the intention of the Legislature in Section 26(3), we are giving effect to the words used by the Legislature without straining any language used by the statute. We have merely followed the well known principles of construction of a taxing statute which may be stated in the words of Lord Morris, as expressed in *Shop and Store Development Ltd. v. Commr. of Inland Revenue*, (1967) 1 AC 472, at p. 493—

"My Lords, the decision in this case calls for a full and fair application of particular statutory language to particular facts as found. The desirability or the undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision. The result reached must be that which is directed by that which is enacted."

We are definitely of the opinion that on a full and fair consideration of the provisions contained in the Bombay Sales Tax Act, 1953, the conclusion to which we have reached is one 'which is directed by what is enacted by the legislature'.

28. Furthermore, we are concerned in these petitions with order of reassessment under Section 15 and the orders of assessment under Section 14 of the Bombay Sales Tax Act, 1953. These sections provide for a machinery for assessing and reassessing a dealer who is liable to pay sales tax. The rules of interpretation of even taxing statutes, so far as the machinery sections of the statutes are concerned, are more liberal and must be reasonably applied (See *Commr. of Income-tax v. Mahaliram Ramjidas*, AIR 1940 PC 124, and *Gursahai Saigal v. Commr. of Income-tax, Punjab*, (1963) 3 SCR 693 at p. 900 = (AIR 1963 SC 1062 at p. 1065)). In the latter case the Supreme Court approved the following observations of Lord Dunedin in *Whitney v. Commrs. of Inland Revenue*, (1925) 10 TC 88, 110, at page 900:—

"My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property

are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery. If the person taxed does not voluntarily pay."

And the Supreme Court further approved in that case the rule regarding the interpretation of the machinery, laid down by the Privy Council in *Mahaliram Ramjidas's case*, AIR 1940 PC 124 and observed:

"The proper way to deal with such a provision is to give it an interpretation which, to use the words of the Privy Council in *Mahaliram Ramjidas's case* 'makes the machinery workable, utres valeat potius quam pereat'."

29. Now, in the present cases the liability of the firms to pay taxes in respect of the predissolution turnovers cannot be disputed by the petitioners. We find on a fair reading of the various provisions contained in the Bombay Sales Tax Act, 1953, that this liability is enforced by necessary implication by providing that the firm would continue to be liable to be assessed or reassessed as the case may be even after its dissolution as a legal entity or as an assessable unit. This, in our judgment, is made crystal clear by the language of Section 26(3), where the Legislature has in unmistakable terms made the firm liable for sales tax even after its dissolution in respect of the goods allotted to a partner. For these reasons, the contention on behalf of the petitioners that our conclusion regarding the machinery provided for enforcing the liability of a dissolved firm to pay taxes is contrary to the rules of construction of a taxing statute must be rejected.

30. It was next contended that such a conclusion principally based on the wording of Section 26(3) is erroneous, because Section 26(3) was enacted by the legislature for the specific purpose of creating a legal fiction of sale regarding allotment of goods, and this legal fiction is held to be ultra vires the powers of the Bombay Legislature in *State of Gujarat v. Ramnath Sankalchand and Co.*, AIR 1965 Guj 60 = (1965) 16 STC 329. In that case a Division Bench of the Gujarat High Court consisting of J. M. Shelat and P. N. Bhagwati, JJ. as they then were, held that Section 26(3) in so far as it purported to tax allotment of goods of a firm amongst partners on dissolution was ultra vires the State Legislature, because in enacting that section what the Legislature did was not to enact an ancillary or subsidiary provision intended to ensure the proper and effective functioning of the main legislation under Entry 54 of List II of the Seventh Schedule to the Constitution, but to directly and expressly bring to tax a transaction which was not a sale within the mean-

ing of the Indian Sale of Goods Act by fictionally treating it as such sale. This decision was substantially based on the decision of the Supreme Court in *State of Madras v. Gannon Dunkerley and Co.*, AIR 1958 SC 560 = (1958) 9 STC 353. It is also true that in *Commr. of Income-tax, Madhya Pradesh, Nagpur and Bhandara v. Dewas Cine Corpn.* (1968) 68 ITR 240 = (AIR 1968 SC 676) in the context of the Indian Income-tax Act also, the Supreme Court was of the view that the expressions "sale" and "sold" had to be interpreted according to the ordinary meaning of the said words; and that 'Sale' was a transfer of property for a price, and adjustment of the rights of the partners in a dissolved firm by allotment of its assets was not a transfer, nor was it for a price. But the petitioners did not allege in the petitions before us that they were relying on the ultra vires nature of the Section 26(3). Normally this Court would not declare a section of the legislature ultra vires even when the Court is required to do so without giving notice to the Advocate-General in that behalf. The petitioners did not at any time move this Court for issuing such a notice. Hence it is not possible for us to proceed on the footing that the section is ultra vires. Even assuming that the decision of the Gujarat High Court is correct, that does not preclude us from looking into the section to find out whether the legislature intended to provide a machinery for enforcing the liability of a dissolved firm. If the Court wants to declare a section ultra vires, the Court has to look into the section. Here we are only looking into it for a collateral purpose for finding out what was intended by the legislature with regard to the question of a firm as a legal entity after its dissolution for the purposes of enforcing its liability to pay taxes. When the section was enacted, it was an integral part of the statute, and we cannot refuse to see what is stated in the statute. We have to give full effect and meaning to all the words used by the legislature, and we have no difficulty in holding, as stated above, that Section 26(3) clearly indicates the mind of the legislature to continue the firm as a legal entity after its dissolution for the purposes of assessment, reassessment or for imposing penalty under the Bombay Sales Tax Act, 1953. What is declared ultra vires by the Gujarat High Court is only the legal fiction which the legislature wanted to create by describing allotment of the goods of a firm amongst its partners as a sale. That object of the Legislature might be in contravention or beyond the powers conferred on the Legislature by Entry 54 (Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I) contained in List II of the Seventh Schedule to the Constitution. Merely be-

cause that section is declared ultra vires, the words used by the Legislature cannot be considered as wiped off the section for all purposes. We can take into consideration the words to find out the intention of the Legislature. Further, any doubt or impediment arising out of the provisions of the Bombay Sales Tax Act, 1953, is completely set at rest by the same Legislature while enacting the Bombay Sales Tax Act, 1959, in which express provision, to which presently we shall refer, was made by enacting that a firm was liable to be assessed even after its dissolution.

31. The relevant provisions of the Bombay Sales Tax Act, 1959, which came into force on January 1, 1960, may now be considered. The material portions of the relevant sections referred to in the course of the arguments are as follows:

32. Section 2(11) defines a "dealer". It reads—

"dealer" means any person who whether for commission, remuneration or otherwise carries on the business of buying or selling goods in the State, and includes the Central Government, or any State Government which carries on such business, and also any society, club or other association of persons, which buys goods from, or sells goods to, its members;

Section 2(19) defines a "person":

"Person" includes any company or association or body of individuals, whether incorporated or not, and also a Hindu undivided family, a firm and a local authority;"

Section 15(1) as far as is material states—

(1) Where a dealer, liable to pay tax under this Act,—

(a)

(b)

(c) is a firm, company, society or other association of persons, or a trust, which is dissolved, liquidated, wound up or revoked, or

(d)

(e)

and the stock of goods held by such dealer immediately before the dissolution, liquidation, winding up, revocation as the case may be, includes taxable goods purchased by him on a certificate given by him under Section 11 or 12, then, there shall be levied a purchase tax on the purchase price of such taxable goods at the relevant rate of purchase tax applicable thereto as if such dealer had become liable to pay purchase tax on such goods under Section 14:

Section 18 is as follows:

"Notwithstanding any contract to the contrary, where any firm is liable to pay tax under this Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment:

Provided that, where any such partner retires from the firm, he shall be liable to pay the tax and the penalty (if any) remaining unpaid at the time of his retirement, and any tax due up to the date of retirement though unassessed at that date."

Section 19(3) is—

"Where a dealer, liable to pay tax under this Act, is a firm, and the firm is dissolved, then every person who was a partner shall be jointly and severally liable to pay to the extent to which he is liable under Section 18, the tax (including any penalty) due from the firm under this Act or under any earlier law, up to the time of dissolution, whether such tax (including any penalty) has been assessed before such dissolution but has remained unpaid or is assessed after dissolution....."

Just as in the case of the Bombay Sales Tax Act, 1953, the firm is made liable as a dealer to pay the tax subject to the conditions mentioned in Section 3 of the Bombay Sales Tax Act, 1959. There are provisions for registration, licences, authorisations, recognitions, and permits relating to the firm as dealer under Chapter IV of the Act of 1959. Section 32 requires the dealer to file returns of turnovers done by the firms prior to their dissolution. Section 33 empowers the Sales Tax authorities to assess a dealer. Section 34 provides—

"Where in respect of any tax (including any penalty) due from a dealer under this Act or under any earlier law, any other person is liable for the payment thereof under Section 19, all the relevant provisions of this Act or, as the case may be, of the earlier law, shall in respect of such liability apply to such person also, as if he were the dealer himself."

Section 35 empowers the Sales Tax authorities to reassess a dealer in respect of escaped turnovers or suppressed transactions. It is not necessary to refer to any other provisions of the Act for the purposes of the disposal of these petitions except Sections 76 and 77 under which the Bombay Sales Tax Act, 1953 was repealed but was kept in force for the purposes of the levy, assessment, re-assessment, collection, refund or set-off of any tax or the granting of a drawback in respect thereof, or the imposition of any penalty, which levy, assessment, re-assessment, collection, refund, set off, drawback or penalty related to any period before the appointed day on which the Bombay Sales Tax Act, 1959 came into force.

33. It is patent that in using the words in Section 19(3) viz. "Whether such tax (including any penalty) has been assessed before such dissolution but has remained unpaid or is assessed after dissolution", the Legislature has clearly expressed its mind to provide a machinery for assessing a

dissolved firm. It is a well settled principle in dealing with matters of construction that a subsequent legislation may be looked into in order to see what is the proper interpretation to be put upon the earlier Act when the earlier Act is obscure or ambiguous or readily capable of more than one interpretation. In *Payne v. Bradley*, 1962 AC 343, Lord Denning relying on the decision of the House of Lords in *Ormond Investment Co. v. Betts*, 1928 AC 143, observed—

"It is permissible to look at a later statute, not perhaps to construe the earlier statute, but to see the meaning which Parliament puts on the self-same phrase in a similar context, in case it throws any light on the matter,"

The decision of the House of Lords in 1928 AC 143 has been approved by the Supreme Court in *State of Bihar v. S. K. Roy*, AIR 1966 SC 1995 at p. 1998. The same Legislature which enacted the Bombay Sales Tax Act, 1953, enacted the Bombay Sales Tax Act, 1959, and kept the earlier Act in force in respect of all liabilities incurred under the earlier law by dealers. Hence, it would be legitimate to rely on the provisions of Section 19(3) and hold that the Legislature always intended and did provide a machinery for enforcing the liability of a firm which was a dealer under the earlier enactment inasmuch as in effect Section 19(3) provided that the firm continued to be a legal entity even after its dissolution for the purposes of assessment, reassessment, penalty, etc. under the earlier Act, as well as under the Bombay Sales Tax Act, 1959. Section 19(3) deals expressly with the dissolved firm and lays down that after dissolution, every person who was a partner shall be jointly and severally liable to pay to the extent to which he is liable under Section 18 the tax (including any penalty) due from the firm. The words "tax due" means tax ascertained after assessment, (See the decision of the Supreme Court in the State of Rajasthan v. Ghasilal, (1965) 16 STC 318—(AIR 1965 SC 145)). This necessarily implies that the Legislature laid down that the firm could be assessed as a firm in spite of the dissolution. Section 19(3) refers to the liability of a partner as a liability to the extent to which he is liable under Section 18 which lays down—

"Notwithstanding any contract to the contrary, where any firm is liable to pay tax under this Act. The firm and each of the partners of the firm shall be jointly and severally liable for such payment:"

The extent referred to in Section 19(3) is only the extent referred to in the proviso to Section 18, which lays down—

"Provided that, where any such partner retires from the firm, he shall be liable to pay the tax and the penalty (if any)

remaining unpaid at the time of his retirement, and any tax due up to the date of retirement though unassessed at that date."

Otherwise, the liability of a partner is co-extensive with the liability of the firm although the partner himself was not liable individually as a dealer. This provision is further clarified by the provisions contained in Section 34 which is already quoted above. Thus, the Legislature made it abundantly clear that for the dues of the firm, both under the earlier law and under the provisions of the Bombay Sales Tax Act, 1959, the firm as well as its partners were liable to be assessed and in certain circumstances, reassessed. Furthermore, the words "including any penalty" in Section 19(3) shows that even after the assessment if the tax assessed is not paid by the firm, it was liable to be proceeded against under the provisions of the Act providing for a penalty. It is, therefore, clear that once the liability was incurred by a firm as a dealer, the Sales Tax Law, both under the Acts of 1953 and of 1959, continued the firm as a legal entity for all the purposes of the said Acts, although in the event of a dissolution the partners were also made liable jointly and severally for the dues of the firm.

34. It is, however, contended on behalf of the petitioners that this conclusion of ours is contrary to the decision of the Supreme Court in AIR 1966 SC 1295 = (1966) 17 STC 326, because even in that case, it was urged before the Supreme Court relying on Rule 40 of the East Punjab General Sales Tax Rules, 1949, that because that rule laid down that a dealer and his partner or partners shall be jointly and severally responsible for payment of the tax, penalty or any amount due under the Act or the Rules, the Act provided for a machinery for assessing a firm after its dissolution. But the Supreme Court rejected this contention observing—

"It only imposes a joint and several liability on the dealer and its partners for the payment of tax, penalty or any amount due under the Act or the Rules. It does not provide for a case of the dissolution of a firm and the assessment of the dissolved firm.

"Nor the provisions of the Partnership Act can possibly be called in aid to resuscitate a dissolved firm for the purpose of assessment. They deal only with the relationship between the partners and their rights and liabilities. They have no bearing on the question of assessment under a different statute. There is, therefore, a lacuna in the Act, which was filled up later on by an Amending Act; but the said Amending Act, it is conceded, is not retrospective in operation."

With respect, Their Lordships were quite right in holding that Rule 40 was not con-

cerned with the dissolved firm and as there was no other provision in the Act or the Rules providing a machinery, there was a lacuna therein. But that is not the position so far as the Acts with which we are concerned in these petitions. We have already pointed out above that the entire machinery for enforcing the liability of dealers is provided under both the Acts of 1953 and 1959, and the Legislature clearly intended that where a dealer is a firm the firm or the dealer will continue to be liable to be assessed in respect of the firm's liabilities as a separate legal entity, and there is no lacuna in these Acts as found by the Supreme Court in AIR 1966 SC 1295.

35. On the contrary that very decision refers to the two earlier decisions of the Supreme Court in (1961) 41 ITR 425 = (AIR 1961 SC 609), and Commr. of Income-tax v. Angidi Chettiar. (1962) 44 ITR 739 = AIR 1962 SC 970, and distinguished those cases on the ground that Section 44 of the Income-tax Act set up a machinery for assessing the tax liability of firms which had discontinued their business, because the said provision was an express provision for assessing a dissolved firm. In (1961-41 ITR 425 = AIR 1961 SC 609) the Supreme Court had to construe the effect of Section 44 of the Income-tax Act, 1922, prior to its amendment by Act 11 of 1958 which read as follows:

"Where any business, profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment."

These provisions, in our opinion, are in pari materia with the provisions contained in Section 19(3) read with Section 18, and Section 34 of the Bombay Sales Tax Act, 1959, and while considering Section 44, Mr. Justice Shah speaking for the Court observed—

"In effect, the Legislature has enacted by Section 44 that the assessment proceedings may be commenced and continued against a firm of which business is discontinued as if discontinuance has not taken place. It is enacted manifestly with a view to ensure continuity in the application of the machinery provided for assessment and imposition of tax liability notwithstanding discontinuance of the business of firms. By a fiction, the firm is deemed to continue after discontinuance

for the purpose of assessment under Chapter IV."

36. This effect has never been challenged in any later decision. On the contrary, the same interpretation is followed in (1962) 44 ITR 739 = AIR 1962 SC 970, and the later decisions in Shivram Poddar v. Income-tax Officer, Central Circle II, Calcutta, (1964) 51 ITR 823 = (AIR 1964 SC 1095) and Commr. of Income-tax, Andhra Pradesh v. Raja Reddy Mallaram, (1964) 51 ITR 285 = (AIR 1964 SC 825). This Court has also followed the decision in Abraham's case, (1961) 41 ITR 425 = AIR 1961 SC 609 in the Commr. of Income-tax (Central), Bombay v. Devidayal and Sons, (1966) 68 ITR 425 (Bom). It is impossible to hold that even though the provisions contained in Sections 18, 19(3) and 34 of the Bombay Sales Tax Act, 1959 are similar to the provisions of Section 44 of the Indian Income-tax Act, 1922, before its amendment in 1958, and although it is well established by weighty authority that the firm continues as a legal entity after its dissolution for the purposes of the Income-tax Act, it does not exist for the purposes of the Sales Tax Act.

37. It is next urged that the construction, which we think is the only proper construction, will lead to an absurd result, because if a firm had only two partners, and both of them die, it would be impossible to assess the firm which continued to be liable. We do not find any substance in this contention because Section 34 makes a partner as if he were a dealer himself and Section 19(1) makes the legal representatives of dealers liable only in certain circumstances. Perhaps, the legislature did not intend to make the legal representatives of the partners of a firm to be liable to the dues of the firm except in the circumstances mentioned in Section 19(1). However, we do not wish to pronounce any final opinion on the point, and we have to deal in the present cases with partners, the majority of whom are living and available for being proceeded against by the sales tax authorities.

38. It was lastly urged that when the bill in respect of the Bombay Sales Tax Act, 1959, was published, Section 44 of the Indian Income-tax Act was already amended by Act 11 of 1958, and as amended, Section 44 clearly stated that the Income-tax Officer shall make assessment of the total income of the firm as if no dissolution had taken place, and if the Legislature wanted to impose any such fiction on a dissolved firm, it would have adopted the same language under the Sales Tax Act. It is true that it would have been better if the legislature had adopted the same phraseology which was adopted by Act 11 of 1958 in substituting the new section for the old Section 44 in

the Indian Income Tax Act, 1922. That, however, does not affect our interpretation of the provisions of the Bombay Sales Tax Act, 1959, as enacted by the Legislature, which must be done on the basis of the words used by the Legislature. Merely because better words or phraseology had not been used by the Legislature, we cannot refuse to give effect to the plain meaning of the words used by the Bombay Legislature, which, according to us, clearly wanted to make a dissolved firm liable to be assessed and proceeded against under the provisions of the Sales Tax legislation.

39. In the result, we hold that the Sales Tax authorities had jurisdiction to proceed against the respective firms in the two cases under the Bombay Sales Tax Act, 1953, as well as under the Bombay Sales Tax Act, 1959, notwithstanding their dissolution as if the firms continued to exist for all purposes under the said Acts.

40. As stated above, we cannot deal with the other questions raised by the petitioners. They raise several questions of fact which cannot be gone into, at this stage. In any event and ordinarily in the exercise of the jurisdiction of the Court under Article 226 of the Constitution, Even the questions raised with regard to the legality of the procedure followed by the Sales Tax authorities can be agitated by the petitioners before the Appellate authorities, and we must not be taken to have expressed any opinion on any questions other than the main question which we have discussed above.

41. For the above reasons, we find no substance in these petitions and the petitions must be rejected. Rule in both the petitions discharged with costs. The petitioners in Miscellaneous Application No. 564 of 1965 shall pay costs on the Long-Cause scale to the respondents. The petitioners in Special Civil Application No. 2050 of 1969 shall pay Rs. 500/- as costs of the respondents.

Petitions rejected.

AIR 1970 BOMBAY 366 (V 57 C 62)

FULL BENCH

KOTVAL, C. J., DESHMUKH AND
PADHYE, JJ.

Kashiram Shriram Doble, Petitioner v. Maharashtra Revenue Tribunal at Nagpur and another, Respondents.

Spl. Civil Appln. No. 333 of 1966, D/-12-6-1969, against order of Maharashtra Revenue Tribunal at Nagpur, D/-23-2-1966.

(A) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region)

EN/EN/C104/70/BDB/D

Act, 1958 (99 of 1958), S. 120 — Bar to jurisdiction of Civil Courts created under S. 124 does not extend to the powers of a Collector under S. 120. (Para 10)

(B) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, (99 of 1958), Preamble — Act mainly provides for relationship of landlord and tenant — It however provides for many other subjects.

The Tenancy Act is not merely a law which governs the relations or provides for the status and rights of tenants or their relationship with their landlords but it purports to provide for many other subjects. In the interests of the general public it also regulates and imposes restrictions on the transfer of agricultural lands and of dwelling houses and lands appurtenant thereto and sites used for allied pursuits belonging to or occupied by agriculturists, agricultural labourers, artisans and persons carrying on allied pursuits. It also provides for the assumption of the management of agricultural lands in certain circumstances, and other matters. Its provisions therefore, do not merely deal with landlords and tenants but many other persons e.g. trespassers on agricultural lands. Its principal provisions however, relate to the acquisition, relinquishment, surrender or transfer of title to or by a tenant and to the safeguarding of the possession of the tenant and the landlord. (Para 11)

(C) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (99 of 1958), S. 120—Words "the said provisions" — Words qualify all three sub-clauses of S. 120.

The subject or context in which the words "the said provisions" are used is really not "transfers" but "persons unauthorisedly occupying or wrongfully in possession of any land." The use of the words "the said provisions" in Cls. (b) and (c) and in the clause "and the said provisions do not provide for the eviction of such person" therefore, refer to the provisions of the entire Act. This clause moreover qualifies not merely Cl. (c) of the section, but all the three Cls. (a), (b) and (c). (Para 14)

(D) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 120 — Summary remedy — Collector must however, make such enquiry as he deems fit and must pass a speaking order. (Para 15)

(E) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 120 — Power of Collector — Collector must see if the application before it complains of unauthorised occupation or wrongful possession — Duties of Collector acting under S. 120 indicated. Obiter observation in Sp. C. A.

529 of 1958, D/- 23-4-1958 (Bom), Dissented.

The two provisions in the Act viz., Section 100 and Section 120 are of equal force, one giving jurisdiction to the Tahsildar to decide whether a person is a tenant and the other giving jurisdiction to the Collector to decide whether any person is unauthorisedly occupying or wrongfully in possession of any land even though he claims to be a tenant. Where such a conflict arises in an application under Section 120, the Collector will have to see whether in substance the application before him is an application complaining of unauthorised occupation or wrongful possession of any person in the first place and if he comes to the conclusion that such a person is unauthorisedly occupying or wrongfully in possession he would have jurisdiction under Section 120 even if that person raises the plea that he is a tenant. The mere raising of the plea would not as in the case of the Civil Court under S. 124, oust the jurisdiction of the Collector. If the dispute is in substance a dispute regarding tenancy, he must refer the matter to the Tahsildar. (The conditions which the Collector has to fulfil while exercising jurisdiction under S. 120 indicated.) Sp. C. A. 278 of 1956, D/- 10-4-56 (Bom) & Sp. C. A. 3207 of 1958, D/- 10-2-59 (DB) (Bom) & Sp. C. A. 3105 of 1958, D/- 1-4-1959 (Bom) & Sp. C. A. 1370 of 1962, D/- 15-7-1963 (Bom) & (1969) 71 Bom LR 523, Rel. on; (Obiter observation in Sp. C. A. 529 of 1958, D/- 23-4-1958 (Bom); Dissented). AIR 1960 Bom 56 (FB) & AIR 1956 Bom 706, Dist. (Para 18)

Cases Referred: Chronological Paras

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| (1963) Spl. C. A. No. 693 of 1962 D/- 22-3-1963 = 1963 Mah LJ (Notes) 90, Dinkar Rao Aburao Shirole v. Jayawant Rao Tukaram Sawant | 26 |
| (1963) Spl. Civil Appln. No. 1370 of 1962, D/- 15-7-1963 (Bom), Rural Product Co. Ltd. v. Laxman Davlu | 22 |
| (1960) AIR 1960 Bom 56 (V 47) = 61 Bom LR 957 (FB), Nivarutti Laxman Kondobahiri v. Shivdayal Laxminarayan Sarda | 28 |
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- (1956) Spl. Civil Appln. No. 278 of 1956, D/- 10-4-1956 (Bom) 20, 22, 23
- (1955) 57 Bom LR 65, Shankar Raoji v. Mahadu Govind 12

J. N. Chandurkar, for Petitioner; S. N. Kherdekar and V. S. Sirpurkar, for Respondent No. 2; G. B. Gandhe, R. N. Deshpande and G.G. Madkholkar, for Interveners.

KOTVAL, C. J.:— This reference raises an important question as to the jurisdiction of the Collector under Section 120 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (Bombay Act No. 99 of 1958), and it arises in this way.

2. Survey No. 39/1, area 19.34 acres of village Wadegaon, District Akola belonged to Madhao, the respondent No. 2 in the petition. On 20th October 1964 Madhao the respondent No. 2 made an application for possession under Sec. 120 of that Act against Kashiram the present petitioner alleging that he Madhao was cultivating the fields in the years 1962-63 and 1963-64 but that the petitioner Kashiram took unlawful possession without any right in the year 1964-65. Kashiram was merely appointed to help Madhao and his family in the cultivation of the lands and taking advantage of his position he entered into wrongful possession over the lands. The respondent No. 2 alleged that the petitioner was a mere trespasser. The application was filed before the Sub-Divisional Officer Akot who has the powers of the Collector under Section 120.

3. In reply to the application the petitioner contended (1) that he was a tenant and, therefore, in lawful possession. The respondent No. 2 had given the field to him for cultivation "on batai terms" and the petitioner had accordingly cultivated the same and acquired the rights of a tenant over the same. (2) that the Sub-Divisional Officer had no jurisdiction to evict the petitioner under Section 120 of the Act; (3) that "the applicant (the present respondent No. 2) should first get a suitable order from the Court of the Tahsildar that this N. A. (the petitioner) is not a tenant and it is only then that he can make his present application under Section 120. This be treated as preliminary ground and the application be dismissed. To decide whether a person is

or is not a tenant is exclusive jurisdiction of the Tahsildar."

4. The Sub-Divisional Officer, Akot, dismissed the application under Sec. 120 holding that the petitioner Kashiram was in cultivation in the years 1962-63 and 1963-64 and that the respondent No. 2 Madhao had failed to show that he had cultivated the field personally during those years. He pointed out that the entries in the crop statement for the said two years were in favour of the petitioner and the petitioner had also filed receipts for the payment of land revenue for those years. He did not rely upon the evidence of Waman Narayan who had been examined on behalf of the respondent No. 2. Taking that view the Sub-Divisional Officer dismissed the application under Section 120 before him on the merits. He however did not decide the question raised on behalf of the petitioner that he (Sub-Divisional Officer) had no jurisdiction because the petitioner had raised the issue that he was a tenant.

5. In a Revision filed before the Maharashtra Revenue Tribunal, that Tribunal has reversed the decision of the Sub-Divisional Officer holding that the reasons given by the Sub-Divisional Officer did not justify the dismissal of the application. The Tribunal discussed the several reasons in detail in paragraph 2 of its order and pointed out that in the years 1960-61 and 1961-62 the respondent No. 2 had cultivated the field and that was corroborated by the evidence of his brother Waman Narayan. The field was also being cultivated by the father of the respondent No. 2 until he died on 26th December 1960. The petitioner's plea moreover that he had been cultivating the field for the last five years before he was examined in March 1965 was raised for the first time in his evidence and had not been put forward even in his written statement. The crop statements for the years 1960-61 and 1961-62 belied his version. There was moreover no evidence to prove the alleged contract of Batai between the petitioner and the respondent No. 2 as alleged by the petitioner. As regards the land revenue receipt the Tribunal held that no conclusion could be drawn from the land revenue receipt on the question of the lease in dispute in the circumstances of the case. The Tribunal held, therefore, that the petitioner had no right to take possession of the respondent No. 2's land and was liable to be evicted under Section 120(c) of the Act.

6. It is against this order that the special civil application is filed, and when it came up before our brother Padhye on the 29th February 1968 he felt that there was a conflict of decisions in this Court as to the scope and extent of the Collec-

tor's jurisdiction under Section 120 and has therefore referred two questions for our opinion:

"(1) In proceedings for summary eviction under Section 120 of the Bombay Tenancy and Agricultural Lands Act, 1958 where a question is raised by a party thereto that he is a tenant, has the Collector jurisdiction to go into that question, and if so, under what circumstances?"

(2) If the answer to the first question is in the negative, then what is the procedure that should be followed by the Collector in those circumstances?"

The Act referred to in the first question is the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 99 of 1958. We need not here set forth the differences in view in the several decisions because they will appear when we consider those decisions.

7. Section 100 of the Act lays down that for the purposes of the Act the following is one of the duties and functions to be performed by the Tahsildar:—

".....
(2) to decide whether a person is a tenant, a protected lessee or an occupancy tenant;"

It is clear that Section 100 by itself merely confers jurisdiction on the Tahsildar to decide whether a person is a tenant. By virtue of Section 124 of the Act the jurisdiction of Civil Courts "to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Tahsildar....." is barred—Section 124 thus refers back to Section 100 and to the several powers given to the Tahsildar to settle, decide or deal with the subjects or questions mentioned in the various clauses of Section 100. We are here concerned only with the power to decide the question "Whether a person is a tenant" conferred by Section 100(2). To that extent the Tahsildar it may be said, is given jurisdiction to the exclusion of the Civil Courts to decide whether a person is a tenant.

8. Section 120, however, gives jurisdiction to the Collector of summary eviction and Section 120 is worded as follows:—

"120. Any person unauthorisedly occupying or wrongfully in possession of any land—

- (a) the transfer of which either by the act of parties or by the operation of law is invalid under the provisions of this Act,
- (b) the management of which has been assumed under the said provisions, or
- (c) to the use and occupation of which he is not entitled under the said provisions and the said provisions do not provide for the eviction of such person, may be

summarily evicted by the Collector after such inquiry as he deems fit."

9. In the present case in a proceeding which the respondent No. 2 commenced for the summary eviction of the petitioner under Section 120(c) the petitioner has raised the plea that he is a tenant and having raised that plea, he has further contended that the Collector would have no jurisdiction to entertain the proceedings for summary eviction against him because the question whether or not he is a tenant has to be decided only by the Mamlatdar under Section 100(2).

10. Before we consider the question one thing must be made clear, and that is, that we are not concerned with Sec. 124 in the present case. As we have said it is that section which bars the jurisdiction of the Civil Courts and by so barring that jurisdiction confers exclusive jurisdiction on the Tahsildar to decide whether a person is a tenant, but Section 124 cannot apply in the present case because in terms the section applies only to Civil Courts. It begins with the words "No Civil Court shall have jurisdiction to settle, decide or deal with....." etc. The power of the Collector under Section 120 is not controlled as the power of the Civil Court is controlled by Section 124. The Collector enjoys a power under Sec. 120, which is as untrammelled by any other jurisdiction such as the Tahsildar enjoys under Section 100. Therefore here the question is not of any competition between the restricted jurisdiction of the Civil Courts and the somewhat unrestricted jurisdiction of the Tahsildar but the question is of a competition between two equal and independent jurisdictions conferred upon two Revenue Authorities namely, upon the Collector by Section 120 and upon the Tahsildar by Section 100(2). The two jurisdictions undoubtedly overlap and it is clear that in a large number of cases they will overlap. The question is how are the provisions relating to the two jurisdictions to be construed in cases where they overlap?

11. The Tenancy Act is not merely a law which governs the relations of landlords and tenants. It is not only content to provide for the status and rights of tenants or their relationship with their landlords but it purports to provide for many other subjects. In the interests of the general public it also purports to regulate and impose restrictions on the transfer of agricultural lands and of dwelling houses and lands appurtenant thereto and sites used for allied pursuits belonging to or occupied by agriculturists, agricultural labourers, artisans and persons carrying on allied pursuits. It also purports to provide for the assumption of

the management of agricultural lands in certain circumstances, and other matters. Its provisions therefore do not merely deal with landlords and tenants but many other persons e.g., trespassers on agricultural lands. Its principal provisions no doubt relate to the acquisition, relinquishment, surrender or transfer of title to or by a tenant and to the safeguarding of the possession of the tenant and the landlord. With the provisions as to titles we are not here concerned.

12. We are here concerned only with the question of possession and on the question of possession between landlords and tenants the Act has made careful provisions. Section 36 of the Act prescribes the procedure for taking possession. Sub-section (1) provides that "a tenant or an agricultural labourer or artisan entitled to possession of any land.....Or as a result of eviction in contravention of sub-section (2) may apply in writing for such possession to the Tahsildar." Sub-section (2) deals with the landlord and it is couched in different language. It says "no landlord shall obtain possession of any land..... held by a tenant except under an order of the Tahsildar" save as provided in sub-section (3-A) and for obtaining such order he has to make an application within a certain period. Similarly where a landlord has obtained possession of land on the ground that it is required for personal cultivation under Section 38 and the conditions laid down in that Section are not fulfilled he is bound to restore possession of the land back to the tenant. The liability to restore possession is that of the landlord, but if he fails to restore possession then he is liable to be dealt with under the provisions of sub-sections (3) and (4) of Section 52. These are some of the specific remedies open to the tenant and the landlord under the Act in respect of possession of land of such tenant or landlord. These provisions have to be read in the light of the definitions of "tenancy" and "tenant" in sub-sections (31) and (32) of Section 22. "Tenancy" means the relationship of landlord and tenant, and "tenant" means a person who holds land on lease and includes—

- (a) a person who is deemed to be a tenant under Sections 6, 7 or 8,
- (b) a person who is a protected lessee or occupancy tenant and the word "landlord" shall be construed accordingly;

These provisions therefore serve to emphasise that Sections 36 and 52 are limited only to the relationship of landlord and tenant, and would not be available in other cases. In fact, it has been held in this Court that if possession is asked for by a person not in his capacity of landlord or tenant Section 29 would not

be available. See 1955-57 Bom LR 65, Shankar Raoji v. Mahadu Govind.

13. We have referred to these provisions of the Act in order to emphasise the distinction between these provisions and the provisions of Section 120 of the Act. While the provisions we have referred to above deal with the question of possession of a tenant or a landlord, Section 120 deals with the subject of possession by trespassers (we use that word for want of a more compendious expression to cover all the cases contemplated in Section 120). Section 120 refers to a person "unauthorisedly occupying or wrongfully in possession". These are key words governing the whole section and laying down the first condition to the applicability of Section 120 namely that it must be shown to the Collector that the land has been unauthorisedly occupied by or is wrongfully in the possession of any person. "Land" is defined in Section 2(17) to mean (see clause (a)) land which is used or capable of being used for agricultural purposes and includes the sites of farm building appurtenant to such land. We are not concerned with Cl. (b) of the definition because it does not apply to Section 120. Such land need not necessarily be land in the possession of a landlord or a tenant, Section 120 in that respect is wider than the provisions regarding possession in Sections 36 and 52.

14. The other important qualification or condition governing the whole of Section 120 is contained in the penultimate clause "and the said provisions do not provide for the eviction of such person". In other words, if there is any other provision in the Act, which a person out of possession can invoke, in order to be restored to possession, Section 120 will not apply. The words "the said provisions" obviously refer back to the expression "the provisions of this Act" contained in clause (a) of Section 120. It was urged by Mr. Deshpande on behalf of one of the interveners that the words "the provisions of this Act" in clause (a) of Section 120 do not mean the whole of the Act, but only such of these provisions as relate to transfers, because that is the subject dealt with in clause (a), such as for instance the provisions prohibiting transfers such as Section 51 or 57. It was urged that the expression "the provisions of this Act" must be read in relation to the context in which it occurs and that it is used in the context of transfer by the act of parties or by operation of law and it was intended therefore to refer only to such provisions of the Act. We are unable to accept this contention because the subject or context in which they are used is really not transfers but in the context of any "persons unauthorisedly occupying or wrongfully in pos-

session of any land". Clauses (a) and (b) merely enumerate the different categories of unauthorised occupation or wrongful possession of any land under the Act and clause (c) is a general residuary clause. To limit the words "provisions of this Act" only to transfers would result in making clause (c) totally inapplicable, for the subject of transfer is already dealt with specifically in clause (a). When the Act says "under the provisions of this Act" it means any of the provisions of the Act, unless there is an express exclusion or exclusion by necessary implication in any particular section. The use of the words "the said provisions" in clauses (b) and (c) and in the clause "and the said provisions do not provide for the eviction of such person" therefore refer to the provisions of the entire Act. This clause moreover qualifies not merely clause (c) of the Section, but all the three clauses (a), (b) and (c). This has been held in *Durgaben v. Moria Bavla*, 58 Bom LR 451 at p. 452 = (AIR 1956 Bom 706 at p. 707). The other conditions which must be fulfilled are those laid down in clauses (a), (b) and (c) of the section itself.

15. In construing Section 120 it must moreover be remembered that it creates a summary remedy, summary in the sense, that the Collector has not to make a judicial inquiry but only "such inquiry as he deems fit". This of course does not mean that he need not make any inquiry whatever, but clearly that he must inform himself as best he can from the records available in his department or the material placed before him by the parties. That it is a summary remedy and that the Collector has only to make "such inquiry as he deems fit" does not, however, absolve the Collector from making a proper order giving reasons for his conclusions. As we have pointed out above, the regular remedies for disturbance of possession are reserved for disturbance of possession of tenants and landlords, such as, for instance those prescribed in Sections 36 and 52. The summary remedy is reserved for trespassers.

16. For the very reason that the remedy is a summary remedy the section arms the Collector with plenary and drastic powers of the widest amplitude. The section must therefore be carefully applied and strictly construed. That is why also, we conceive, the legislature advisedly did not entrust the exercise of that power to the Tahsildar who is one of the lower officers in the Revenue hierarchy, although most of the other powers under the Act have been so entrusted, but entrusted it to a superior revenue officer like the Collector who is the highest officer in a District.

17. Having analysed the provisions of the law we turn to consider the question

which arises viz., which authority has jurisdiction where a person applies under Section 120(c) saying that the opponent is in unauthorised occupation or wrongful possession or as is found in the present case a trespasser but the opponent in reply pleads that he is a tenant?

18. We have already said that Section 124 does not apply in the instant case and there is no express exclusion of jurisdiction by the provisions of Section 100 so far as the Collector's powers under Section 120 are concerned. Thus here we have two provisions in the Act of equal force, one giving jurisdiction to the Tahsildar to decide whether a person is a tenant and the other giving jurisdiction to the Collector to decide whether any person is unauthorisedly occupying or wrongfully in possession of any land. It seems to us that where such a conflict arises in an application under Section 120, the Collector will have to see whether in substance the application before him is an application complaining of unauthorised occupation or wrongful possession of any person in the first place, and if he comes to the conclusion that such a person is unauthorisedly occupying or wrongfully in possession he would have jurisdiction under Section 120 even if that person raises the plea that he is a tenant. The mere raising of the plea would not as in the case of the Civil Court, oust the jurisdiction of the Collector. The Collector will have to look to the substance of the matter and decide whether it is a dispute regarding unauthorised occupation or wrongful possession or it is in substance a dispute regarding tenancy. If the latter, he must refer the matter to the Tahsildar. If the former, he will have jurisdiction to decide it. It will not be sufficient to oust the jurisdiction of the Collector for a person to say that he is a tenant if on the face of the material before the Collector it appears to him that the plea of tenancy is one which cannot reasonably be raised or is not bona fide or the Collector comes to the express conclusion that it is raised mala fide. This may be difficult to decide in given cases, but in the absence of specification by the law as to whose jurisdiction is to prevail, that appears to us to be the only test to indicate the dividing line between two overlapping jurisdictions. The Collector must of course also see that the following conditions (which we have already discussed above) are fulfilled: (1) that a person is unauthorisedly in occupation or wrongfully in possession; (2) that the other provisions of the Act do not provide for the eviction of such a person and (3) that the conditions required by clauses (a), (b) and (c) are fulfilled; (4) in deciding the application the Collector must apply his mind to the material before him and because the remedy is summary it

will not be enough for him to say "sle volo, sic Jubeo" ("I wish it therefore I shall be"). He must consider such material as he has before him and write an order giving his reasons. (5) The Collector must also bear in mind that the power which he exercises is a very drastic power and we have no doubt that he will exercise it with care, construing the provisions strictly in case of doubt. (6) In cases where complicated questions of law and fact arise the Collector moreover has a discretion to refer the parties to the Civil Courts or leave them to take any other remedy that they may be entitled to.

19. The view which we have taken is supported by some of the decisions which have been referred to. It is necessary to refer to these decisions because the view taken has not throughout been consistent. Most of these cases are cases under the parallel provisions of Section 84 of the Bombay Tenancy and Agricultural Lands Act 1948. Those provisions are identical with the provisions of Section 120 of the Vidarbha Act. The decisions therefore under the Bombay Act are equally applicable under the Vidarbha Act.

20. The first decision pointed out to us is that of a Division Bench of this Court (Gajendragadkar and Gokhale JJ.) in Spl. Civil Appln. No. 278 of 1956, D/- 10-4-1956 (Bom). There the application was made under Section 84 of the Bombay Act by a person claiming to be the owner of the land and alleging that the opponent was a trespasser. The opponent claimed to be a tenant. The Deputy Collector held that the opponent who was in possession was a trespasser and ordered summary eviction. The plea was raised that the Deputy Collector would have no jurisdiction to deal with the matter since the opponent had claimed that he was a tenant but both the Deputy Collector as well as the Revenue Tribunal rejected that plea. The Division Bench of this Court affirmed this view of the Deputy Collector and the Tribunal. This Court held that the opponent was a trespasser and since the provisions of the Bombay Tenancy Act did not provide for a remedy for the eviction of such a trespasser Section 84(c) would apply and the Deputy Collector would have jurisdiction under Section 84 (c) to evict the opponent. As regards the contention that before such a proceeding could be adopted, it was incumbent upon the applicant to obtain a decision from the Mamlatdar under Section 70 (b) of the Act that the opponent was not a tenant, it was expressly held rejecting that contention, that it was only when an application could be made under Section 29 of the Act (corresponding with Section 36 of the Vidarbha Act) that the question of the examination of the status of the opponent as

a tenant could possibly arise but since no application could be made under Section 29 against a trespasser the question of determination of the status of the opponent as a tenant by the Mamlatdar would not arise. The Court held that so far as the trespassers are concerned the only provision that could be invoked is the one contained in Section 84 of the Act. That view with respect was a correct view taken of the provisions of that Act.

21. Then we have a decision of another Division Bench (Mudholkar and Patel JJ.) in Anjalibai Ramchandra Yevalekar v. Shankar Bala Patil, Spl. Civil Appln. No. 3207 of 1958, D/- 10-2-1959 (Bom). In that case Anjalibai had made an application under Section 84 of the Bombay Tenancy Act to recover possession on the ground that the opponent Shankar Bala was her servant; that he had refused to execute a service agreement but had continued in possession and that therefore he was unauthorisedly in possession of the property and should be evicted. The Assistant Collector, Northern Division, Kolhapur held that she was entitled to recover possession of five fields since the opponent Shankar Bala was her servant and not a tenant, but as regards four fields he held that Shankar Bala had been on the land since 1954-55 as a tenant and possession had been taken from him without recourse to the Mamlatdar and that therefore the petitioner Anjalibai was not entitled to claim possession of those lands. In revision the Revenue Tribunal took the view that the application made by Anjalibai should have been treated as an application under Section 29 though she had made an application expressly under Section 84 and should be dealt with under the Tenancy Act. It was against that decision that Anjalibai the owner had applied to the High Court.

22. The Division Bench held that Section 29 was the only section which provided for an application either by a landlord or a tenant for recovery of possession of the land to which they were entitled under the provisions of the Act. Section 84 on the other hand provided a summary remedy and only in cases where possession is sought by a person entitled to possession from a person who is unauthorisedly in possession of the property. They also pointed out that in order to avoid overlapping of the two provisions a specific provision has been made by way of proviso to Section 84 that under that section the Collector could act only if the provisions of Tenancy Act do not provide for the eviction of such persons. As regards the contention that the Mamlatdar must first decide the question whether Shankar Bala Patil and others were tenants under Section 70(b), the Division Bench observed:

"It is not possible in view of the provisions of this Act to accept the argument that merely because Section 70 provides as one of the duties of a Mamlatdar to decide the question whether or not a person is a tenant or not the matter must necessarily be referred to him or must be decided by him..... If one reads the Act as a whole there is no doubt that the Collector had in him the necessary power of determining the questions involved when he was called upon to take action under Section 84."

This Court, therefore, clearly held that where the conditions laid down by Section 84 are fulfilled, the Collector would have the power to decide whether a person was in unauthorised occupation or wrongful possession even though it involved holding incidentally that he was not a tenant. The Division Bench relied upon an earlier decision of the Division Bench in Spl. Civil Appln. No. 278 of 1956, D/- 10-4-1956 (Bom). The same view was taken in *Sarjerao Shripati Jared v. Namdeo Magutrao Jared*, Spl. Civil Appln. No. 3105 of 1958, D/- 1-4-1959 (Bom) and in *Rural Product Co. Ltd. v. Laxman Davlu*, Spl. Civil Appln. No. 1370 of 1962, D/- 15-7-1963 (Bom). With respect, these decisions took the correct view of the provisions of Section 84 and the same should be the view to be taken under the identical provisions of Section 120 of the Vidarbha Act.

23. Then we come to a decision in which apparently a contrary view was taken and on which strong reliance was placed by Mr. Chandurkar. That is a decision in *Shivanarayan Motilal Kabre v. Fakira Bala Roham*, Spl. Civil Appln. No. 529 of 1958, D/- 23-4-1958 (Bom) by a Division Bench consisting of Chainani J. as he then was (later C. J.) and Tar-kunde J. In that case 'A' applied under Section 84 of the Bombay Tenancy Act for obtaining possession of the land from 'B' on the ground that he was a trespasser and was in unauthorised occupation of the land. 'B' contended that he was a tenant. The contention was accepted by the Prant Officer who upon that view dismissed the application under Section 84. Before the Division Bench the order of the Prant Officer was really not challenged at all, but only his jurisdiction to decide the application on the ground that 'B' had raised the contention that he was a tenant and the Prant Officer had no jurisdiction to decide that issue. The Division Bench summarily ruled out the contention holding "This argument about the Prant Officer not having jurisdiction in the matter was not urged by the petitioner before the Bombay Revenue Tribunal. It cannot, therefore, be urged now". Thus so far as that decision was concerned the only point raised in the Special Civil Applica-

tion was negatived on the short ground that it had not been raised before the Revenue Tribunal. There was no decision as such on the question of jurisdiction. There the matter should have ended but in the concluding portion of the judgment the Division Bench went on to make certain observations, which are the very basis of the contention raised by Mr. Chandurkar. Those observations were:

"We might, however, observe that under the Tenancy Act, it is only the Mamlatdar who can decide whether a person is or is not a tenant and that consequently when opponent No. 1 raised the contention that he was the petitioner's tenant the Prant Officer should have directed the parties to approach the Mamlatdar and obtain a decision from him whether the opponent No. 1 was a tenant of the petitioner.

With these observations, the rule will be discharged with costs'.

Now in the first place these remarks were expressly stated by the Division Bench itself to be mere observations and they cannot be taken to be the decision in the case. The remarks moreover were clearly obiter because the case was decided on the short ground that the point had not been raised. We may also observe that the earlier decisions to which we have referred namely, those in Spl. C. A. No. 278 of 1956 (Bom) in Spl. C. A. No. 3207 of 1958 (Bom) and in Spl. C. A. No. 3105 of 1958 (Bom) were not referred to. We may say here that we are not in agreement with the said observations made in that case.

24. In two decisions of two Division Benches, the decision in Spl. C. A. No. 529 of 1958 (Bom) was relied on but was distinguished. The first of these is Spl. Civil Appln. No. 1003 of 1959 (Bom), *Keshav Hari Joshi v. Bhaga Mahadu Kanavade*, decided on 7th January 1960 by the Division Bench consisting of S. T. Desai and V. S. Desai JJ. The petitioner in that case had filed an application under Section 84 and the respondents 1 and 2 had raised the contention that they were protected tenants of the lands in dispute. In that case the facts were glaring. The petitioner had filed a suit in the court of the Mamlatdar, Akola for possession on the ground that he had been unlawfully dispossessed by the respondent and one Gangaram Kalu Kanavade. That suit after a chequered career was ultimately heard and decided by the Mamlatdar on the 19th August 1954 in favour of the petitioner. In a revision the Prant Officer confirmed the view taken by the Mamlatdar that the respondents had unlawfully dispossessed the petitioner. The petitioner then took execution proceedings and possession of the lands was handed over to the petitioner. At the time when

possession was being handed over the respondent No. 2 had obstructed delivery of possession and she was prosecuted and convicted and ultimately possession was delivered to the petitioner on 24th February 1956, but the petitioner alleged that the respondents had forcibly taken back possession in July 1956. In spite of all these proceedings and in spite of the fact that the petitioner has been found to be the lawful owner and entitled to possession, when an application was made under Section 84 against the respondents for eviction on the ground that they were in unlawful possession, they pleaded that they were protected tenants and the matter should be decided under Section 70(b) of the Act by the Mamlatdar alone and not by the Collector before whom the proceedings under Section 84 had been filed. The Division Bench held "very briefly stated, the argument is that that section (Section 70) can have no operation when proceedings have been taken in a competent court by a person and the competent court has held that the other party is a trespasser and possession has been directed to be handed over to him and has in fact been handed over to him. There is, in our opinion, substance in this contention."

25. On behalf of the respondent it was contended that the Collector cannot in any proceeding under Section 84 decide the matter whether the respondent who claims to be a tenant is or is not a tenant or is a trespasser. This question can only be decided by the Mamlatdar. The Division Bench held that they were unable to accept that contention "as there is nothing in Section 84 which compels us to reach any such undesirable conclusion". They referred to the decision in *Spt C. A. No. 3207 of 1958 (Bom)* and followed it. In this case therefore also the principle was accepted that if the requirements of Section 84 are fulfilled and the conditions prescribed therein exist, the Collector would have jurisdiction to decide the application before him notwithstanding that it involved the decision in an ancillary way on the question whether the respondent was a tenant or not.

26. To the same effect is the decision in *Dinkarrao Aburao Shirole v. Jayawantrao Tukaram Sawant*, *Spl. C. A. No. 693 of 1962, D/-22-3-1963 (Bom)* by another Division Bench (Tarkunde and Gokhale JJ.) In that case also after protracted proceedings the respondent before the Division Bench had lost and was ordered to deliver up possession. A preliminary partition decree has been passed against him, then a compromise had been effected on the basis of which the dispute was settled and under the compromise the disputed lands were given in possession of the petitioner. Mutation had

also taken place and a joint purshis had been passed stating that the dispute had been settled. It appears, however, that in the final mutation some mistake had crept in and the petitioner's case was that taking advantage of that mistake the 1st respondent had made an application that he should be shown as a tenant of the disputed lands. The mutation proceedings showed that possession had actually been delivered to the petitioner and no appeal had been preferred against the decision in those proceedings. In answer to the application of the respondent to be shown as a tenant the petitioner had applied under Section 84 for his eviction. The Prant Officer overruled the preliminary contention of the 1st respondent that he had no jurisdiction to try the application and held that the 1st respondent was a trespasser. The Division Bench observed "It seems that taking advantage of a mistake which crept in the mutation record, respondent No. 1 put up a vexatious claim that he was a tenant some time in September 1960. The fact that he had no evidence to lead before the Prant Officer and the further fact that he even refused to enter the witness box to enable the petitioners to cross-examine him would show that he himself was conscious that he had no substantial basis to support his claim that he was a tenant". Though the Division Bench used the word "vexatious", it is clear that what they intended to say was that the 1st respondent's claim was a mala fide claim. The case, therefore, is again an authority for holding that if the plea of tenancy is found not to be bona fide, but mala fide, the jurisdiction of the Collector under Section 84 would not be ousted upon such a plea.

27. We may also refer to a recent decision which was not referred to at the Bar during the arguments, but which has been brought to our notice subsequently, namely the decision in *Spl. C. A. No. 749 of 1966, D/- 24-9-1968 (Bom)* by a Division Bench consisting of Patel and Wagle JJ. where the provisions of Section 84 have been more fully dealt with. In connection with those provisions the Division Bench observed "It must, however, be remembered that the procedure is summary and there is no appeal against his decision. It would, therefore, be clear that the procedure is not suited to deciding complicated and serious questions of title. In cases where the occupant raises a contention regarding his title which appears to be unsupported by any prima facie reasonably reliable evidence and is such as he is entitled to consider in inquiries under the Land Revenue Code or the Tenancy Act he would be justified in considering the question and decide whether he is in unauthorised occupation of the land. A fortiori this would be so.

where the contention is patently false or untenable. If, however, there are complicated questions of law and facts involved, then he would have no jurisdiction to decide the questions." With respect we are in agreement with this statement of the law.

28. In spite of all these authorities directly upon the provisions of Section 84, which would equally apply to Section 120 of the Vidarbha Act counsel urged that the view taken in them is wrong because of the decision of this Court in *Nivrutti Laxman Kondobahiri v. Shivdayal Laxminarayan Sarda*, 61 Bom LR 957 = (AIR 1960 Bom 56) (FB) and upon the decision in 58 Bom LR 451 = (AIR 1956 Bom 706). No doubt in 61 Bom LR 957 = (AIR 1960 Bom 56) (FB) it was held at pp. 959 and 960 (of Bom LR) = (at pp. 57 and 58 of AIR) that the power conferred upon the Mamlatdar under Section 70(b) to decide whether a person is a tenant, would include a power also to decide that a person is not a tenant, whether the application is made by the landlord or the tenant. At page 960 the Full Bench held "under clause (b) of Section 70 of the Act, the Mamlatdar has jurisdiction to determine whether a person is a tenant. He can, therefore, also decide that a person is not a tenant. If he can decide this question on an application made to him by a tenant, it is difficult to understand why he should not be able to decide this question when the application is made by the landlord. In either case, the question which the Mamlatdar will have to determine is whether the relationship of landlord and tenant exists between the parties. The jurisdiction to decide this question vests exclusively in the Mamlatdar and the Civil Court is not competent to decide it." The present argument is founded upon these remarks of the Full Bench. It is urged that the Full Bench has clearly said that it is the exclusive jurisdiction of the Mamlatdar to determine whether a person is a tenant as also to determine that a person is not a tenant. Therefore, it is urged that when in an application under Section 84 or Section 120 of the Vidarbha Act, the person alleged to be in unauthorised occupation or wrongful possession, alleges that he is a tenant also both the question whether he is a tenant at all as well as the question whether he is not a tenant, would fall to be determined only by the Mamlatdar and not by the Collector.

29. The Full Bench case was not decided with reference to the provisions of Section 84 or the analogous provisions of Section 120 of the Vidarbha Act. It was only concerned with construing the meaning of the words "to decide whether a person is a tenant, a protected lessee or an occupancy tenant" occurring in Section 70(b) of the Bombay Act or Sec-

tion 100(2) of the Vidarbha Act. It was in that connection that they observed that the negative aspect of the question that a person is not a tenant is included within the jurisdiction to decide the affirmative aspect viz., whether a person is a tenant. This decision was given in a case where there was no question involved of a competition between the two jurisdictions of the Mamlatdar and the Collector created by Section 70(b) and Section 84. We do not think therefore, that the remarks made in the context of that case would be binding upon us. So far as the case in 58 Bom LR 451 = (AIR 1956 Bom 706) is concerned, an order was expressly passed in that case in favour of the landlord under S. 29(2) of the Bombay Act for possession against his tenant on the allegation that the tenant had surrendered his lease. It was thereafter that the tenant applied to the Collector under S. 84 of the Act for summary eviction of the landlord alleging that notwithstanding the order of the Mamlatdar he in fact had continued to be in possession but that he was dispossessed by the landlord. It was in the light of those facts that the Division Bench held that that was a dispute purely between a landlord and a tenant and therefore the question of possession would fall to be determined only under Section 29 which expressly deals with that subject and not under Section 84. They also pointed out that Section 84 itself excludes such an application by virtue of the words used in that section "and the said provisions do not provide for the eviction of such person." Since Section 29 made provision for the eviction of the landlord in that case, Section 84 would be inapplicable. In the present case it is clear that Kashiram has been found not to be a tenant but a trespasser and upon that finding only Section 120 would be attracted (or Section 84 of the Bombay Act) and not Section 36 or (Section 29 of the Bombay Act).

30. In the view which we take we answer the two questions referred as follows:—

Question No. 1: In proceedings for summary eviction under Section 120 of the Bombay Tenancy and Agricultural Lands Act, 1958 where a question is raised by a party thereto that he is a tenant, the Collector would have jurisdiction to go into that question provided the conditions laid down in Section 120 are strictly fulfilled.

Question No 2: In view of the answer to the 1st question the 2nd question does not arise.

The papers will now be returned to the learned single Judge for decision of the Special Civil Application.

Reference answered.

AIR 1970 BOMBAY 376 (V 57 C 63)
BHASME, J.

Mrs. Piadad Fernander, Petitioner v. K. M. Ramesh and others, Opponents.

Spl. Civil Appns. Nos. 1578 to 1580 of 1969, D/- 22-1-1970.

(A) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 13(1) (hhh) — Suit for eviction of tenant on ground of landlord receiving notice from Municipal Corporation to demolish structure as it was in a dangerous condition — Duty of Court — Satisfaction under S. 13(1) (hhh) is not a mere formal thing — If efficacy of demolition order is impaired due to subsequent or intervening events, Court cannot act on earlier order and proceed to pass a decree for eviction.

The satisfaction that is contemplated by Section 13(1) (hhh) of the Rent Act is not a mere formal thing. The court must apply its mind to all the facts and circumstances of the case including the order of demolition and then come to the conclusion one way or the other. If the municipal authorities are no longer interested in the demolition of the premises, the landlord cannot be allowed to use it as a handle or lever to somehow evict the tenants from the suit premises.

(Para 13)

The fact that after issuing the order for demolition of structure under Section 354(1) of Bombay Municipal Corporation Act (3 of 1888) the Municipal authorities have proceeded further with their action under Section 488 and finally abandoned the demolition work on their being satisfied that the building is no longer in a dangerous condition considerably affects the efficacy of the original demolition order. The court cannot blindly accept the order of demolition as a document complete in itself and proceed to order the eviction of the tenants. The court must enquire and find out whether there is valid subsisting order requiring immediate demolition of suit premises. Where the facts show that the urgency implicit in the demolition order is no longer in existence, the court cannot act on that order and proceed to pass a decree for eviction. (Paras 8, 12, 13)

(B) Constitution of India, Art. 227 — Power of superintendence by High Court — Lower Courts misconstruing provisions of Rent Act and proceeding to pass decree for eviction of tenant — It being a patent error of law can be corrected in exercise of powers of superintendence vested in High Court under Article 227. (Para 15)

(C) Municipalities — Bombay Municipal Corporation Act (3 of 1888), Ss. 488 and 354 — Notice under S. 354 (1) for demolition of structure — Municipal Au-

thorities proceeding further with their action under Section 488 and finally abandoning demolition work on their satisfaction that the building is no longer in dangerous condition — Effect — Original order issued under S. 354 no longer remains operative — Express orders cancelling requisition to demolish not necessary in every case — Even from their subsequent conduct it can be inferred that the initial direction is withdrawn.

(Para 7)

Cases Referred: Chronological Paras (1967) C.R.A. Nos. 1734 to 1748 of

1965, D/- 14-8-1967 (Bom) 8

(1965) C.R.A. Nos. 1162 and 1163 of

1960, D/- 5-2-1965 (Bom) 9

F. S. Nariman with S. R. Shah and D. T. Gandhi, for Petitioner (in all appeals); R. B. Andhyarjina i/b. Vaccha and Co., Attorneys for Opponents Nos. 1 and 2 (in all appeals).

ORDER:— This is a group of five Special Civil Applications by the defendants-tenants whose eviction has been ordered by the courts below under Section 13(1) (hhh) of the Bombay Rent Act from the suit premises. The five suits were heard together as common questions of law and fact were involved and for the very reason this judgment will dispose of all these five applications.

2. The plaintiffs are owners of a property situate at 35, 3rd Marine Lines, Dhoobi Talao, Bombay and portions of that property are occupied by the defendants as tenants. On 21-7-1958 the plaintiffs received a notice from the Municipal Corporation under Section 354(1) of the Municipal Corporation Act requiring the plaintiffs to pull down the structure on the ground that it was in a dangerous condition. On receipt of this notice the plaintiffs initiated proceedings under Section 507 of the Municipal Corporation Act and the Chief Judge of the Court of Small Causes at Bombay passed an order in their favour on 29-1-1959 granting time to the defendants to vacate the premises on or before 30-9-1959. On 7-4-1961 the plaintiffs gave a notice terminating the defendants' tenancy on the ground that they wanted vacant possession for carrying out the order of the Municipal Corporation regarding the demolition of the building. On 1-8-1961 the Municipal authorities decided to act departmentally and demolish the structures in exercise of the powers conferred on them under Section 488 of the Municipal Corporation Act. On 18-9-1961 the defendants made representations against the proposed action and the Municipal authorities on a certain undertaking given by the defendants to the Commissioner stopped the demolition work and the labour charges incurred by the municipal authorities amounting to Rs. 55/- were recovered

from the defendants. Pursuant to their undertaking the defendants completed the repair work within six weeks and by a letter dated 12-1-1962 informed the Municipal Commissioner accordingly. After the quit notice dated 1-8-1961 the plaintiffs filed the five suits on 23-12-1961 against the defendants claiming reliefs under Section 13(1) (hhh) of the Rent Act. The defendants resisted the suits on the ground that they had already carried out the repairs and there was no valid order in existence which required the plaintiffs to immediately demolish the suit building. In other words the defendants contended that the plaintiffs had no cause of action under Section 13(1) (hhh) against them on the strength of the notice given by the municipal authorities on 21-7-1958. At the trial the plaintiffs did not adduce any oral evidence nor did they examine any one of them. Similarly neither of the defendants have stepped into the witness-box. It appears that the parties went to the trial on the basis that it was a matter only for documentary evidence and the burden of proof, if any, was on the defendants. The defendants examined one witness on their behalf who happens to be the Municipal Engineer acquainted with certain facts relevant for the case.

3. The learned trial Judge considered the evidence on record and negated the defendants' contention that the order of notice of the Municipal authorities dated 21-7-1958 was no longer operative or effective for the purpose of the plaintiffs' suit under Section 13(1) (hhh). The defendants' contention that by reason of the repairs carried out by them to the satisfaction of the municipal authorities the notice under Section 354, became nugatory was rejected by the learned trial Judge. The learned trial Judge came to the conclusion that the plaintiffs had established that they required possession of the premises for the purpose of immediate demolition ordered by the municipal authorities. Accordingly the learned trial Judge passed a decree for possession in favour of the plaintiffs in all the five suits.

4. The defendants appealed to the Appellate Bench of the Court of Small Causes. The appeals were disposed of by a common judgment and the Appellate Bench came to the conclusion that the burden of proof was rightly thrown on the defendants; that the defendants had not led sufficient evidence to disprove the plaintiffs' case based upon the order of demolition passed by the municipal authorities, and as the municipal engineer examined by the defendants has not stated anything about the withdrawal or cancellation of the earlier order, the order must be held to be still in force and operative. For these reasons the Appellate Bench dismissed the appeals and confirm-

ed the decree for eviction passed by the trial Court against the defendants.

5. Mr. Nariman, who appears for the petitioners-tenants (defendants) has attacked the decree in ejectment passed against the defendants on the ground that the learned Judges of the lower Courts have misunderstood the scope of an enquiry under Section 13(1) (hhh) of the Rent Act. According to Mr. Nariman the said section gives a right to the landlord to recover possession of the premises from the tenant only when the court is satisfied that the premises are required for the immediate purpose of demolition ordered by any local or competent authority. The burden of proof is certainly on the plaintiffs and in the present case the plaintiffs have not even stated in so many words that they in fact required the premises for such a purpose. A mere production of the order of demolition is not sufficient for obtaining a decree under the Rent Act against the defendants. The court will have to be satisfied after considering all the relevant circumstances and the evidence that there is such a valid order requiring immediate demolition of the premises. The court will have to consider the intervening circumstances for finding out whether or not the plaintiffs have made out a case for getting possession of the premises for the purpose of demolition. In the present case the Municipal Corporation has, in fact, followed up its action under Section 354 by further steps under Section 488 of the Act. After taking an undertaking from the defendants-tenants for effecting the necessary repairs to the premises the corporation has refrained from any further action under Section 488 of the Municipal Corporation Act. In view of these subsequent events the original order requiring demolition issued under Section 354(1) of the Act is no longer effective and cannot be the basis of an ejectment decree under the relevant provisions of the Rent Act.

6. Mr. Andhyarjina, who appears for the plaintiffs repels all these contentions and argues that the order dated 21-7-1958 is still operative and is a good and valid order; that the plaintiffs are exonerated only from penal liability by obtaining an order under Section 507 of the Municipal Corporation Act; that the plaintiffs have every right to obtain a decree under Section 13(1) (hhh) on the basis of the demolition order. It is not open to the court to go behind that order and consider extraneous circumstances and then uphold the defendants' contention that they in fact, had carried out the necessary repairs to the premises in pursuance of the undertaking given by them to the municipal authorities and even paid the charges incurred by the municipal authorities in connection with the further steps taken by the municipality for demolition

of the premises and, consequently the order of the Municipal Corporation has become invalid and inoperative.

7. I have to examine these rival contentions and find out which of them should be accepted. For this purpose it is necessary to turn first to the provisions of Section 13(1) (hhh) of the Bombay Rent Act. The relevant part of that section reads thus:—

"13(1). Notwithstanding anything contained in this Act (but subject to the provisions of Section 15) a landlord shall be entitled to recover possession of any premises if the court is satisfied:

... ..
(hhh). that the premises are required for the immediate purpose of demolition offered by any local authority or other competent authority."

In the present case the Municipal Corporation, as stated above, had addressed a notice to the plaintiffs on 21-7-1958 under Section 354 of the Municipal Corporation Act requiring them to demolish the suit building on the ground that it was in a dangerous condition. This notice certainly will be an order within the meaning of Section 13 (1) (hhh) issued by the local authority, i.e. the Municipal Corporation. The plaintiffs had the option either to demolish the suit building or to approach the Chief Judge, Court of Small Causes at Bombay under Section 507 of the Municipal Corporation Act for appropriate directions. Once an order is passed in their favour under Section 507 of the Municipal Corporation Act, they are exonerated from any penal liability under the provisions of the Municipal Corporation Act. But the plaintiffs by getting an order in their favour under Section 507 have not lost their distinct remedy which they can certainly pursue under the provisions of the Rent Act. In the present case the plaintiffs have filed the suits for getting a decree against the defendants under Section 13(1) (hhh) of the Rent Act. As stated above, even before the suit was filed by the plaintiffs, the municipal authorities attempted to demolish the suit building in exercise of their powers under Section 483. At that stage the defendants-tenants offered to effect the necessary repairs and they persuaded the municipal authorities to abandon the attempted demolition of the suit building. The municipal engineer Shri Madhusudan Raghunath Kelkar has testified to these facts. To his knowledge the tenants had carried out the repairs and the work of demolition was stopped. He also stated that the present condition of the building did not warrant the pulling down of the suit building. In cross-examination he admitted that no letter has been issued by the Municipal Corporation withdrawing the original notice under Section 354. He also admitted that the Municipal

Commissioner has not authorised the tenants to carry out any repairs in writing. If Mr. Andhyarjina's contention is accepted then on production of the demolition order the court will have to pass a decree for eviction against the defendants-tenants without any further enquiry. Mr. Andhyarjina is fair enough to concede that the court might examine the evidence only to find out about the existence of a valid subsisting order. In other words it was open to the defendants to adduce evidence and show that the notice was, in fact, withdrawn, waived or cancelled by the municipal authorities. If this is the limited scope of the enquiry, then Section 13(1) (hhh) would not have contained the words to the effect that the court must be satisfied about the existence of the ground on which possession is claimed by the landlord-plaintiffs. The court can only be satisfied after considering all the relevant circumstances and the evidence on record and after applying its mind even to the intervening circumstances since the passing of the earlier demolition order. In a given case the court might consider the intervening circumstances and record a finding that there is no immediate need for demolition of the suit building. An order may have been passed requiring the demolition of the building and thereafter change of circumstances can take place. The building after lapse of time and on account of the intervening circumstances may not remain in the same condition. In such a case if an attempt is made to get an ejectment order on the basis of the earlier demolition order then the Court can certainly say that the order cannot be considered to be operative in the changed set of circumstances. The evidence on record clearly shows that the tenants have effected the necessary repairs to the suit building. The municipal authorities, at any rate, were satisfied about the sound condition of the building. This can be inferred from the fact that the municipal authorities had abandoned any further action under Section 483 of the Municipal Corporation Act. The effect of their giving up the attempted demolition is that the original order issued by them under Section 354 is no longer operative. The various steps contemplated by Sections 354 and 483 of the Corporation Act are taken in their order. As a result of their attempted action under Section 483, the Municipal Corporation has by implication withdrawn its earlier notice under Section 354. It is not necessary in every case that the authorities should issue express orders cancelling their requisitions. Even from their subsequent conduct it is possible to infer that the initial direction is withdrawn by them.

8. Mr. Nariman has relied upon an unreported decision of this Court in C. R. A.

Nos. 1734 to 1748 of 1965, D/- 14-8-1967 (Bom), Patel J. was considering a similar case in which after the issue of the initial notice under Section 354 of the Municipal Corporation Act certain circumstances had intervened. The tenants and the landlord had entered into an agreement with the consent of the Municipal Corporation under which the tenants were allowed to continue to stay in the building for a period of five years. After the expiry of the five years the landlord filed a suit against the tenants claiming possession under Section 13(1) (hhh) of the Rent Act on the basis of the earlier order of the municipal authorities under Section 354 of the Act. An argument was made on behalf of the tenants that on account of the intervening circumstances the earlier notice had lost all its efficacy and the building was no longer urgently required by the landlord for the purpose of demolition. Mr. Justice Patel has interpreted the word "immediate" appearing in Section 13(1) (hhh) in the following manner and that interpretation is of considerable assistance while deciding the points now raised before me:—

"In my view, the word 'immediate' in the above clause has been used by the legislature with some intent. If the legislature wanted to provide that the landlord should be entitled to recover possession for the purpose of demolition of the property ordered by the Corporation there should have been no necessity of using the word 'immediate' and even then the meaning it would have borne would be the same which Mr. Dhanuka wants me to give to the above clause. It must be remembered in this connection that between the issuing of the notices by the Municipal Corporation for demolition of the premises and the filing of a suit many things might intervene and though at one time the Corporation might have thought that a building was in such a ruinous condition that it must be ordered to be demolished, the same state of affairs might not continue to exist after the lapse of a few years. The word 'immediate' must be given its due effect in the context."

Mr. Andhiyarjina for the plaintiffs tried to distinguish this case on the ground that in the present case the landlords have pursued their remedy shortly after the receipt of the notice under Section 354 without any loss of time. The landlords first obtained an order under Section 507 and thereafter proceeded with the filing of the suit against the tenants. But the ratio of the case decided by Justice Patel does not depend upon the mere lapse of a number of years. While giving due effect to the word "immediate" Justice Patel emphasised that the intervening circumstances will have to be taken into account while deciding the efficacy of the

earlier order issued by the municipal authorities. If that is so, then in the present case also I find that after issuing the order the municipal authorities have proceeded further with their action under Section 488 and finally abandoned the demolition work on their being satisfied that the building is no longer in a dangerous condition. This fact, in my judgment, considerably affects the efficacy of the original demolition order. The court cannot blindly accept the order as a document complete in itself and proceed to order the eviction of the tenants.

9. Mr. Andhiyarjina relied upon another unreported decision of this Court in C. R. A. No. 1162 of 1960 with C. R. A. No. 1163 of 1960, D/- 5-2-1965 (Bom) by K. K. Desai, J.

10. The municipal authorities in this case had issued a notice calling upon the owner to demolish the unauthorised construction within a certain prescribed time. The owner thereafter terminated the tenancy of the tenants on the ground that municipal authorities had ordered immediate demolition of the premises. As a result of the representations made by the tenants and on an undertaking given that the premises will be vacated within two years or earlier, the municipal authorities suspended the operation of their earlier notice. In these circumstances the owner had filed a suit against the tenant for eviction under Section 13(1) (hhh) of the Rent Act. The tenant resisted the suit on the ground that the case was not covered by Section 13(1) (hhh) as the earlier notice regarding demolition was held in abeyance by the municipal authorities. The learned trial Judge and the Appellate Bench of the Court of Small Causes negatived the defence. The tenant challenged the eviction decree by approaching this Court under Section 115 of the Civil Procedure Code. Justice K. K. Desai refused to interfere with the order of the lower courts principally on the ground that this court had no jurisdiction under Section 115 of the Civil Procedure Code to interfere with the orders of the lower courts unless there was some error of jurisdiction. Incidentally Mr. Justice K. K. Desai also made certain observations in the judgment with regard to the construction, which the appellate Bench of the Court of Small Causes, had adopted in respect of the provisions of S. 13(1) (hhh) as correct and that he was in complete agreement with the discussion and finding made. Mr. Andhiyarjina strongly relied upon these observations and argued that Justice K. K. Desai, in fact, took the view that the mere fact that the operation of the notice was held in abeyance by the municipal authorities is not sufficient to non-suit the landlord. Once the landlord approached the court armed with a notice or order addressed to him by the

municipal authorities requiring the immediate demolition of the structure, the condition precedent is satisfied and a decree for eviction must follow under Section 13(1) (hhh) of the Act.

11. I am not inclined to accept this submission of Mr. Andhiyarjina. Justice K. K. Desai had refused to interfere principally on the ground that no case for interference was made out by the petitioner under Section 115 of the Civil Procedure Code. It was not necessary to record a further finding on merits and hold that the lower courts were right in adopting a certain construction of Section 13(1) (hhh). These observations are clearly obiter. Moreover Justice K. K. Desai had not stated in his judgment any particular reasons or the exact discussion of law made by the lower courts, which was found to be correct by him. I prefer to follow the later unreported judgment of Justice Patel where an identical question of law was debated, fully argued and decided.

12. On a consideration of the facts and circumstances of this case, I am disposed to hold that it is open to a court hearing the landlord's suit under Section 13(1) (hhh) of the Rent Act to enquire and find out whether there is valid subsisting order of the municipal authorities, requiring the immediate demolition of the suit premises. The landlord can certainly produce such an order and rely upon the fact that he is directed by the municipal authorities to effect immediate demolition of the premises. But it is open to the defendants to adduce evidence and bring facts to the notice of the court and show that the efficacy of the demolition order is considerably impaired on account of the subsequent or intervening events. If the court is satisfied that having regard to the facts and circumstances of the case, the initial order of the municipal authorities has lost its efficacy, then the court may not pass a decree for eviction against the tenants.

13. In the present case, as stated earlier, the municipal authorities, after issuing the first requisition addressed to the landlords, decided to act departmentally and demolish the premises. In fact the municipal authorities while engaged in the act of demolition through their contractors abandoned the further work only on condition that the tenants will effect the necessary repairs to the satisfaction of the municipal authorities. As told by the Municipal Engineer, the repairs were, in fact, made. The tenants also paid the labour charges incurred by the municipal authorities while they were engaged in the demolition work and thereafter no further action was either contemplated or in fact taken by the municipal authorities. All these intervening facts and events

clearly show that the urgency implicit in the demolition order is no longer in existence. No emergent action is required in the matter. Once the court is convinced about all this, the court cannot act on the earlier order and proceed to pass a decree for eviction. The satisfaction that is contemplated by Section 13(1) (hhh) of the Rent Act is not a mere formal thing. The court must apply its mind to all the facts and circumstances of the case including the order of demolition and then come to the conclusion one way or the other i.e., whether or not a decree for eviction should be passed against the tenant. The landlord is merely carrying out the order issued by the municipal authorities, who have issued the order in public interest. If the municipal authorities are no longer interested in the demolition of the premises, the landlord cannot be allowed to use it as a handle or lever to somehow evict the tenants from the suit premises.

14. Lastly Mr. Andhiyarjina argued that at any rate, there is no case for interference under Article 227 of the Constitution. He argued that the two courts of facts have considered the evidence, recorded the finding and then expressed a certain view in the matter. There is no error of law apparent on the face of the record. Merely difference of opinion is not sufficient justification for this Court to act under Article 227 of the Constitution.

15. I am not disputing the proposition of law enunciated by Mr. Andhiyarjina. In my view, however, in the present case there is a clear error of law when the two courts below misconstrued the provisions of the Rent Act and then proceeded to pass a decree for eviction against the tenants. I have accepted the facts proved and findings made by the courts below and I am merely correcting a patent error of law which can certainly be done in exercise of the powers of superintendence vested in this Court under Article 227 of the Constitution of India.

16. In the result the petitions succeed, the decree for eviction passed in all the five suits is set aside (and?) the plaintiffs' suit is dismissed. In the circumstances there will be no order as to costs throughout in all the five suits.

Petitions allowed.

AIR 1970 BOMBAY 380 (V 57 C 64)
(AT NAGPUR)

ABHYANKAR AND
CHANDURKAR, JJ.

Narayan Hari Kumbhare, Petitioner v.
P. K. Porwal and others, Respondents.

Spl. Civil Appln. No. 1087 of 1966, D/-
13-12-1967, against order of Civil J.
Gondia, D/- 3-11-1966.

FN/GN/C780/70/JRM/E

(A) Minimum Wages Act (1948), Sections 20 and 24 — Adjudication of claims — Relationship between claimant and person claimed against — Determination — Power of Authority under Act.

The existence of employer-employee relationship is a jurisdictional fact. The Authority under the Act whose jurisdiction though limited being exclusive must be empowered under the Act alone in adjudicating a claim, to decide all necessary questions, the crucial of which is the nature of relationship between the claimant and the person claimed against. Thus he has the jurisdiction to determine that relationship. (Paras 11, 12 and 14)

The plea that the relationship is through an agent and its denial alleging the agent to be only an independent contractor do not affect such jurisdiction as no adjudication of competing contracts arises. The inquiry into that plea will only be ancillary to the determination of that relationship. AIR 1958 Bom 111 (FB). Followed; (1966-67) 30 FJR 206 (Punj) & Spl. Civil Appln. No. 376 of 1966. D/-20-8-1966 (Bom), referring to AIR 1951 Bom 423 & AIR 1956 Bom 737 & AIR 1961 SC 970, Distinguished.

(Paras 7 and 9)

(B) Minimum Wages Act (1948), Preamble — The Act and the Industrial Disputes Act are not *pari materia*. (Para 13) Cases Referred: Chronological Paras (1967) 1966-67 30 FJR 206 = 1967-

2 Lab LJ 682 (Punj), *Sher Singh Verma v. Rup Chandra* 13
(1966) Spl. Civil Appln. No. 376 of 1966, D/- 20-8-1966 (Bom), *Ram Krishna Ramnath's Case* 4, 7, 8
(1961) AIR 1961 SC 970 (V 48) = 1961-3 SCR 220, *Shri Ambika Mills Co. Ltd. v. S. B. Bhatta* 7, 10
(1958) AIR 1958 Bom 111 (V 45) = 59 Bom LR 892 (FB), *Vishwanath Tukaram v. General Manager, Central Rly.* 7
(1956) AIR 1956 Bom 737 (V 43) = ILR (1957) Bom 15, *Anthony S. Almeda v. R. M. Taylor* 7
(1951) AIR 1951 Bom 423 (V 38) = 53 Bom LR 674, *A. R. Sarin v. B. C. Patil* 7
S. G. Kukday and D. K. Khamborkar, for Petitioner; *M. Q. Kazi*, for Respondent No. 1; *M/s. M. N. Phadke, M. W. Puranik and S. Paunikar*, for Respondent No. 4; None for Respondents 2 and 3.

ABHYANKAR, J.:— This petition under Article 227 of the Constitution challenges the order of the Authority constituted under the Minimum Wages Act holding that it has no jurisdiction to hear and decide the application made by certain persons claiming to be the employees of the respondent No. 1, who is a Bidi Manufacturer.

2. Several applications were filed before the authority appointed under the

Minimum Wages Act, 1948, at Gondia, claiming certain amounts from respondent No. 1. At page 13 of the paper book is one specimen of such application. In their application the claimants averred that they have been employees in the establishment of respondent No. 1, that is, P. K. Porwal, Bidi manufacturer, as bidi rollers. To their application they impleaded one Zibal Tukaram Meshram as opponent No. 2. This Zibal is the second respondent in this petition. They stated that Zibal, the respondent No. 2, is a person who supervises the work of the establishment of bidi manufacturer. They claimed that the opposite party had rejected out of the bidis rolled by them to the extent of 250 to 300 bidis per thousand, for which no wages were paid, during the period for which the claim was made, that is, from 5-11-1965 to 4-5-1966. It was alleged that each of the applicants on an average has not been paid for 45000 rejected bidies during the above period. The bidies were rejected on the ground that they were sub-standard. The petitioners also claimed that they have not been paid wages because of the cut effected called "Patta katni" and "tobacco katni" on account of the defect in tendu leaves and deficiency in the tobacco contents of the bidies. On this account also they put up a claim. Rs. 990/- were claimed on account of 'chhat' or rejection and Rs. 396/- were claimed as illegally deducted amount on account of Patta Katni and Tobacco Katni.

3. The first respondent, that is, the bidi manufacturer filed a detailed written statement in answer to the claim. In paragraph No. 1 of the written statement, the respondent No. 1 denied that the applicants were ever employed in the establishment of the bidi manufacturer. He also denied that Zibal was employed to supervise the work in the establishment. His specific case was that opponent No. 1, that is, P. K. Porwal, Bidi Manufacturer, was not the employer of the applicants within the meaning of Section 2(E) of the Minimum Wages Act. This position was reiterated in paragraph No. 4 of the written statement saying that since opponent No. 1 had no concern or dealing with any of the applicants, there is no question of rejection of bidies, nor making any direction for payment to them. Opponent No. 1 stated that applicants did not supply any bidi to the non-applicant No. 1. In paragraph 11, which is styled as a specific plea, the non-applicant No. 1 raised another contention, namely, that inasmuch as the applicants were working on Gharkhata basis, the application was untenable because bidi making on Ghar-khata basis is not a scheduled industry within the meaning of Minimum Wages Act. In para 13 of the written statement opponent No. 1 pleaded that Zibal was an

independent contractor of opponent No. 1, that he had executed an agreement in favour of opponent No. 1 and that it was he who was supplying rolled bides to opponent No. 1, according to the terms and conditions laid down in the contract. He also alleged that Zibal is not the employee of opponent No. 1, and hence persons like the applicants, who are bidi rollers of the contractor, cannot become employees of the opponent No. 1, in fact, or in law. It is categorically stated in paragraph 13 that the relationship of "employer" and "employee" never existed between the contractor, that is Zibal, and the applicants and much less there could be any question of the applicants being employees of opponent No. 1. In paragraph 16 of his written statement, the opponent No. 1 has stated as follows:

"..... it is respectfully submitted that the claim for 'chhat' involves complicated questions of facts and law and as such, it cannot be summarily adjudicated upon under Section 20 of the Minimum Wages Act for which there is no provision for appeal or revision and that the decision is to be final. It is respectfully submitted that this Honourable Court has no jurisdiction to entertain such a claim of a complicated nature."

It will thus be seen that the specific objection that was raised to the jurisdiction of the Authority under the Minimum Wages Act was in respect of adjudication of complicated questions of facts and law, which would be required to be decided in view of the contentions of the claimants about chhat, that is, rejected bides and other deductions made on account of Patta Katni and Tobacco Katni.

4. Opponent No. 2 Zibal also filed written statement. He admitted that he was working for the opponent No. 1 and his work consisted of distribution of raw material to the applicants, supervise the work of bidi making, keep the accounts of bides and disburse the wages after the same were received from opponent No. 1. He has also stated that he has to work under the direction of the opponent No. 1 and his status is that of an employee of the opponent No. 1. He also categorically averred that he had no business of bidi making and is not an employer within the definition of Minimum Wages Act. The Presiding Officer and the Authority, which is Civil Judge (Junior Division) treated the question of jurisdiction of the Authority as a preliminary issue. It is unfortunate that the issues were not drawn up on the basis of the pleadings of the parties in this case. On a perusal of pleadings, it will be seen that opponent No. 1 had not specifically raised an issue about the jurisdiction of the authority to determine the nature of relationship between the claimants and the opponent No. 1. An objection to

jurisdiction seems to have been taken as specifically pleaded in paragraph 16 only to adjudication of complicated questions of facts and law. But during the arguments, in disposing of the preliminary issue, the learned Judge considered that objection to jurisdiction was in the matter of adjudication in the nature of relationship between the claimants and the persons who were alleged to be employers of the claimants, and on that basis has disposed of the objection. The learned Judge purports to follow the principle of the recent decision of this Court in Spl. Civil Appln. No. 376 of 1966, D/- 20-8-1966 (Bom), to hold that what has to be decided on the pleadings of the parties before him is the issue as to which of the rival contracts set up by the parties holds the field, and considering that that was the nature of the dispute between the parties, the Authority has come to the conclusion that it has no jurisdiction to decide any such issue. Observing that provisions of the Payment of Wages Act, under which the case referred to arose, and the provisions of the Minimum Wages Act, under which the claim before him was made, the learned Judge considered that the same principles would be attracted in determining the ambit of jurisdiction of the Authority under the Minimum Wages Act. (sic)

5. It is this decision declining to exercise jurisdiction by the Authority under the Minimum Wages Act, under these circumstances, which is challenged before us. We may mention at the outset that the question whether the provisions of the Payment of Wages Act, 1936, and the Minimum Wages Act, 1948, are or are not *pari materia* has not been canvassed before us and we do not propose to decide this petition on that basis.

6. In support of the order impugned in this petition, it is urged on behalf of the contesting respondent No. 1, that the view taken regarding the issue arising out of the pleadings is supportable because of the claim of the applicant, that is, the petitioner, that he was an employee of the opponent No. 1 having been employed through the agency of opponent No. 2 Zibal. In considering this question, therefore, the argument proceeds, it would have been necessary to determine the nature of relationship between the opponent No. 1 and opponent No. 2 inter se, and if that issue is required to be decided, the Authority will necessarily be required to adjudicate in respect of the two contracts, one being the contract or its absence as to the relationship between the claimants on the one hand and the opponent No. 1 on the other, and the other contract as to the relationship or the nature of contract between the opponent No. 1 and the opponent No. 2.

7. Inasmuch as the decision of this Court in Ramkrishna Ramnath's case, Spl. Civil Appn. No. 376 of 1966, D/-20-8-1966 (Bom) has been heavily relied upon both before the Authority and also in this Court, it is necessary to find out what the exact decision in that case is. The petitioner before the High Court in that writ petition was bidi manufacturer, called Ramkrishna Ramnath (Private) Limited. The first respondent was the Authority under the Payment of Wages Act and the second respondent No. 2, opponent No. 2, was the worker, or the person, who claimed to be a worker in the bidi factory of the petitioner. No other party was impleaded to that petition. While the respondent No. 2 in that petition claimed that he was an employee of the petitioner Ramkrishna Ramnath, the petitioner resisted the claim on the ground that the application was not maintainable under the Payment of Wages Act and one of the grounds of the petition was that the second respondent, that is, the claimant, was an independent contractor and not an employee, in that he was paid by the out-turn of the work as so much per thousand, and therefore, he was not a worker or an employee of the petitioner Ramkrishna Ramnath. The decision makes a reference to several judicial pronouncements bearing on the question of jurisdiction of the Authority under the Payment of Wages Act and the 3 decisions of this Court, namely, A. R. Sarin v. B. C. Patil, AIR 1951 Bom 425 = 53 Bom LR 674; Anthony S. Almeida v. R. M. Taylor, AIR 1956 Bom 737 and Full Bench decision in Vishwanath Tukaram v. General Manager, Central Railway, AIR 1958 Bom 111 (FB) as well as the decision of the Supreme Court in Sri Ambika Mills Co. Ltd. v. S. B. Bhatt, AIR 1961 SC 970 have been referred to. With advertence to the decision in Almeida's case, AIR 1956 Bom 737, the Division Bench in Spl. Civil Appn. No. 376 of 1966 (Bom) observed as follows:—

"In AIR 1956 Bom 737 the question was which contract of employment — the one alleged by the employee, or the one alleged by the employer — governed the relationship of the parties. The Authority had to decide whether there had been deduction or non-payment of wages and for that purpose to decide what were the wages to which the employee was entitled and what the contract between the employer and the employee was, what the employee was entitled to under the terms of the contract and not what the terms or conditions of service of the employee were. The Court held that when the very basis of the relationship is in dispute and in controversy, the Legislature did not intend that a Court of summary jurisdiction should decide that important question."

We have deliberately reproduced this passage from the judgment of the Division Bench because of the interpretation sought to be placed on the observation "the Court held that when the very basis of the relationship is in dispute and in controversy, the Legislature did not intend that a Court of summary jurisdiction should decide that important question," to mean that whenever there is any dispute of any kind as to the relationship between the parties alleged by one party and denied by the other, such a question is outside the pale of jurisdiction. In subsequent paragraph, the Division Bench observed that though an employer cannot deprive the Authority of its jurisdiction by a mere denial of the relationship, if there are two different kinds of relationships alleged by either of the parties, then the question cannot be regarded as merely incidental to the only dispute between the parties which is whether wages are delayed and there is deduction in the wages, where there are two contracts in the field. Then the Division Bench observed as follows:—

"In the present case the contention of the petitioner is that having regard to the nature of the work done, the method of payment and other matters connected with the work, the respondent is an independent contractor, while the respondent says that he is an employee."

In our opinion the facts of the case before the Division Bench and the observations which we have quoted in some detail leave no manner of doubt that that case was decided on the footing that two different kinds of contracts were pleaded in competition with each other as to the relationship between the employer and the employee, whereas the claimant urged that he was an employee of the bidi manufacturer, the bidi manufacturer, in his turn, contended that the claimant was employed as an independent contractor. We do not see how this principle can be reasonably called in aid in determining the ambit of jurisdiction of the Authority in the present case. Here the question is straight and simple one. The claimant on the one hand, like the petitioner, says that he is employed as a bidi roller by the opponent No. 1. Though undoubtedly he says that the employment was through the agency of opponent No. 2, that further averment will not be detrimental to the adjudication of the question as to what is the true relationship between the claimant and the opponent No. 1. The opponent No. 1 on his part does not say that there is any kind of jural relationship between the opponent No. 1 and the claimant. So this is a case where there is assertion of the relationship of an employer and an employee between the claimant and the person against whom the claim is made, and the denial on the

part of such a person against whom the claim is made that the claimant was an employee. In our opinion, the case squarely falls within the ratio of the Full Bench decision of this Court in AIR 1958 Bom 111. The summary of the decision of the Full Bench on the basis of the observations in paragraphs 4 and 7 of the judgment would be as follows:—

"The nature and ambit of the jurisdiction of the Authority acting under the Payment of Wages Act are: (1) the Authority has no jurisdiction to decide whether the services of an employee have been rightly or wrongly terminated or whether the dismissal is lawful or unlawful; (2) the primary function of the Authority is to determine what the wages of the employee are and whether there has been a delay in the payment of those wages or a deduction from those wages; (3) in order to determine the wages it may be necessary to determine what the terms of the contract were under which the employee was employed and under which he was claiming his wages; (4) in order to determine what the contract was, what the terms of the contract were, what were the wages due under the contract, it might become necessary for the Authority to determine whether in the first place there was an employment or not; and (5) when there is a dispute as to which is the contract that governs the relationship of the parties and if two rival contracts are in the field, then the Authority under the Payment of Wages Act has no jurisdiction to decide which of the contracts should regulate the rights of the parties."

¶ 8. It will thus be seen that the fourth item, namely, the necessity to determine what the contract was, necessarily postulates necessity to find out the terms of the contract, because the Authority has to find what were the wages due under the contract, and to find all this it might be necessary to determine in the first place whether there was an employment or not. We, therefore fail to see how it could be said that the Authority even under the Payment of Wages Act lacks jurisdiction to determine when an issue is joined as to whether there was or was not an employment, or a relationship of employer and employee between the claimant and the person against whom payment is claimed. We are unable to interpret the Division Bench decision of this Court in Spl. Civil Appn. No 376 of 1966 (Bom) tantamount to a view that the Authority under the Payment of Wages Act lacks jurisdiction to decide the question of existence or otherwise of a relationship of employer and employee between the claimant and the person against whom the claim is made.

9. Here we may consider another argument urged on behalf of the contest-

ing respondents, namely, that the pleadings of the parties in the case before us had raised a question of more than one contract. The contention is that the claimant claims to have been employed through Zibal, who is alleged to be an agent of employee of the opponent No. 1, whereas the opponent No. 1 says that the opponent No. 2 Zibal is an independent contractor, and therefore, in that sense, the Authority will have to determine the nature of relationship between the claimant and the opponent No. 1 and also between the opponent No. 1 and opponent No. 2 inter se. That may be so, but we fail to see how merely because the Authority is required to determine who had employed the claimant and on whose behalf, that becomes the question of adjudication of rival contracts or competing contract. The issue thus raised does not involve adjudication of any competing contract, but whether the contract pleaded or relationship claimed has been brought about through the agency of some other person, or in the circumstances alleged. Such an inquiry when necessary will be included as a part of the inquiry into ancillary matter required to be decided to determine the basic question of relationship between the claimant and the person from whom the payment is claimed.

10. The Full Bench decision of this Court was before the Supreme Court in AIR 1961 SC 979 at p. 975, the Supreme Court observed as follows:

"Now, if a claim is made by an employee on the ground of alleged illegal deduction or alleged delay in payment of wages several relevant facts would fall to be considered. Is the applicant an employee of the opponent? and that refers to the subsistence of the relation between the employer and the employee. If the said fact is admitted, then the next question would be: what are the terms of employment? Is there any contract of employment in writing, or is the contract oral? If that is not the point of dispute between the parties, then it would be necessary to inquire what are the terms of the admitted contract. In some cases a question may arise whether the contract which was subsisting at one time had ceased to subsist and the relationship of employer and employee had come to an end at the relevant period. In regard to an illegal deduction, a question may arise whether the lockout declared by the employer is legal or illegal. In regard to contracts of service sometimes parties may be at variance and may set up rival contracts, and in such a case it may be necessary to inquire which contract was in existence at the relevant time."

11. There is, therefore, no doubt that one of the crucial questions that must

so, this Court is powerless. I, therefore, do not find any substance in the first point raised by the petitioner.

10. As regards the second point, it is very difficult to follow the argument raised by the learned Advocate for the petitioner. Firstly, he wanted to argue that Rule 84 sub-rule (2) is ultra vires the Constitution. I fail to see how this is so. The learned Advocate could not really point out to me even at the hearing as to which of the articles or which part of the Constitution was being violated by framing of such rule. So in absence of such particulars it is very difficult to appreciate the argument of the learned Advocate and I do not think that the sub-rule (2) of Rule 84 is involved in any Constitutional difficulties.

11. The learned Advocate then wanted to argue that under Rule 84 (1) the notice has to be served personally. This personal service could not be effected by a mere presumption under sub-rule (2) as provided by Rule 84. I again fail to see how this is so. This is an age-old rule incorporated in the present Rule substantially from provision of Section 114 of the Evidence Act, as also of Section 27 of the Bengal General Clauses Act. This is really a protection given to the official act. It is well settled that such a clause only creates a presumption of service and unless it is rebutted, the authorities concerned are entitled to act upon such presumption as conclusive proof of particular act or transaction. It cannot be said that this sub-rule (2) is inconsistent with sub-rule (1) (i) of Rule 84. It was open to the petitioner to rebut the presumption but the successive findings are that he has failed to do so. That being the position, the second point, in my view, is equally without any substance.

12. Before I part with this case I must also notice that the learned Advocate also tried to argue that the 'best judgment assessment' itself was bad in law because it was arbitrary, capricious and based on no data. I am afraid I cannot enter into this question because it is well settled that if an aggrieved party has allowed his appeal to be barred by time, he cannot be heard to agitate this point over again which was the subject matter of appeal, in a writ petition in this jurisdiction. So I reject this argument of the petitioner.

13. The result is, the petition fails. The Rule is discharged. But there will be no order as to costs.

Rule discharged.

AIR 1970 CALCUTTA 417 (V 57 C 78).

P. N. MOOKERJEE AND A. K.

MOOKERJI, JJ.

Union of India, represented by Commr. of L. T. W. B. II, Petitioner v. Jnanada Prasanna Chakravarti, Opp. Party.

Civil Revn. Case No. 3274 of 1969, D/- 10-3-1970.

(A) Income-tax Act (1961), Section 222 — Tax Recovery Officer — Powers of.

Tax Recovery Officer is a creature of Income Tax Act, 1961. He has no powers to charge, levy or recover any interest which can be recoverable only under S. 16 (a) of the Public Demands Recovery Act.

(Para 5)

(B) Income-tax Act (1961), S. 297 (2) (i) — Pending recovery action — Saving of — Recovery proceedings started under Public Demands Recovery Act taken over by Tax Recovery Officer under Income Tax Act — Procedure under Income Tax Act 1961 followed — Tax Recovery Officer ordering payment of interest recoverable under Public Demands Recovery Act but not under Income Tax Act, 1961 — Proceedings for recovery of such interest not saved under the section — Tax Recovery Officer's order for payment of such interest not sustainable.

(Para 5)

Balai Lal Pal and Nandalal Pal, for Petitioner; Bhagabati Prosad Banerjee, for Opp. Party.

P. N. MOOKERJEE, J.: This Rule raises a short question.

The opposite party became liable to payment of Income Tax under the Indian Income Tax Act, 1922. For recovery of the same, proceedings were started under the Public Demands Recovery Act, as authorised by law. In the said proceedings, the opposite party was permitted to make payment of the dues under the certificate by instalments. These payments were being made from time to time and they were being accepted by the Certificate Officer, and, through him, by the Income Tax Department. This state of things continued upto 14th August, 1957. Thereafter, it appears, the proceedings for recovery were taken over by the Tax Recovery Officer under the Income Tax Act, 1961. Before him, also, a further instalment was paid, namely, of Rs. 500, on or about 6th October, 1967, and, thereafter, on or about 9th November, 1967, the balance, due under the above existing certificate, namely, Rs. 7042.33 p., appears to have been paid and the same was accepted by the Tax Recovery Officer, who, however, recorded an order on that date in the following terms:—

"9th November, 1967: Challan passed for Rs. 7042.33 p. for payment. Await official challan. To date fixed for payment of balance."

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The next order on the order-sheet appears to be of the 18th May, 1968, which is recorded as follows:

"18th May, 1968: Seen credited challan for the marginal noted payment. Ask C. D. R. to pay balance including interest and costs."

This further payment was apparently demanded under Section 16 (a) of the Public Demands Recovery Act and, to the same, the opposite party objected, on the ground, inter alia, that the Tax Recovery Officer had no jurisdiction to make such demand under the aforesaid Act. This objection, however, was rejected by the learned Tax Recovery Officer upon the view that Section 297 (2) (j) of the Income Tax Act, 1961, authorised such recovery.

2. Against this order, the opposite party filed an appeal to the Commissioner under Rule 86, Schedule II, of the Income Tax Act, 1961. That appeal was allowed by the learned Commissioner upon the view that the recovery of interest and cost, sought for by the department, was not permissible under the law and, against the said order of the learned Commissioner, the present Rule was obtained by the Union of India.

3. Before us, in support of the Rule, Mr. Pal has relied on Section 16 (a) of the Public Demands Recovery Act, read with Section 297 (2) (j) of the Income Tax Act, 1961, and his contention is that this demand for interest and cost is sufficiently warranted and authorised by the above provision of the Public Demands Recovery Act in the present proceeding, which was saved under Section 297 (2) (j) of the Income Tax Act, 1961.

4. In our view, the order for recovery of the above interest and cost was passed by the Tax Recovery Officer under a misconception and, although the learned Commissioner may not have correctly expressed the position in law in his order, which is challenged in this Rule, his decision, so far as his ultimate conclusion is concerned, that the same cannot be recovered by the Tax Recovery Officer, is correct.

5. Section 297 (2) (j) of the Income Tax Act, 1961, saves recovery of 'any sum payable by way of income-tax, super-tax, interest, penalty or otherwise under the repealed Act....' and also gives 'any action already taken for the recovery of such sum under the repealed Act.' It is clear, however, from the words underlined (here in ') above that the saving applies to sums, recoverable under the repealed Act or the Indian Income Tax Act, 1922, which would not include the disputed interest. Moreover, the Tax Recovery Officer is a creature of the new statute, the Income Tax Act, 1961, and his power of recovery and procedure for the same are governed by Schedule II of the said Act, which does not contain any provision similar to Section 16 (a) of the Public Demands Recovery Act. As Tax Recovery Officer,

therefore, he has no power to charge or levy or recover any interest under S. 16 (a) of the Public Demands Recovery Act. It is not also disputed before us that the instant demand for interest and cost would only be supportable under S. 16 (a) of the Public Demands Recovery Act. In the circumstances, the Tax Recovery Officer had no jurisdiction to recover or to institute or carry on recovery proceedings for the same.

6. Mr. Pal points out that the Tax Recovery officer may be the Certificate Officer himself [vide Section 2 (41) of the Income Tax Act, 1961] and, as Certificate Officer, he will have power to make recovery under the Public Demands Recovery Act. It is not clear, however, from the record whether, in the instant case, the Tax Recovery Officer in question was also the Certificate Officer. Further, the relative or relevant recovery proceedings in the instant case from the moment they were taken over by the Tax Recovery Officer appear to be proceedings under the Income Tax Act, 1961 (vide Schedule II of the Act), and not under the Public Demands Recovery Act — and, as a matter of fact, the appeal to the Commissioner was filed under the said Schedule, — and so Section 16 (a) of this latter Act (Public Demands Recovery Act) would not apply.

7. In the above view, we would uphold the ultimate decision of the learned Commissioner and accept the opposite party's objection to the recovery of the disputed amounts by the Tax Recovery Officer and this Rule must be discharged accordingly.

8. We would, however, make it clear that this order will be without prejudice to the Union's right, if any under the law, to recover the disputed amounts by appropriate proceedings, in accordance with law.

There will be no order as to costs in this Rule.

9. AMIYA KUMAR MOOKERJI, J.— I agree.

Rule discharged.

AIR 1970 CALCUTTA 418 (V 57 C 79)

A. N. SEN, J.

Ofu Lynx Ltd., Applicant v. Simon Carves India Ltd., Respondent.

C. A. 183 of 1969 and C. P. No. 144 of 1969, D/- 21-3-1969.

(A) Companies Act (1956), Section 434 (1) (c) — Company when deemed unable to pay its debts — Bona fide dispute regarding the debt — Court will not entertain insolvency petition — Building contracts are generally disputed.

If there is a bona fide dispute with regard to the debt which forms the subject-matter of winding up proceeding, the Court

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will not entertain any winding-up petition on the basis of the said disputed debt and will leave the parties to resolve the disputes in appropriate proceedings. To come to any conclusion as to whether the disputes raised or sought to be raised are bona fide or not; it is certainly open to the Court to consider the nature of the disputes, to examine the same and, if necessary, to scrutinise the items of disputes. The Court does this not for the purpose of adjudicating upon the dispute or coming to any final conclusion in respect of the said dispute, but to satisfy itself whether the said disputes appear prima facie bona fide and make the debt a disputed one. In the facts of particular cases, if the Court comes to the conclusion that disputes sought to be raised are not bona fide it will refuse to grant any stay of the winding-up petition and will proceed with the same. In any case where the Court entertains some doubt as to the bona fides of the disputes sought to be raised and has suspicion about the true nature thereof, the Court may direct the company to furnish security to prove its bona fides and solvency and relegate the claimant to a suit on such security being furnished and the Court may stay the winding up proceeding.

(Para 12)

In building contracts as disputes are very likely to arise between the parties provision is usually made in the contracts themselves as to how such disputes are to be resolved. The Court should not normally entertain a winding-up petition on the basis of a claim arising out of a contract of this nature, unless the Court is satisfied beyond doubt on the materials available that the claim is firmly established and there is no room for any genuine dispute with regard to the same. (1952) 56 Cal WN 29, (1967) 71 Cal WN 38, Rel. on.

(Para 13)

(B) Companies Act (1956), Section 434 (1) (a) — Company when deemed unable to pay its debts — Notice under Section 434 (1) (a) — Notice not stating exactly correct amount of debt but amount exceeding Rs. 500/ — Notice not invalid. (1867) 2 Ch A 405; Com. Petn. No. 179 of 1967, D/- 6-6-1968 (Cal), Rel. on. Case law discussed.

(Para 22)

Cases Referred: Chronological Paras

- (1967) Com. Petn. No. 179 of 1967
D/- 6-6-1968 (Cal) Re Amritlal Ojha
and Co. (P) Ltd. 11, 19, 22
(1967) 71 Cal WN 38= (1966) 2
Com. LJ 213, In re, Bengal Fly-
ing Club Ltd. 6, 13, 17
(1966) AIR 1966 SC 1707 (V 53)=
1966-2 SCJ 126, Harinagar Sugar
Mills Co. Ltd. Bombay v. Court
Receiver, High Court, Bombay 8
(1962) AIR 1962 Cal 613 (V 49),
Bangasri Ice and Cold Storage Ltd.
v. Kali Charan Banerjee 8
(1962) 1 All ER 121= 1962-2 WLR
38, In Re, Tweeds Garages Ltd. 11, 19, 22

- (1952) 56 Cal WN 29= 1952-22 Com
Cas 62 In Re, Bharat Vegetables
Products Ltd. 13
(1946) (1946) 2 All ER 197, Re, Welsh
Brick Industries Ltd. 8
(1936) AIR 1936 Cal 628 (V 23)=
ILR 62 Cal 294, In Re: Janbad
Coal Syndicate Ltd. 6, 17, 20
(1931) AIR 1931 Cal 692 (V 18)=
ILR 58 Cal 716, In Re: Janbazar
Manna Estate Ltd. 6, 11, 17, 20
(1927) AIR 1927 Cal 625 (V 14)=
ILR 54 Cal 345, Japan Cotton
Trading Co. Ltd. v. Jajodia Cotton
Mills Ltd. 6, 11, 17, 20
(1920) AIR 1920 Cal 1004 (V 7)=
23 Cal WN 844, Company v.
Resmeswar Singh 6, 17
(1882) 49 LT 147, Re: Imperial Hydro-
pathic Hotel Company Blackpool
Ltd. 8
(1867) 2 Ch App 405= 36 LJ Ch
451, Cardiff Preserved Coal &
Coke Co. v. Norton 11, 18, 22
S. C. Sen, for Applicant; Sankar Ghosh,
for Respondent.

ORDER:— This is an application by Ofu Lynx Limited (hereinafter referred to as the company) for an order that the petition for winding-up of the company presented by the respondent Simon Carves India Limited also a company (and hereinafter referred to as the respondent) be dismissed and/or stayed permanently.

2. The respondent claims to be a Creditor of the company for a sum of Rupees 8,32,400.43 paise. The respondent had caused a notice to be served on the company under Section 434 of the Companies Act, 1956 demanding payment of the said sum of Rs. 8,32,400.43 paise together with interest. On the expiry of the prescribed period of three weeks the respondent has presented the petition for the winding-up of the company on the allegation that the company is unable to pay its debts. After the petition presented by the respondent for the winding-up of the company has been admitted by this Court, the company has made this application for an order that the said petition presented by the respondent be dismissed or permanently stayed. The company has obtained an interim order of stay of further proceedings of the said petition for winding-up.

3. The main ground on which the company has made this application is that the winding-up petition presented by the respondent is an abuse of the process of this Court and is not maintainable, as there is no debt due and payable by the company to the respondent. It is contended on behalf of the company that the claim made by the respondent is seriously in dispute and there is a bona fide dispute with regard to the claim of the respondent. It is the contention of the company that as there is a genuine dispute with regard to the claim of the

company and the alleged debt of the company is disputed bona fide by the company, the petition for the winding-up of the company cannot be entertained. It has also been contended that the respondent has presented the winding-up petition mala fide with the intention of humiliating the company which is a rival of the respondent in its trade. Mr. S. C. Sen, learned Counsel appearing to support of this application has submitted that the alleged claim of the plaintiff arises in respect of works of construction done on the basis of contracts between the parties. He has submitted that although on the basis of the value mentioned in the contracts between the company and the respondent the company has to pay a sum of about Rupees 12 Lakhs in respect of the works covered by the contracts between the parties, the company has already paid about Rupees 13 Lakhs to the respondent. It is his submission that the claim for the further sum of Rs. 8,32,400.43 paise is absurd, excessive and exorbitant and the company has no liability to pay the said sum or any portion thereof to the respondent. He has argued that in any event the sum claimed by the respondent is disputed bona fide by the company and so long as the claim of the company is not properly established in appropriate proceedings it cannot be said that there is any debt due to the respondent and that there has been any failure or neglect on the part of the company to pay any debt due and payable to the respondent. He has drawn my attention to the contracts which were entered into between the parties and he has contended that the very nature of the contracts indicates that there is every likelihood of honest disputes and differences arising between the parties in the matter of execution of the same; and it is his contention that as disputes and differences are embedded in the contracts and contemplated by the parties themselves, the contracts provide the method as to how such disputes and differences are to be resolved by arbitration. Mr. Sen has argued that in the instant case there is a dispute with regard to the quality of works done, the quantity of works done, the rates on the basis of which bills have been made out, apart from the question of non-completion of the work by the respondent and the loss and damage suffered by the company in consequence thereof. He has argued that in the instant case out of the claim of over Rupees 8 lakhs made by the respondent, over Rupees 5 lakhs is alleged by the respondent to be payable in respect of extra works done. It is the argument of Mr. Sen that the entire claim of over Rupees 5 lakhs in respect of extra works done is disputed and there can really be no doubt with regard to the existence of a bona fide dispute of a very serious nature with regard to the same. It is Mr. Sen's contention that a claim made by the respondent on its own calculation and

basis of any sum for alleged extra works done does not make the claim a valid one and does not cast any liability upon the company to meet the same. With regard to the claim of the respondent for the remaining sum of over Rupees 3 lakhs on the basis of the bills submitted, Mr. Sen has argued that the said claim made by the respondent is bona fide disputed by the company. Mr. Sen argues that the nature of the disputes and the particulars thereof have been fully set out in the affidavit and in the annexures thereto. Mr. Sen contends that it cannot be said that the disputes which have been raised by the company, giving necessary particulars in details, are mala fide or manufactured for the purpose of resisting the claim of the respondent. Mr. Sen submits that there is no admitted claim of the respondent and the fact that the company had not raised these disputes when the respondent had been making demands, does not go to show that there were no disputes or that the claim of the respondent was being admitted by the company. He has commented that when the letters demanding payment were being written to the company by the respondent, there was normal business relationship between the parties and the company was expecting that cordial business relationship between the parties would continue till the end and the entire works would be done and the whole transaction would be completed to the satisfaction of the parties. Mr. Sen has drawn my attention to the letter dated the 6th of July, 1967 from the company to Mr. P. S. Vanchi, Dy. Managing Director of the respondent and points out that even at that point of time the company has stated that "Your bills are under verification and we are ascertaining the payments due to you". Mr. Sen has also pointed out that in reply to the statutory notice served on the company, the company has clearly and categorically raised the disputes with regard to the claim made. It is Mr. Sen's contention that whether there is any bona fide dispute to the claim of the respondent has to be judged on the merits of the case now before the Court. Mr. Sen in fact has sought to argue that in case of any kind of a claim arising out of any building contract or a contract involving works of construction, there is always room for bona fide disputes between the parties and unless all such disputes are properly and satisfactorily resolved, there cannot be any debt due or payable in respect of such works of construction done and it is Mr. Sen's contention that in any such cases, a winding-up petition for any such alleged claim, should not be encouraged by Court. Mr. Sen, therefore, submits that the debt alleged by the respondent is disputed bona fide and therefore no order for winding-up of the company should be made.

4. Mr. Sen has also submitted that the claim of the respondent is disputed is

also borne out by the fact that the company in terms of the arbitration clause contained in the contract between the parties has referred the disputes to arbitration and the respondent company has also appointed its arbitrator. Mr. Sen has contended that the respondent should not be permitted to proceed with its winding-up petition in breach of the said arbitration agreement between the parties, as the same will have the effect of permitting the respondent to circumvent the provisions of the agreement between the parties. It is Mr. Sen's contention that the existence of such an arbitration agreement in the contracts between the parties in respect of which any claim is made, should be considered to be a bar to any winding-up proceeding and a party to such an agreement should not be allowed to present a winding-up petition till the disputes are resolved in the manner agreed upon by the parties.

5. In support of his contention that there cannot be any winding-up order of any company in a case where there is a bona fide dispute with regard to the debt, Mr. Sen has referred to various authorities.

6. Mr. Sen has next contended that there cannot be any winding-up order in the instant case as the statutory notice under Section 434 of the Companies Act is invalid and not in order. It is Mr. Sen's contention that the said notice mentions a sum of Rupees 8,32,400.43 paise together with interest and in any event the said sum can never be due and payable and a much lesser sum, if any, would be due and payable upon proper adjustment, calculation and valuation and settlement. Mr. Sen contends that the said claim of Rs. 8,32,400.43 paise includes claims of various extra works alleged to have been done by the respondent and other claims about which there is no ascertained amount and there can be no ascertained amount till the said amount is either settled by the parties or adjudicated upon in proper proceedings. It is Mr. Sen's contention that the notice under Section 434 of the Companies Act must state and mention the exact sum due and payable by the company and if the exact amount is not mentioned in the notice, the notice must be considered to be a bad notice and no effect can be given to such a notice. Mr. Sen has argued that this statutory notice, the service of which, gives rise to a presumption of inability to pay debts, must be strictly construed. It is his argument that there may be either insolvency of the company in fact and such fact must be established by necessary or proper materials. He has argued that as it is difficult for any creditor of a Company to establish factual insolvency of the company, the legislature has provided that the statutory notice under Section 434 for payment of the debt and the service of a proper notice in accordance with the statute will give rise to a statutory presumption of insolvency and the company will be deemed to be unable

to pay its debts on the expiry of the prescribed period after the service of the statutory notice. Mr. Sen contends that a notice which has the effect of creating such important statutory presumption must necessarily be strictly construed and any creditor who intends to have the benefit of this statutory presumption and the deeming provisions of inability to pay debts must comply strictly with the provisions contained in the statute. He contends that the statute clearly contemplates that the definite and exact sum must be stated in the notice and the failure or neglect to pay the said exact sum within the prescribed period can only give rise to the presumption. If the notice does not state the exact sum and demands payment of a sum which is in excess of the debt payable by the company, the notice is bad, as the company has no liability to pay the said sum stated in the notice and as such there can be no question, according to Mr. Sen, of any failure or neglect to pay the sum claimed in the notice and there can therefore be no presumption of inability to pay the debt. In support of the contention Mr. Sen has referred to the following decisions:—

Japan Cotton Trading Co. Ltd. v. Jajodia Cotton Mills Ltd., AIR 1927 Cal 625; In Re: Janbazar Manna Estate Ltd., ILR 58 Cal 716= (AIR 1931 Cal 692); In Re: Jambad Coal Syndicate Ltd., AIR 1936 Cal 628; The Company v. Rameswar Singh, 23 Cal WN 844= (AIR 1920 Cal 1004); In Re: Bengal Flying Club Ltd., (1967) 71 Cal WN 38.

7. Mr. Sen has submitted that the respondent is a rival of the company in the same line of business and the respondent has made the application of winding-up of the company mala fide because of the business rivalry.

8. Mr. Sankar Ghosh, learned Counsel appearing on behalf of the respondent has submitted that there is no bona fide dispute with regard to the debt of the company to the respondent. He has argued that the company is seeking to raise certain false and frivolous disputes to resist the application made bona fide by the respondent for the winding-up of the company. Mr. Ghosh does not dispute that if there is a bona fide dispute with regard to any claim or debt on the basis of which a winding-up petition is presented, the winding-up petition must fail and the dispute must be resolved in appropriate proceedings. Mr. Ghosh, however, contends that merely seeking to raise a dispute does not make the dispute a bona fide one and does not make the debt a disputed debt. It is his argument that only in a case where the Court is satisfied that there is a bona fide dispute with regard to the debt on the basis of which the winding-up petition is presented, the Court will refuse to make any order on the said application for winding-up. He contends that it is the duty of the Court to consider the nature of the disputes sought to be raised, to exa-

mine the same and, if necessary, to scrutinise the same for the purpose of deciding whether the disputes sought to be raised are bona fide or not. He does not contend that Court can or should finally adjudicate upon the disputes sought to be raised by any company in any winding-up proceeding, but it is his contention that the Court has to examine the facts and circumstances of each particular case and the nature of the dispute sought to be raised to come to a prima facie conclusion as to whether there is any bona fide dispute with regard to the debt or the disputes sought to be raised are mala fide and being manufactured for the purpose of resisting the application for winding-up. In support of his contention that it is the duty of the Court to examine the nature of the disputes and to scrutinise the disputes sought to be raised by way of defence to a winding-up petition on the basis of such debt Mr. Ghosh has referred to and relied on the following decisions:—

Bangasri Ice and Cold Storage Ltd. v. Kali Gharan Rancierjee, AIR 1962 Cal 613; In Re: Welsh Brick Industries Ltd., (1916) 2 All ER 197; In Re: The Imperial Hydro-pathic Hotel Co., Blackpool Ltd., (1882) 49 LT 147, Harmanagar Sugar Mills Co Ltd., Bombay v M. W. Pradhan, Court Receiver, High Court, Bombay, AIR 1966 SG 1707.

9. Mr. Ghosh has argued that in the facts of the instant case the disputes sought to be raised by the company are clearly mala fide and have been engineered only with the view of resisting the winding-up petition presented by the respondent. It is his argument that there is no bona fide dispute with regard to the debt. He submits that the claim of the respondent company in respect of extra works done amounting to about Rupees 5 lakhs may be said to be disputed in the sense that the said amount is not agreed upon and may have to be settled either by agreement of the parties or through appropriate proceedings. He has argued that a huge sum of course, will be found due and payable by the company in respect of the extra works done, but it may be said that the exact claim of the respondent on this account is yet to be finally settled. He contends that there is, however, no dispute with regard to the claim of over Rs. 3 lakhs for works done on the basis of the contract and in respect of which bills were duly submitted to the company and the bills have been duly accepted by the company. He points out that in respect of this claim of over Rs. 3 lakhs the company never raised any dispute at any earlier stage before the statutory notice under Section 434 of the Companies Act was served on the company. He has drawn my attention to the correspondence that passed between the parties before the respondent served the statutory notice on the 28th of November, 1967. He has drawn my particular attention to the letters dated the 19th April, 1967, 4th May,

1967 and 15th May, 1967 all addressed by the respondent to the company and annexed to the affidavit in opposition affirmed by Ashoko Kr. Sinha Roy on the 12th of August, 1968 in this proceeding and to the letters of the 9th May, 1967 and 8th July, 1967, addressed by the company to the respondent and also annexed to the said affidavit and to various other letters annexed to the said affidavit of Ashoko Kr. Sinha Roy. Relying on the said letters in particular and the correspondence generally that had passed between the parties before any legal action had been taken, Mr. Ghosh submits that it is obvious from the same that there was no genuine dispute with regard to the claim of the respondent for the sum of over Rs. 3 lakhs and the company was not in a position to pay the sum due to financial difficulty and the company had in fact pleaded financial difficulty for being unable to meet the said bills of the respondent. Mr. Ghosh contends that in this background when the company has practically admitted its liability and has asked for time to make the payments, the disputes now sought to be raised cannot be said to be bona fide and no reliance should be placed by the Court on the said disputes now sought to be raised. Scrutinising the nature of the disputes raised in answer to the statutory notice and in the affidavits, Mr. Ghosh submits that a scrutiny of the said disputes sought to be raised clearly indicates that the said disputes have been manufactured for the purpose of resisting the winding-up application of the company.

10. Mr. Ghosh has next argued that the fact that the company has sought to refer the disputes to arbitration and has appointed an arbitrator is not of any consequence. According to Mr. Ghosh, this fact on the other hand goes to show the mala fide conduct of the company. Mr. Ghosh points out that the said disputes were referred to arbitration only at the time of making this application and not at any time before that and he submits that that was so done only with the intention of creating grounds for this application. Mr. Ghosh has argued that the said reference to arbitration by the company has been intended to be used as a mere device for resisting this application and not for settlement of any real dispute between the parties. Mr. Ghosh points out that after the said reference had been made by the Company, the respondent also appointed its Arbitrator without prejudice to the pending application for winding up of the company presented by the respondent with a view to prevent the Arbitrator appointed by the company from acting as the sole Arbitrator and to stop any ex parte arbitration in the interest of the respondent. Mr. Ghosh, however, comments that no further steps have been taken by the company in the matter of the said arbitration thereafter.

11. Mr. Ghosh has next contended that the statutory notice under Section 434 served on the company in the instant case is perfectly valid and in order. He has argued that if any claim is made in the notice in excess of what may be actually held to be payable by the company, the notice does not become bad or defective, so long as the debt mentioned in the notice exceeds the sum of Rs. 500 and includes the claim on the basis of which the notice is served. He argues that to hold to the contrary would render the provisions contained in Section 434 of the Companies Act absolutely nugatory. He does not dispute that the notice being a statutory notice should be strictly construed and he submits that even on a strict construction of the said section it is not imperative that the exact amount has to be mentioned. With regard to the cases cited by Mr. Sen, AIR 1927 Cal 625 and in ILR 58 Cal 716 = (AIR 1931 Cal 692) Mr. Ghosh has submitted that those decisions were perfectly justified as the notice in the case in AIR 1927 Cal 625 was by a Solicitor and not under the hand of the creditor and in view of the language used in the section, such a notice by Solicitor was then not permissible. Mr. Ghosh, however, points out that the said provision has since been amended and a notice by Solicitor is now in order. With regard to the other case of Janbazar Manna Estate in ILR 58 Cal 716 = (AIR 1931 Cal 692) Mr. Ghosh points out that the notice in the said case was not served at the Registered Office of the company as required under statute, and was therefore held to be bad. With regard to the amount of the claim, Mr. Ghosh has argued that all that section 434 requires that the claim must exceed Rs. 500 in value and it is his argument that claim for a bigger sum necessarily includes a claim for the lesser sum. He argues that if for any reason it appears to the Court that the claim for the sum stated in the notice is *prima facie* not tenable or correct and it appears that a claim for a lesser sum exceeding the sum of Rs. 500 is not in dispute and remains payable by the company and has remained unpaid after the service of the notice claiming a larger sum, the notice cannot be said to be bad and the winding up petition cannot be rejected on that ground. In support of this contention, Mr. Ghose has relied on the following decisions:—

Cardiff Preserved Coal and Coke Co. v. Norten, (1867) 2 Ch App 405; In re: Tweeds Garages Ltd., (1962) 1 All ER 121; Unreported decision of Ghose, J., in Com. Petn. No. 179 of 1967, (Cal) In Re: Amritlal Ojha, and Co. (P) Ltd.

12. The main question which falls for determination in the present case is whether there is a bona fide dispute to the debt on the basis of which the winding up petition has been presented in the instant case. It is well settled that if there is a bona fide dis-

pute with regard to the debt which forms the subject-matter of the winding up proceeding, the court will not entertain any winding up petition on the basis of the said disputed debt and will leave the parties to resolve the disputes in appropriate proceedings. This legal position is so firmly and universally established that I do not consider it necessary to refer to any authority in support of this proposition. This position necessarily follows from the provisions contained in Section 434 of the Companies Act. When there is a bona fide dispute with regard to any debt claimed, it cannot be said that there is in fact any debt till the disputes are resolved and there cannot be any question of any failure or neglect to pay unless the debt is established to be due and payable. Whether there is any bona fide dispute with regard to any debt claimed or not will necessarily depend on the facts and circumstances of each particular case. Disputes raised or sought to be raised may not be bona fide and will not necessarily make the debt a dispute one. Merely seeking to raise certain disputes for putting off liability for payment of the debt or creating a kind of defence to the claim, will not make the debt a disputed one and disputes which appear to have been created or manufactured for the purpose of creating pleas to cover up the liability for payment of the debt can never be considered to be bona fide and will be of no avail in resisting a winding up petition. Whether the disputes which are raised or sought to be raised are bona fide or not and whether the same have been manufactured for the purpose of resisting a case for winding up of the company will have to be considered and determined by the Court on the basis of the facts of each particular case and on the basis of the materials that may be available to the court at the time the court is called upon to decide the question. To come to any conclusion as to whether the disputes raised or sought to be raised are bona fide or not, it is certainly open to the Court to consider the nature of the disputes, to examine the same and, if necessary, to scrutinise the items of disputes. The Court considers the nature of the dispute and examines and scrutinises the same not for the purpose of adjudicating upon the same or coming to any final conclusion in respect of the said dispute, but to satisfy itself whether the said disputes appear *prima facie* bona fide and make the debt a disputed one. In considering the question whether the dispute in respect of any debt is bona fide or not and whether the debt is bona fide disputed or not, the Court has not only to consider and examine the nature of the disputes raised but should consider all the facts and circumstances of the case. The conduct of the parties may be and is a relevant fact which is also taken into consideration by the Court in determining this question. The answer to this question must therefore necessarily

depend on the facts and circumstances of each particular case. In given cases on a proper consideration of all the materials the Court may come to the conclusion that there is a bona fide dispute with regard to the debt on the basis of which the petition for winding up has been presented and the Court in such cases will refuse to entertain the said application. If, on the other hand, in the facts of particular cases, the Court comes to the conclusion that disputes sought to be raised are not bona fide and have only been manufactured or created for the purposes of resisting the application, the Court will refuse to grant any stay of the winding up petition and will proceed with the same. If in particular cases the court is in some doubt as to whether the disputes are bona fide or not and is not in a position to come to any definite conclusion that the disputes are mala fide and manufactured only to create a defence to the winding up petition, the court may stay the winding up proceeding and relegate the parties to an action on terms as to security or otherwise. In other words, in any case where the Court entertains some doubt as to the bona fides of the disputes sought to be raised and has suspicion about the true nature thereof, the Court may direct the company to furnish security to prove its bona fides and solvency and relegate the claimant to a suit on such security being furnished and the Court may stay the winding-up proceeding. The legal position, to my mind, appears to be well established and I do not, therefore, consider it necessary to refer to the various authorities cited from the Bar on this aspect.

13. In the facts of the present case, I am unable to accept the contention of the respondent that there is no bona fide dispute to the claim of the respondent and the company has manufactured the disputes and sought to create them only for the purpose of resisting the winding up application. The provisions in the contract and the nature of the works done on the basis of which the claim of the respondent arises, indicate, to my mind, that there is sufficient scope for honest difference of opinion and genuine disputes in respect of the claim made. In my opinion, there seems to be a good deal of force in the contention of Mr. Sen that in building contracts of this nature 'disputes' to quote the expression used by Mr. Sen, 'are built in the contracts themselves' and it is in consideration of the fact that disputes are very likely to arise between the parties in relation to the same, provision is usually made in the contracts themselves as to how such disputes are to be resolved. In my opinion, the Court should not normally entertain a winding up petition on the basis of a claim arising out of a contract of this nature, unless the Court is satisfied beyond doubt on the materials available that the claim is firmly established and there is no room for any genuine dispute with regard to the

same. The correspondence on which Mr. Ghosh has relied do support to some extent his contention that the company had not raised any dispute with regard to the claim of over Rs. 8 lakhs at that time. It is, however, not inconceivable in the facts of the present case and particularly in view of the nature of the works done that genuine disputes might arise in respect thereof at a later stage. It has also to be noted that although the company did not raise any dispute at the time when the correspondence had passed, there is also no admission on the part of the company as to any exact amount being due and payable by the company to the respondent. On the other hand, the company in its letter of the 8th July, 1967 has specifically stated that the bills of the respondent are under scrutiny. I have also to bear in mind that at the time when these letters passed, the work was in progress and there was normal business relationship between the parties. In view of the fact that work was being done by the respondent and the respondent had to be paid for the works they were doing and in view of the nature of the business relationship between the parties, it is not unreasonable and improbable that the company might prefer not to enter into any controversy at that stage and to wait till the entire work was done for final settlement. It is also not unlikely that the points of dispute might have arisen or have been discovered subsequently. In any event, in the facts of the instant case, I am unable to come to the conclusion that the disputes sought to be raised are all mala fide and created for the purpose of this application only because no reference had been made to them in the said correspondence relied on by Mr. Ghosh. The nature of the disputes with particulars have been set out in the affidavit of Raghunath Harihar Putran affirmed on the 1st of July, 1968 on behalf of the company in support of the present summons and in the annexures thereto. It cannot be said, in my opinion, at this stage that the disputes raised or sought to be raised are all false, frivolous and mala fide. It is an admitted fact that the respondent has so far been paid over Rs. 12 lakhs by the company and it is also an admitted fact that the respondent has not completed the work under the contract. Whether the respondent was justified in stopping the work, is a question which may have to be adjudicated upon in appropriate proceedings; but the fact remains that the entire work under the contract has not been done by the respondent. There can also be no doubt that there is a bona fide dispute with regard to a major part of the debt amounting to over Rs. 5 lakhs, claimed for extra works done out of the debt of over Rs. 8 lakhs on the basis of which the respondent has presented the winding up application. In fact, Mr. Ghosh did not and could not seriously contend on behalf of the respon-

dent that there was no bona fide dispute with regard to the claim of over Rs. 5 lakhs for extra works said to have been done by the respondent and Mr. Ghosh confined his arguments to the claim of over Rs. 3 lakhs in respect of which, according to Mr. Ghosh, there is no bona fide dispute. It is, therefore, clear that there is, in any event, a bona fide dispute with regard to a very substantial part of the debt claimed. Bachawat, J. in *Re: Bharat Vegetables Products Limited*, (1952) 56 Cal WN 29 observed at p. 32 "It is well settled that the presentation of a petition for winding up is an abuse of the process of the Court if the debt on which petition is presented is disputed bona fide. The Court will not allow its process of winding up an insolvent company to be used as an instrument for extorting a claim which is disputed bona fide. The Court will at least stay the hearing of the petition even when there is ground for supposing that there is bona fide dispute as to a substantial part of the claim". Ray, J., in the case of (1967) 71 Cal WN 38, after a review of various authorities, also expressed the same view. In the facts of the instant case, I am further of the opinion that the disputes sought to be raised with regard to the remaining part of the debt claimed, cannot be said to be mala fide and to have been manufactured for the purpose of resisting the winding up application. The entire debt on the basis of which the winding up petition has been presented is, to my mind, in dispute.

14. The above finding is sufficient for the disposal of this application and in view thereof, it does not become necessary to decide the other contentions raised. As however, considerable arguments have been advanced from the bar on the question of the validity of the statutory notice. I consider it desirable to express my views on the same.

15. As already noted Mr. Sen has contended that a statutory notice to be valid must state the exact amount of debt and it has been the contention of Mr. Sen that if the exact debt is not correctly stated in the notice, the notice becomes invalid and inoperative. In essence, Mr. Sen's contention has been that if the amount claimed in the notice is not exactly the correct amount of the debt payable or if it appears to the court that the amount claimed in the statutory notice is not the exact debt which should be payable by the company because of any mistake in calculation or otherwise or because of any bona fide disputes raised with regard to any portion thereof, the notice becomes invalid and ineffective; and no presumption of any inability to pay the debt on the part of the company or of any insolvency of the company can arise under Section 434 of the Companies Act. Mr. Ghosh, on the other hand, has contended that the statu-

tory notice does not become bad, if the debt mentioned in the notice is not the exact or correct sum which may be held to be payable by the company, provided that the sum stated in the notice exceeds the amount of Rs. 500 and includes the claim which forms the subject-matter of the winding up petition, although the amount stated in the notice may not be exactly the correct amount which may be held to be payable by the company.

16. Before I deal with the respective contentions of the parties it will be convenient to set out Section 434 of the Companies Act and to discuss the cases cited from the bar on this question. Section 434 of the Companies Act 1956 reads as follows:

"434. Company when deemed unable to pay its debts. (1) A Company shall be deemed to be unable to pay its debts — (a) If a Creditor, by assignment or otherwise to whom the company is indebted in a sum exceeding Rs. 500 then due, has served on the company, by causing it to be delivered at its Registered Office, by registered post or otherwise, 'demand' under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the same, or to secure or compound for it to the reasonable satisfaction of the Creditor; (b) If execution or other process issued on a decree or order of any court in favour of a Creditor of the company is returned unsatisfied in whole or in part; or (c) If it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in Clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the Creditor if it is signed by any Agent or legal Adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any such Agent or legal Adviser or by any member of the firm."

17. The first case that has been relied on by Mr. Sen is the case of AIR 1927 Cal 625. In this case the Court was concerned with the construction of Section 163 of the Companies Act, 1913 and the relevant portion of the said Section 163 was to the following effect:—

"If a Creditor, to whom the company is indebted in a sum exceeding Rs. 500 then due, has served on the company a demand under his hand requiring the company to pay the sum so due....."

On a construction of the said section the Court of Appeal came to the conclusion that a demand by the Solicitor of a Creditor was not sufficient for purpose of Section 163. Rankin, C. J., who delivered the judgment, observed at p. 626. "But it is clear that under his hand' has some special purpose in this

connection: and in view of the fact that a consequence so serious is attached to non-compliance with the notice I am not of opinion that there is here nothing to prevent the general common law principle from being applied. That being so, the two notices founded upon this petition as being statutory notices are not sufficient." It is to be noted that there was no provision in Section 163 of the Companies Act of 1913 corresponding to Section 432 (2) of the Companies Act of 1956 and the said decision was arrived at on the basis of the language used in Section 163 of the Companies Act, 1913. The next decision that has been relied on by Mr. Sen is the decision in the case of Janbazar Manna Estate, ILR 53 Cal 716 = (AIR 1931 Cal 692). In this case the statutory notice was held to be bad as the same was not served at the Registered office of the company as required under the statute. It is to be noted that the decision in this case was also based on the clear language used in the statute and it was held that in view of the express provision in the statute, the notice to be effective must be served at the Registered office of the company. The other case that has been relied on by Mr. Sen is the decision of Remfry J. in AIR 1930 Cal 628. In this case a petition for the winding up of the company had been presented on the ground that after the statutory notice, the company had failed to pay a debt of about Rs. 72,000 due for royalties and rent. The company had taken two main objections to the said petition. The first objection of the company was that there was a claim by a third party who was alleged to have a title paramount to that of the petitioning Creditor and this objection was found not to be a very serious one. The other objection of the company was upheld by the learned Judge and in view thereof the learned Judge dismissed the said petition for winding up. The other objection and the grounds on which the same was upheld by the learned Judge may best be stated in the language of the learned Judge himself. The learned Judge observed at p. 629 "The other point is more difficult. It appears that by a consent decree in 1927 the Syndicate, as the company is called, agreed to take a new lease and surrender the old one. This lease has been executed by all the parties and as the affidavit states: 'The lease was registered by the company and the Syndicate and various parties. Registration has not been completed by four persons who executed the document, and summons have been issued to compel registration.' These four persons appear to be interested in the Syndicate. It may be that under Section 35, Registration Act, the company could have completed the registration as regards the parties attempting execution, but that has not been done. The delay in preparing the lease has been caused by difficulties in the company's title. In a winding up order the debt must

be presently payable and the title of the petitioner complete. Clearly it is insufficient to show that some other debt is due or even though that there is something over Rs. 500 due in respect of the claim made, if that was not the sum claimed. The law requires that a demand must be made for a debt that is due, and it is not permissible to support a petition by alleging that something else is due. The company, therefore, cannot rely on any admission that Rs. 13,000 and not Rs. 72,000 is due under the former lease if it is in force, nor is it sufficient to allege that Rs. 60,000 is due under the old lease. The demand was not made for rent or royalties under the old lease." Mr. Sen has also referred to the decision in the case of 23 Cal WN 841 = (AIR 1920 Cal 1004) and also to the decision in the case of (1967) 71 Cal WN 38.

18. Mr. Ghose has relied on the decision in the case of (1967) 2 Ch App 405 and has placed particular reliance on the following observations of the Lord Chancellor at p. 410 "It was contended that the winding up order was bad because Mr. Hill had demanded a sum of £ 029, and it appeared that he was entitled only to £411-7s. 0d, and the 67th and 68th sections of the Act make a company liable to be wound up only when a demand is made on a certain sum, and the company neglect to pay such sum, which in this case they were not bound to pay. But the liability of a company to be wound up under these provisions arises when a creditor, to whom the company is indebted above £ 50, serves a demand requiring the company to pay the sum so due, and the company for a certain time neglect to pay such sum. In this case there was a debt of more than £ 50 due to Mr. Hill. He made, it is true, a demand upon the company for payment of more than what was due, but of course the amount due was known to the company, and was included in the demand, and the company neglected to pay 'such sum', which means not the sum demanded, but the sum due, which they might have paid, and so have prevented the order being made. The construction contended for would make every winding up order bad where the Creditor had demanded the smallest sum above what was actually due to him."

19. The next case that has been relied on by Mr. Ghosh is the case of (1962) 1 All ER 121. In this case a petition was presented by a Creditor of the company for the winding up of the company by the Court under the provision of the Companies Act, 1913 on the ground that the company was insolvent and unable to pay its debts and that it was just and equitable that the company should be wound up. The company carried on the business of Garage proprietor and Car Dealers. The petition alleged that the company was indebted to the petitioner in the sum of £ 20,039-19s. 2d.

in respect of Higher Purchase and credit transactions on the sale of Motor Cars, the sales being financed by the petitioning Creditor and guaranteed by the company. It was alleged that sum of £20,039-19s. 3d. comprised (a) £ 19,619 which was alleged to be the subject of a settled account on a particular date and (b) £ 420-19s. 3d. which was alleged to have become due since that date. The winding up petition was supported by another Creditor who was in the employ of the company and who claimed to be a creditor for £ 95 in respect of wages due to him when he was employed by the company and who was said to have since been paid. The petition was also supported by another creditor who had obtained against the company judgment for £ 114, against which it was alleged that the company proposed to appeal. From the facts of the case it was clear that the company was at all material times heavily indebted to the petitioning Creditor, although the exact amount of the indebtedness was in dispute. It was held that where there was no doubt that the petitioners were Creditors for a sum which would otherwise entitle them to a winding up order, a dispute as to the precise amount owed was not a sufficient answer to the petition. After analysing the relevant provisions of the English Companies Act Ploymman, J. observed at p. 124 "From those provisions it appears that the only qualification which is required of the petitioners in this case is that they are Creditors, and about that, as I have said, there is really no dispute. Moreover, it seems to me that it would in many cases be quite unjust to refuse a winding up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing. If I may refer to an example which I suggested in the course of argument, suppose that a Creditor obtains judgment against a company for £ 10,000 and after the date of the judgment something is paid off. There is a genuine bona fide dispute whether the sum paid off is £ 10 or £ 20. The Creditor then presents a petition to have the company wound up. Is the company to be entitled to say:— 'It is not disputed that you are a Creditor but the amount of your debt is disputed and you are not, therefore, entitled to an order?' I think not. In my judgment, where there is no dispute (and there is none here) that the petitioner is a Creditor for a sum which would otherwise entitle him to a winding up order, a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to his petition." The other judgment that has been referred to is the judgment of S. C. Ghose, J., (unreported) in Com. Petn. No. 179 of 1967 (Cal) in which Bengal Coal Co. Ltd. was the petitioner, delivered on 6th of June, 1968. In this case a similar contention had been raised before Ghose, J. The learned Judge referred to

the decision in (1962) 1 All ER 121 and observed that the provisions of the English statute were similar to the corresponding provisions of the Companies Act of 1956 and the learned Judge negatived the said contention.

20. The cases relied on by Mr. Sen do not appear to be of any great assistance on the question involved in the present case. In the case of AIR 1927 Cal 625 and also in the case of Janbazar Manna Estate, ILR 58 Cal 716 = (AIR 1931 Cal 692) the notices were held to be bad because they were not in conformity with the express provisions of the statute. In the case of Jambad Coal Syndicate Ltd., AIR 1936 Cal 628, the decision of the Court, to my mind, appears to be that the notice must be in respect of an existing debt presently payable and cannot be availed of to include some other debt not included in the notice, even though the said other debt exceeds a sum of Rs. 500 and has not been paid. These decisions, however, establish, to my mind, that the notice has to conform to the provisions of the statute and must be strictly construed. The other decisions referred to by Mr. Sen relate mainly to the questions of disputed debts and do not appear to have any material bearing on this question.

21. The decisions relied on by Mr. Ghosh clearly support his contention and necessarily therefore, are against the contention of Mr. Sen.

22. The notice under Section 434 of the Companies Act is a serious matter and the same is fraught with grave consequences. The effect of a notice validly given under the said provision is to raise a presumption under the statute as to the inability of the company to pay the debt and its insolvency rendering the company liable to the extreme penalty of losing its very existence and being compulsorily wound up by the Court. Such a notice has necessarily to be strictly construed and the notice must comply with the requirements of the statute. I have already set out the provisions of the said Section 434 of the Companies Act. On this aspect, all that the statute requires, to my mind, is that the notice must be in respect of an existing and presently payable debt which exceeds the sum of Rs. 500. If the amount stated in the notice is for some reason, found not to be the exactly correct amount payable by the company; but is in respect of a debt existing and presently payable exceeding the sum of Rs. 500, there will be, in my opinion, sufficient compliance with the provisions of the statute and the notice will be a valid one. The statute requires a Creditor to whom the company is indebted in a sum exceeding Rs. 500 then due to serve a notice of demand requiring the company to pay the sum so due. If for some reason or other, the demand is in respect of a sum which may be in excess of the debt due, the sum due remains in-

cluded in the demand and if the sum due exceeds the amount of Rs. 500, the notice will be a valid notice, as the company is required to pay the amount which is due and which is included in the notice. To hold otherwise may have the effect of rendering the provision of Section 434 of the Companies Act, 1956 nugatory in very many of the cases, for any minor discrepancy in the amount mentioned in the notice for reasons of mistake in calculation or otherwise, will have the effect of rendering the notices bad. If the construction contended for by Mr. Sen is to be accepted, then the Court may be compelled to dismiss a winding up petition presented on the basis of a notice in respect of a debt, say, for Rs. 5 lakhs, if it appears to the Court that Rs. 100 out of the said sum of Rs. 5 lakhs stated in the notice is not payable by the company and even if it appears to the court that the sum of Rs. 4,99,900 is presently payable by the company and has not been paid in spite of the notice. As Plowman, J., points out in his judgment in the case of (1962) 1 All ER 121, such a construction may have the effect of rendering every notice bad, if there be a very minor dispute with regard to the amount mentioned in the notice and 'it would in many cases be quite unjust to refuse a winding up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing.' The observations of Lord Chelmsford, L. C., in the case of (1867) 2 Ch App 405, which I have quoted earlier, support, to my mind, the view I take. Ghose J., in the case of Amritlal Ojha and Co (P) Ltd., Com. Petn. No. 179 of 1967 (Cal) (unreported) has expressed the view that a notice does not become bad only because the exact amount has not been correctly mentioned in the notice. I respectfully agree with the view expressed by Ghose J., and in any event it is considered to be my duty to follow the same. I, therefore, hold that a notice under Section 434 of the Companies Act, 1956 will not be rendered invalid only because of the fact that the amount of debt mentioned in the notice may not be exactly the correct amount of the debt due, provided the amount mentioned in the notice includes the debt due and exceeds the sum of Rs. 500. I may incidentally point out in this connection that in case of a bona fide dispute to the debt or a substantial portion thereof a winding up petition is refused not because of invalidity of the notice, but because of the fact that there is no failure or neglect to pay on the part of the company in view of the disputes. In case of such disputed debts, there cannot be any question of neglect or failure to pay, till the disputes are resolved in appropriate proceedings; and in such cases, even though the notice may be otherwise a valid one, there cannot arise any statutory presumption as to insolvency or inability to pay the debt,

as the other conditions laid down in the section for giving rise to such presumption are not satisfied.

23. As in the instant case I am satisfied that the debt claimed is disputed bona fide by the company, the winding up proceeding cannot be allowed to proceed. This application succeeds and there will be an order in terms of prayer (a) of the summons, staying permanently the Company Petition No. 144 of 1968, being an application for winding up of the company. The respondent will be at liberty to take such steps as the respondent may be advised for establishing the claim of the respondent against the company. If within three months from date the respondent chooses to take any appropriate steps for establishing the claim of the respondent against the company, the costs of this application and also of the winding up petition presented by the respondent which is being permanently stayed, will be costs in the said proceedings. If no such steps are taken by the respondent within the time aforesaid, each party will pay and bear its own costs of this application and also of the winding up petition. In the facts of this particular case and taking into consideration the largeness of the claim alleged I make an order of injunction against the company from dealing with, disposing of, transferring or encumbering the assets of the company except in the usual course of business for a period of three months from date. I, however, make it clear that this order of injunction will not prevent the company from carrying on its business in the usual course and from dealing with all its assets in the usual course of business and I also make it clear that this order of injunction will be limited in duration for a period of three months to enable the respondent to take such steps as the respondent may be advised in the meantime.

Petition allowed.

AIR 1970 CALCUTTA 428 (V 57 C 80)

DAS AND K. K. MITRA, JJ.

Sachidananda Banerji, Appellant v. Motichand Verma, Respondent.

Criminal Appeal No. 748 of 1961, D/- 7-8-1969.

(A) Criminal P. C. (1893), S. 423 — Appeal from acquittal — Appreciation of evidence.

The powers of High Court in an appeal from acquittal are in no way different from those in appeal against conviction. The High Court can consider the evidence and weigh the probabilities. It can accept the evidence rejected by the lower Court and reject the evidence accepted by it, unless the lower Court relied on demeanour. High Court however will pay due attention to the

FM/EN/E642/69/RSK/Z

grounds on which acquittal is based and repel these grounds satisfactorily.

(Para 18)

(B) Criminal P. C. (1898), Section 417 (3) — Bench admitting appeal granting leave presumably on being satisfied that successor in office was complainant within meaning of Section 417 (3) — Issue cannot be re-opened at time of hearing. (Para 17)

(C) Criminal P. C. (1898), S. 417 (3) — 'Complainant' — Meaning of — Successor-in-office is 'complainant' — Criminal Appeal No. 779 of 1965 (Cal), Dissented.

The word 'complainant' in Section 417 is not used in any restrictive sense and successor-in-office of an officer is also the complainant within the meaning of Section 417, sub-section (3) and is equally competent to file the appeal. AIR 1961 SC 1, Rel. on; AIR 1964 Cal 64 (65) and AIR 1967 Cal 442 and Criminal Appeal No. 429 of 1961 (Cal), Disting; Criminal Appeal No. 779 of 1965 (Cal), Dissented from.

(Para 18)

(D) Sea Customs Act (1878), Section 167 (81) — Punishment — Watches smuggled in India secretly under wooden plank of record player — Deterrent punishment is necessary.

(Para 24)

Cases Referred: Chronological Paras

- | | |
|-------------------------------------|------------|
| (1967) AIR 1967 SC 1412 (V 54) = | |
| 1967 Cri LJ 1213, Sher Singh v. | |
| State of U. P. | 18 |
| (1967) AIR 1967 Cal 442 (V 54) = | |
| 1967 Cri LJ 1135, Monmatha Nath | |
| Halder v. Niranjan Mondal | 21 |
| (1965) Criminal Appeal No. 779 of | |
| 1965 (Cal), Chairman Raigunge | |
| Municipality v. H. Agarwalla | 21, 22 |
| (1964) AIR 1964 Cal 64 (V 51) = | |
| 1964 (1) Cri LJ 186, Nani Lal | |
| Samanta v. Rabin Ghosh | 21 |
| (1962) Criminal Appeal No. 10 of | |
| 1962 (Cal), Nanilal Samanta v. | |
| Rabin Ghosh. | 21, 22, 23 |
| (1961) AIR 1961 SC 1 (V 48) = | |
| 1961 (1) Cri LJ 170, Vasanlal | |
| Maganbhai v. State of Bombay | 23 |
| (1961) Criminal Appeal No. 429 of | |
| 1961 (Cal), Jugal Kishore v. Syama- | |
| charan | 21, 22 |

Bejay Bhose, for Appellant; N. C. Banerjee and Jaharlal Roy, for Respondent.

DAS, J.: This is an appeal against an order of acquittal passed by a learned Additional Sessions Judge, setting aside the order of conviction passed by a learned Magistrate, Alipur.

2. The prosecution case is as follows:

3. On June 19, 1959 at about 3 P. M. the respondent Moti Chand Verma arrived at Dumdum Airport by Quantas Aircraft as a passenger from Singapore. For customs checking, he was taken to the customs enclosure, where the belongings were searched by the customs staff. During the search, the customs officers found that there was

false bottom in the record player in his possession. This was opened and underneath was found concealed 261 wrist watches, valued at about Rs. 7630, for which 100% duty was chargeable. A complaint was filed in Court against him by the Assistant Collector of Customs and he was convicted under Section 167 (81) of the Sea Customs Act.

4. The defence was a plea of innocence, upon denial that he was carrying the record player with him. He alleged that the record player was foisted upon him by the customs officers.

5. There was an appeal against the order of conviction and the learned Additional Sessions Judge found that prosecution failed to prove that the record player was part of his luggage and he therefore set aside the order of conviction and acquitted him. This appeal is directed against the order of acquittal.

6. At the outset, Mr. N. C. Banerjee learned Advocate for the respondent raised a preliminary point of objection regarding maintainability of the appeal, as the right to appeal against an order of acquittal is available to the complainant only. The complainant, before the Magistrate was R. C. Misra, Assistant Collector of Customs and this appeal is filed by his successor in office Sachidananda Banerjee, Assistant Collector of Customs and Mr. Banerjee argues that Sachidananda Banerjee, although successor in office as Assistant Collector of Customs, is not the complainant within the meaning of sub-clause (3) of Section 417 of the Criminal P. C., and as such, this appeal is not competent. Mr. Banerjee has also argued on merits and supported the view taken by the appellate Court.

7. Before we take up the preliminary point, we propose to deal with the merits of the case viz., whether the respondent had the record player as part of his baggage while travelling by air from Singapore. Recovery of the diamonds has not been challenged and has been proved by the evidence of a number of responsible witnesses. On this point two important pieces of evidence are the testimony of P. W. 8, Mrs. Grey, employee under B. O. A. C. who actually escorted the respondent to the customs enclosure for examination of the baggages and the respondent's own admission in the baggage declaration inventory Ex. 2, where he claims the Record player purchased at Singapore as his baggage. Mrs. Grey stated in her evidence that respondent disembarked from Quantas plane and was carrying the record player Ex. II himself while a porter was carrying his suitcase, Ex. I. She took him to the custom's enclosure for examination of baggages and the inventory was signed by her. In cross-examination she asserted that the respondent did not carry any hand bag with him when she conducted him and that he was carrying a record player. Evidence of P. W. 8 finds

corroboration from the evidence of P. W. 1, Mr. Lobo, Preventive Officer, Customs House, Calcutta. He stated that when respondent came to Customs House, he supplied him with the declaration form Ex. 2 and the respondent himself filled it up. He was then asked by the Air Port Inspector Marcelline to search the baggage and he did it in presence of two witnesses, Mrs. Grey and Panna De, besides Mr. Marcelline. He searched the suitcase Ex. 1 and then the record player Ex. II, which was locked. He opened it with a key supplied by respondent and suspected a false bottom. On removing the venesta wood floor, he found 261 wrist watches. A search list was prepared and the respondent also signed it. He denies that the record player was foisted on him or that he did not supply the key with which it was opened. He also stated that tag was attached to Record player and not to the Hand-bag. This witness is also corroborated by P. W. 2; P. De, who told that the record player was opened with a key supplied by the respondent. The upper lid was opened with screw driver and the plate gave way leading to recovery of 261 watches. He also told that Ex. 4 inventory was written in his presence and signed by the respondent. He mentions a suitcase and a leather handbag; the latter was handed over to respondent after search. P. W. 4 Marcelline is the Airport Inspector at Dum Dum Airport and he told P. W. 1 Lobo to take a declaration, and search the baggages of respondent and he was present during search. He stated that respondent had three packages with him and he identified Exs. I and II, suitcase and record player. The handbag was returned to respondent at the airport. He also corroborates other witnesses that respondent opened the Record player with key in his possession and then he describes how the wrist watches are recovered after removal of venesta floor. He denies that the respondent had only 2 packages with him and he is definite that the record player was with him and he saw him coming with it. He denies the suggestion that the baggage declaration form was filled and obtained from respondent at the Customs House or that he did not produce the key with which the Record player was opened. He was retired when he deposed and there is no reason for him to falsely depose.

8. Prosecution also examined other witnesses to prove the search and the seizure list and they also stated that respondent signed the seizure list. Apart from the oral evidence, the declaration form clearly shows that the record player, purchased by him at Singapore was part of his baggage and the plea that this declaration was taken from him later at the Customs House under threat is unbelievable. The learned Judge was conscious that it was very valuable evidence against him but he felt that, "there are certain points in this case which lead to the conclusion that no conviction can be made only on this declaration form", for-

getting that there was unimpeachable oral evidence that he was carrying this record player while disembarking from the plane and that he produced the key with which it was opened. It is true that the learned Magistrate, while examining the respondent under Section 342, Criminal P. C., did not draw his attention to this declaration form but then there was thorough cross-examination of different witnesses on this point and it was suggested that it was taken from him under threat at the Customs House. The explanation was therefore on record and the learned Magistrate considered the defence suggestion and rejected it. There is therefore no question of any prejudice to defence in the absence of a specific question on the point and the learned Judge is not right in holding that respondent was deprived of the opportunities to give any explanation. The second point accepted by the learned Judge in favour of appellant is the delay in producing the respondent before Magistrate after arrest. The plane touched airport at about 3 P. M., then was the search in the customs enclosure in the manner already discussed and the respondent was put under arrest at 4.30 P. M. and taken to Customs House between 4.30 P. M. and 5 P. M. Search list Ex. 3 shows search completed at 4.30 P. M. And he was produced before the Magistrate on the next date. We do not see any delay in production before Magistrate in violation of the statutory provisions, so as to draw any inference that the declaration was taken at the Customs House under threat or by force and there is clear evidence from Airport officers that the baggage declaration form was filled up and signed before search.

9. The learned Judge has pointed out that the respondent had one registered and another unregistered package according to the ticket and baggage check and no record player and he therefore discredits the evidence regarding the record player, obviously holding the handbag as the unregistered package. This was considered by the learned Magistrate who held that the record player, in view of the evidence on record, was carried as an unregistered baggage, in avoidance of rules. Ex. VI, ticket and baggage check does not show the number (Pieces) of unregistered baggages but shows merely the weight. P. W. 8 stated that packages weighing less than 5 lbs. are carried by passengers themselves as unregistered baggage. Weight of the unchecked baggage is 4 kg. which is 8.8 lbs. and the learned Magistrate points out that the weight points to the existence of more than 1 package. Any passenger smuggling prohibited goods would obviously attempt to avoid detection, and preplan for the purpose of a handbag and record player coming as one unregistered package is not such an improbability as to undo the oral evidence from so many responsible officers at the airport and the statement of the passenger in his own declaration, Ex. 2 at the airport before search.

10. The learned Judge has referred to the non-production of the key but the key was not seized at all. The learned Judge has referred to absence of any tag with the record player and has concluded that the accused was not in possession of the record player. The conclusion is obviously unwarranted, as the record player is a baggage brought in the plane. All that the respondent contends is that he did not bring it but there is no doubt it came by the plane without a tag and absence of a tag does not lead to the conclusion that respondent did not bring it. It contained smuggled watches and hence meticulous care was taken to avoid detection and this explains absence of the tag, just as there was avoidance of mentioning the third package, namely, the handbag. The learned Judge referred to non-production of the manifest and drew adverse inference, forgetting the evidence that the manifest does not disclose the weight of the package. P. W. 4 Marcelline made it clear that no Airlines except that of Thailand and Union of Burma showed number of packages and their weights in the manifest. Prosecution therefore had no occasion to produce the manifest and there is no scope for drawing adverse presumption.

11. Referring to weight, the learned Judge held that the weight of a record player like Ex. II would be more than 28 lbs. No weights were taken and we do not know how the learned Judge came to take this view on appeal.

12. The evidence that the respondent was carrying the record player is overwhelming; this evidence is further strengthened by the baggage declaration at the Customs in the Airport before search and there is no scope for any doubt, far less reasonable doubt—that the record player was brought by the respondent from Singapore and 261 watches were kept concealed in it underneath a false venesta wood floor.

13. We are not unmindful that this is an appeal against acquittal—that the respondent had not only the initial presumption of innocence but having been acquitted on appeal by the Sessions Judge this presumption was reinforced. In the case reported in AIR 1967 SC 1412, *Sher Singh v. State of U. P.*, the learned Judges pointed out that the powers of a High Court in an appeal from acquittal are in no way different from those in appeal against conviction. The High Court can consider the evidence and weigh the probabilities. It can accept the evidence rejected by the lower court and reject the evidence accepted by it, unless the lower Court relied on demeanour. High Court however will pay due attention to the grounds on which acquittal is based and repel these grounds satisfactorily. We have pointed out during the discussion of the evidence that the appellate Court's approach to evidence was perverse and that he drew presumption in law where none was avail-

able. The evidence regarding the appellant's possession of the record player is overwhelming and a different conclusion is not possible on the evidence on record.

14. The learned Judge's order acquitting the respondent should therefore be set aside and the order of conviction passed by the learned Magistrate restored.

15. We may now consider the point of law raised by Mr. Banerjee regarding the admissibility of the appeal. The complaint initiating the proceeding was filed by R. C. Misra, then Assistant Collector of Customs on November 7, 1959 and the Magistrate convicted respondent by an order dated June 28, 1961. There was an appeal against order of conviction and the learned Judge acquitted the respondent by an order dated August 8, 1961. By this time, R. C. Misra was transferred and this appeal was filed by his successor in office, Sachidananda Banerjee on November 18, 1961. Special leave to appeal was applied for and granted by the Court. Mr. Banerjee, learned Advocate for respondent has submitted that right to appeal under Section 417, Criminal P. C. on special leave is open to the complainant alone and the appellant being somebody other than R. C. Misra, this is incompetent. His argument is that sub-section (3) of Section 417 enables the High Court to grant special leave on the application of the complainant and therefore no leave can be granted, on application of Sachidananda Banerjee, as he is not the complainant in the case.

16. Sub-section (3) of Section 417, Criminal P. C. reads as follows:—

"417 (3). If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court."

17. This provision was enacted by the amendment of 1955 (Act 26 of 1955). This sub-section read with sub-section (5) provides for an appeal against acquittal only in cases where special leave to appeal is granted. Paragraph 5 of the petition for leave mentions that R. C. Misra has since been transferred elsewhere out of Calcutta and therefore this application for leave is prayed for by his successor in office, Banerjee. Leave was granted by the Bench admitting the appeal in 1961, presumably on being satisfied that Banerjee, as successor in office, was the complainant within the meaning of sub-section (3) of Section 417, Criminal P. C. and was competent to ask for special leave to file appeal. There is therefore no scope for reopening the issue by this Court again.

18. We are also of the view that the word 'complainant' in Section 417, Criminal P. C. is not used in any restrictive sense and that where the statute provides for complaint by a public servant with the sanction

of his superior officer, as a condition precedent to cognizance by a Magistrate, it is the public office that counts and the successor-in-office of that officer is also the complainant within the meaning of Section 417, sub-section (3), Criminal P. C. and is equally competent to file the appeal. There is good deal of difference between a private complaint and complaint by a public servant under the provisions of a statute. The complainant in the latter case is really the office and not the individual and the individual comes into the picture only because the office speaks through the individual. To take a very rigid view of the word complainant by restricting it to the same individual is to take an absurd, unreal and unworkable view, and it does not help the cause of justice. A criminal proceeding almost always takes several years, including often two appeals and if this rigid view prevails, no appeal against acquittal will lie where the holder of the office retires or dies or is transferred. It is absurd to suggest that the office remains but the officer retires or is transferred and carries away with him the right of appeal. Equally absurd would be to hold that though retired, or transferred and not the holder of the office, he still preserves the right to appeal, even though only the holder of the office is competent to file the complaint.

19. Section 187A provides for cognizance by a Magistrate on the complaint of the Chief Customs Officer or by any Assistant Collector of Customs, authorised by him. The authority granted is Ex. 7 and the authority comes from the Chief Customs Officer to the Assistant Collector of Customs, incidentally to R. C. Misra, as he happened to be the Assistant Collector. So long therefore the office remains, it is the holder of the office who becomes the complainant and the appeal by Banerjee, Assistant Collector, is competent.

20. Mr. N. C. Banerjee, learned Advocate for the respondent submits that the word 'complainant' within the meaning of Section 417 (3), Criminal P. C. is the man who sets the law in motion and therefore the successor-in-office is not the complainant—the statute authorising complaint by a person authorised by the Chief Customs Officer means the person who filed the complaint and not anybody else, including the successor.

21. In support of this view Mr. Banerjee has referred to a decision reported in AIR 1964 Cal 64 at p. 65, Nani Lal Samanta v. Rabin Ghosh, corresponding to Criminal Appeal No. 10 of 1962, Nanilal Samanta v. Rabin Ghosh, AIR 1967 Cal 442 and unreported decision in Criminal Appeal No. 429 of 1961 (Cal), Jugal Kishore v. Syamacharan and Criminal Appeal No. 779 of 1965 (Cal). In Nanilal Samanta's case, AIR 1964 Cal 64, A. C. Ray J. pointed out that the word 'complainant' means the person who was examined as complainant under

Section 200 and none else is so, however much he is interested in the prosecution. In view of the provisions of Section 417 (3), if the complainant dies before presentation of the appeal, no other person, not even his legal heirs, may have that right. The same view was taken in Jugal Kishore's case, Criminal Appeal No. 429 of 1961 (Cal), and in the reported decision in AIR 1967 Cal 442 where it was pointed out that there is no inherent right of appeal against acquittal on special leave. These are decisions where the complainant is a private party, whose examination under Section 200, Criminal P. C. was essential and where question of sanction did not arise. They are therefore no authority for the proposition that where a complaint is required to be filed by a public servant with sanction from his superior, upon retirement, death or transfer of the officer, his successor in office is incompetent to appeal, not being a complainant within the meaning of Section 417 (3), Criminal P. C.

22. Criminal Appeal No. 779 of 1965 (Cal), Chairman, Raigunge Municipality v. H. Agarwalla, is another single Bench decision where also the learned Judge relied on Criminal Appeal No. 10 of 1962 (Cal) and Criminal Appeal No. 429 of 1961 (Cal), and held that no extended meaning can be given to the word 'complainant', so as to enable any other person, however interested he may be in the prosecution of the accused and further there was no right to present such an appeal in the legal representative of a deceased complainant. It was further held that the successor in interest of a complainant is not a complainant within the meaning of the terms of Section 417 (3) of the Criminal Procedure Code. That was a decision where the Chairman of a Municipality filed the appeal after the Administrator ceased to function and the learned Judge also found that the Chairman of the Municipality is not a successor in interest of the Administrator. This decision unfortunately failed to give due importance to the fact that the complainant in these earlier cases were private parties and that the instant complaint was filed by a public officer under provisions of Section 187 (a) under authority of the Chief Customs Officer and that no Court could take cognizance unless the complaint was under such authority.

23. In the instant case R. K. Misra filed this complaint under the authority of the Chief Customs Officer and by the time this matter was heard in appeal, R. K. Misra was transferred and Sachidananda Banerjee took charge as Assistant Collector of Customs. By virtue of the provision of Section 187 (a) of the Sea Customs Act it is the holder of public office who is authorised to lodge the complaint and no cognizance shall be taken by a Magistrate unless the holder of this authority lodges the complaint. It is not R. K. Misra or Sachidananda Banerjee who is competent to file the

complaint and it is the office they hold that authorises them to lodge the complaint. Proviso (aa) of Section 192, Criminal P. C. provides that where the complaint is made by a Court or by a public servant purporting to act in the discharge of his official duties, it is not required to examine the complainant. There is no doubt that the Chief Customs Officer or the Assistant Collector of Customs is a public servant and their examination under Section 192 is not necessary nor has R. K. Misra been examined in the instant case. This makes fundamental difference between a private complaint and a complaint by a public servant and the cases relied on by Mr. Banerjee, except Criminal Appeal No. 10 of 1962 (Cal) deal with private complainants where on the death of such complainants their heirs filed an appeal against acquittal. Those decisions, therefore, are no authority for the proposition attempted to be propounded by Mr. Banerjee. The provision of the Sea Customs Act authorises the holder of the office to lodge a complaint and it is of little importance who is the person holding that office. Therefore, on the transfer of such officer the present incumbent is the 'complainant' under the provisions of Sec. 417 (3), Criminal P. C. The Act provides for authority from the Chief Customs Officer and the authority really is given to the holder of the office and therefore, on the transfer of the officer, his successor in office is competent to file the complaint or file the appeal and it cannot be said that he is not competent to file the appeal. A similar point was considered by the Supreme Court in *State of Bombay v. Parshottam Kanaiyalal* reported in AIR 1961 SC 1, in connection with sanction for prosecution under the P. F. A. Act. Section 20 of the Act provides that no prosecution under this Act shall be instituted except by or with the written consent of the State Government. . . High Court held that the written consent did not in terms mention the person in whose favour the sanction or written consent was given. Supreme Court held that the consent is for launching a prosecution and not 'in favour' of a complainant authorising him to file the complaint. Emphasis is on the consent for filing the complaint, not on the person filing it. It was also held that "the specification of the name of the complainant is not a statutory requirement—the consent being to a specified prosecution." The reason behind this provision for 'consent' is apparent, viz., the authority competent to initiate proceeding should apply its mind to the facts and satisfy itself that a prima facie case exists for prosecution. This authorisation is therefore for a specified prosecution and specification of the name of the complainant is not a statutory requirement and the provision for appeal by the complainant in such cases of public servant covers cases of successor to the complainant holding the office. This objection must therefore be overruled. It is well

known that sometimes a complaint with its appeal takes a fairly long time and by that time the public servant may either be transferred or may retire or even die. It is unthinkable that a retired officer would be asked to file the appeal under Section 417 (3); it is equally unthinkable that the officer who has been transferred and often diverted to another kind of job would be asked to come over for filing the appeal. We wonder if in such a case, objection against the competence to file appeal may not be taken, as the person is no longer in office as holder of the office. This objection, therefore, is overruled. We hold that Sachidananda Banerjee, Assistant Collector of Customs is competent to file this appeal and leave to appeal has already been granted to him.

24. We have already found that the view taken by the learned Sessions Judge is untenable and that there is clear evidence that the respondent committed the offence. We have found that the evidence against appellant is overwhelming and also that the learned Judge's approach is perverse and the grounds advanced for an order of acquittal are palpably wrong. This is a case where watches were smuggled into India secretly under the wooden plank of a record player and the respondents therefore deserve deterrent punishment.

25. We, therefore, set aside the order of acquittal and restore the order of conviction and sentence passed by the learned Magistrate. The respondent is sentenced to rigorous imprisonment for three months.

26. K. K. MITRA, J.: I agree.

Order accordingly.

AIR 1970 CALCUTTA 433 (V 57 C 81)

S. K. CHAKRAVARTI, AND
S. K. DATTA, JJ.

Sm. Annapurna Kumar, Appellant v.
Subodh Chandra Kumar, Respondent.

A. F. O. D. No. 398 of 1959, D/- 28-7-1969.

(A) Succession Act (1925), Ss. 263, 283
— Absence of citation — Effect.

Any interest, however slight, and even the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper. Even in a case where the person is not entitled to get a compulsory citation, but the citation is discretionary, the absence of citation to such a person, also would invalidate the grant in certain circumstances. AIR 1947 Pat 434 and (1898) 2 Cal WN 100 and AIR 1927 Cal 207, Foll. (Para 2)

(B) Succession Act (1925), Sec. 298 — Power to refuse letters of administration — More than 33 years elapsing since death of deceased — Real contention between parties as to whether one of them was legally married wife of deceased and hence entitled

LM/CN/F685/69/JHS/W.

to inherit all properties — Held, point should be decided in proper suit before competent Court and not before Court of limited jurisdiction like Court of probate or letters of administration — Proper course is to refuse letters of administration.

(Para 3)

Cases Referred: Chronological Paras

- (1947) AIR 1947, Pat 434 (V 34) =
ILR 25 Pat 747, Mt. Sheopati Kuer
v. Ramakant Dikshit 2
(1927) AIR 1927 Cal 207 (V 14) =
31 Cal WN 160, Rammaya Gaoran-
gini v. Betty Mahbert 2
(1898) 2 Cal WN 100, Walter Rebells
v. Maria Rebells 2

Mr. Apurbadhan. Mukherjee and Kanan Kumar Ghose, for Appellant, Mr. Mukul Gopal Mukherjee, for Respondent.

S. K. CHAKRAVARTI, J.: This is an appeal by one Annapurna Kumar whose application for revocation of the grant of Letters of Administration to the respondent Subodh Chandra Kumar was dismissed by the learned District Judge, Hooghly. It appears that the properties were left by one Sarat Chandra Kumar who died intestate on 14-4-36. On the 16th of February 1939 his widowed mother Rakhalmni filed an application for Letters of Administration, and objections were filed by Subodh and his brothers, who happened to be the sons of the sister of Sarat. Their case was that the grant of Letters of Administration was unnecessary. The case ended in a compromise on the 14th of September, 1940 and an order was made for grant of Letters of Administration jointly to Rakhalmni and Subodh on their furnishing security. Subodh did not furnish any security and Rakhalmni alone did so, and on the 11th of April 1941, Letters of Administration were issued to Rakhalmni. On the 25th of May, 1955, Subodh applied for revocation of the grant made to Rakhalmni on the ground that Rakhalmni had sold away a portion of the estate without the Court's permission. During the pendency of the Subodh's application for revocation, Rakhalmni died on the 15th of April 1956. On the 24th of September, 1956 Subodh applied for grant of Letters of Administration on the ground that Rakhalmni was dead, and that by mistake, Letters of Administration were not issued to him. In the meantime, on the 4th May, 1956 the present appellant Annapurna sent a registered letter through her Solicitor to Subodh claiming the possession of Calcutta properties left by Sarat on the ground that she was Sarat's widow and as such entitled to the same. In spite of that, Subodh did not implead her as a party in his application for the grant of Letters of Administration. On the 4th of March, 1957 the Court granted the Letters of Administration to Subodh ex parte on the ground that he was the surviving grantee. On the 2nd of April, 1957 Annapurna filed the instant application for revocation of the grant on the

ground that she was the widow of Sarat and should have received special citation, but that everything was done without citing her at all. In spite of the pendency of that application for revocation, on the 5th of July, 1957, the Court granted Letters of Administration to Subodh. Annapurna moved this Court, and this Court pointed out that Subodh had made some incorrect statements in his application to the effect that by mistake of the Court, Letters of Administration were not issued to him whereas, in fact, they were not issued to him because he had not furnished security. This Court also questioned the propriety of issuing Letters of Administration so many years after the death of the deceased, and opined that the property should have been completely administered by this time. However, this Court refused to interfere inasmuch as this Court could not find that what the learned Judge did, amounted to irregularity or illegality in the exercise of jurisdiction, and thereafter the learned District Judge on the evidence came to the conclusion that Annapurna was not the legally married wife of Sarat, and in fact, was a prostitute, and as such has no locus standi to maintain her application for revocation, and dismissed that application. Hence this appeal.

2. We are of opinion that the question whether Annapurna was the legally married wife of Sarat should not have been canvassed in such details in a Court of limited jurisdiction, namely, the Probate and Letters of Administration Court. It is well settled now that any interest, however slight, and even the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper. Even in a case where the person is not entitled to get a compulsory citation, but the citation is discretionary, the absence of citation to such a person, also would invalidate the grant in certain circumstances. This actually has been laid down in the case of Mt. Sheopati Kuer v. Ramakant Dikshit, reported in AIR 1947 Pat 434 and it has followed two decisions of this Court reported in (1898) 2 Cal WN 100 and 31 Cal WN 160 = (AIR 1927 Cal 207). In this particular case, we have already pointed out that Subodh's application for grant of Letters of Administration was made, after he had got notice through his Solicitor, that Annapurna claimed to be the widow of Sarat. Even before that, his evidence would disclose, that he was aware that Annapurna was claiming the properties as the widow of Sarat. She should have, therefore, received special citation. What is more, it would appear, that during the life time of Sarat, Annapurna was abducted by some persons, and there was a sessions case over it, in which Sarat deposed, and he quite categorically and emphatically claimed Annapurna to be his wife. There are also letters written by Subodh's brothers to Annapurna addressing her as Mamima or in other words as the uncle's wife. There is also evidence to show that Annapurna had

been paying rents for some Hooghly properties, and there is some evidence also to show that she is in possession of some portion at least of the Hooghly properties. In the circumstances, even if it be found that she was not entitled to a compulsory ejection, she was a person who was claiming some interest in the properties as the widow of Sarat, and there was a possibility of her interest in the properties left by Sarat, and in the circumstances, without going into the vital question as to whether Annapurna was the legally married wife of Sarat, the Court below should have revoked the grant, and considered granting it only in presence of Annapurna. In this view of the matter, the order passed by the learned District Judge cannot stand, and must be, and hereby is, set aside.

3. More than 33 years have passed since the death of Sarat, and we do not see any reason for the grant of Letters of Administration to his properties at this late stage, specially in view of the fact that the real contention between the parties is as to whether Annapurna is the legally married wife of Sarat, and, as such, entitled to inherit all the properties left by him. If she is not the legally married wife, then Subodh and his brothers, being the sister's sons, would get the properties. This is a point which, as we have already pointed out, should be found out in a proper suit before a competent Court, and, not before a Court of limited jurisdiction like the Court of Probate or Letters of Administration. As a matter of fact, the learned District Judge should have taken action under Section 298 of the Indian Succession Act, and for the above reasons, refused to grant any Letters of Administration.

4. We, therefore, allow this appeal, set aside the judgment and decree passed by the learned District Judge, decree the suit for revocation, and dismiss also the application for Letters of Administration in the circumstances stated above. The aggrieved party may approach the ordinary civil Court for adjudication of his or her rights to the properties left by Sarat.

5. Each party will bear its own costs in this Court.

6. It may be noted in this connection that we have not passed any opinion as to whether Annapurna is the legally married wife or not of Sarat. If the respondent had already acted under the Letters of Administration issued to him by the learned District Judge, he must submit his proper account and get full and complete discharge from the Court of the learned District Judge and he will also surrender the Letters of Administration to the Court below forthwith.

7. S. K. DATTA, J.: I agree.
Appeal allowed.

AIR 1970 CALCUTTA 435 (V 57 C 82).

A. K. DAS AND K. K. MITRA, JJ.

Corporation of Calcutta, Appellant v. M/s. Rathii and Co. and another, Respondents.

Criminal Appeals Nos. 655 and 656 of 1963, D/- 13-8-1969.

Prevention of Food Adulteration Act (1954), Section 10 (1) — Enumeration in Section 10 of circumstances under which sample can be taken is not exhaustive — Seller leaving the shop on the approach of Food Inspector — Shop under watch by Police — Sample taken in the absence of seller from shop and godown of seller but following the prescribed procedure — Sample does not cease to be one within the meaning of S. 10 (1) and S. 2 because there was none to accept price — Shop continued to be in seller's possession though under police guard — Sample found adulterated — Seller is punishable under Sections 7 and 16. (Paras 11, 18)

N. C. Banerjee, for Appellant; Jaharlal Roy, for Respondent.

DAS, J.: Criminal Appeals Nos. 655 and 656 of 1963 arise out of two orders of acquittal by a learned Presidency Magistrate under the Food Adulteration Act. The respondents are common and decisions are based on common point.

2. In Criminal Appeal No. 656 of 1963, the prosecution case is that on December, 5, 1962 the Food Inspector of the Calcutta Corporation went to the godown of the accused P. C. Rathii at 8, Banstolla Lane and wanted to take samples of ghee from stock in the shop and the godown at the back of the shop. He found P. C. Rathii, respondent but he denied that the shop belonged to him and contended that the godown was an order-supplying concern, not connected with ghee business. Thereafter, respondent disappeared and could not be found. Police was posted and with the Magistrate's permission to break open the locks, the Food Inspector went to the shop at 5 p. m. on the next date and sealed the padlock. Next day i. e. 7-12-62, at about 2 p. m., he went with the Enforcement Police and in presence of witnesses, broke the padlock and opened the door of the godown at the rear of the shop. He found a name plate P. C. Rathii affixed on the door leaf of the godown. He seized big galvanised drums, copper vessel with tap, stoves and other implements for boiling, including a pot containing yellow colour and made a seizure list. He also found several tins of lotus brand Dalda and took samples under the Rules, after affixing a copy of the notice. One of the samples was sent to Public Analyst who found the ghee highly adulterated.

3. In case No. 11-D a similar raid was carried out on the same date in the same firm's godown on the ground-floor of 17,

Banstolla Road. The godown was under lock and key and the respondent P. C. Rathí could not be found out. Policemen were posted at the request of the Food Inspector and he also stayed there for the night. Next day, permission from the Magistrate was taken to break open the lock. On 7-12-62, he broke open the lock in presence of 2 witnesses and policemen and seized 8 tins, 17 seers each, in wooden boxes wrapped with gunny and on the gunny was written "To P. C. Rathí Hipwrah" in ink. He took several samples under the Rules — and sent one sample to Public Analyst who found it highly adulterated.

4. Thereafter sanction was obtained in both cases and complaints were filed.

5. Defence in either case is that the sample was not legally taken nor was it proved to be taken from the possession of the respondent and that it was not also proved to be adulterated.

6. The learned Magistrate found that the sample was highly adulterated but was not proved to be either legally taken or taken from possession of the respondent. He therefore, acquitted the respondents.

7. The Public Analyst found that the sample did not conform to the standard in respect of B. R. reading, Reichert value and Baudouin Test, due to the presence of excessive amount of foreign fat containing sesame oil. On this report, the learned Magistrate was justified in holding that the samples were highly adulterated.

8. The learned Magistrate however found that the sample seized in the absence of the seller is not a sample within the meaning of Section 10 (1) of the P. F. A. Act and therefore, the Public Analyst's report does not form the basis for a prosecution. The learned Magistrate has held that at every stage of taking sample, the presence of the seller or any person on his behalf is a pre-requisite for taking sample. As the seller or anybody on his behalf was not present at the time of taking sample, the quantity of ghee taken by the Food Inspector is no sample within the meaning of Section 2 of the Act. He also held that where the sample was taken, the premises were under police guard and as such, it was in possession of the police and not of the respondent.

9. Food Inspector was examined as the principal witness in either case and his evidence has given a clear picture how the respondent Sethi avoided his presence and how he slipped away and how in spite of serious attempt he could not be contacted. The premises were thereafter sealed and then opened with order from the Magistrate and samples were taken in presence of witnesses and police, after observing the formality laid down in the Act. Sample is defined in Section 2 and it means a sample of any article of food taken under the provisions of this Act or of any rules made

thereunder. Evidence has disclosed that the godown at 8, Banstolla lane and that at ground-floor of 17, Banstolla Road were godowns of P. C. Sethi & Company, respondent No. 1. On the door leaf of the godown at No. 8, was affixed a name plate "P. C. Sethi". The witness also stated that previously he collected sample from the shop of respondent No. 1 and he was convicted under Food Adulteration Act. This witness further says that when he entered the shop at No. 8, P. C. Rathí was found inside the shop. Rathí's defence at the time was that though the trade license was in his name, it was an order-supply concern. The existence of the trade license in his name supports the view that he is the owner of the shop and godown. P. W. 4 Assistant of the license department, Calcutta Corporation also proves that P. C. Rathí holds the profession license at premises No. 8, and that he paid trade license fee for 1962. P. W. 3 police officer stated that a crowd gathered and while he was trying to disperse the crowd, Sethi made himself scarce. In respect of No. 17, P. W. 1 stated that he came to know on the 5th that the shop belonged to P. C. Rathí and the godown belonged to Rathí and Co. P. W. 3 is son of the owner of premises No. 17 and they resided on the 3rd floor. He stated that the godown on the ground floor belonged to Tara-chand and Company, of which the proprietor is P. C. Rathí. Ex. 10 is the petition of P. C. Rathí to Rent Controller where he describes himself as proprietor of Tara-chand & Company which is a tenant in respect of the godown room on the ground floor of premises No. 17, Banstolla Cully. There is therefore, no doubt that the shops and godowns belonged to M/s. Rathí & Company, of which the proprietor is P. C. Rathí, respondent No. 1.

10. The learned Magistrate referred to Section 10 and held that the sample taken is not a sample contemplated under Section 10, as it was taken in the absence of the proprietor or seller and at a time when they were not in possession, as the shop and godown were in possession of police. The shop or godown was never in possession of the Police; the owner Sethi slipped away and therefore, the shop and the godown were sealed and kept under Police guard, till the lock was broken in presence of witnesses under order of the Magistrate. The possession in effect remains with the owner, though it is under police watch and guard and this does not mean transfer of possession either in law or in fact to the police. The seizure was therefore, from the shop or godown in possession of the owner and the learned Magistrate is wrong in holding otherwise.

11. The provision of Section 10 regarding taking sample is again misconstrued by the learned Magistrate. This is an enabling section but for which, the seller or the consignee might refuse to sell or allow the

Food Inspector to take sample. The section begins with "Powers of Food Inspector" and it empowers the Food Inspector to take samples from the seller, from the person who is in course of conveying, delivering or preparing to deliver such article to a purchaser or consignee, and also from the consignee after delivery of any such article to him. The section is not restrictive of the powers of the Food Inspector and it only enumerates certain circumstances in which samples may be taken from different persons. This enumeration is not exhaustive nor does it in any way operate as a restriction on the power of the Food Inspector to take a sample, which is the object of this provision. Where therefore, sample is taken under the Rules from the stock in possession of the proprietor, it does not cease to be a sample merely on the ground that the proprietor or seller slips away on approach of the Food Inspector or that there is none to accept the price. These provisions are to ensure that the seller gets price of the sample and that samples are taken from the stock in his possession but by running away, the proprietor or seller does not take away the right to take samples for examination and prosecution. This provision is an enabling one, making the demand for sample legal. The provision for taking sample from seller is directory and not mandatory and it does not purport to restrict the power of the Food Inspector to take sample in such contingencies. The fact that price could not be paid, as none was there to receive does not change its character as a sale, for offer to pay price remains and credit sale is also a sale.

12. The provision for taking sample in presence of the seller was for the benefit of the seller, but was never intended to be utilised by a dishonest seller by running away and law will not allow him to take advantage of that dishonest move.

13. Facts in this case are glaring. The Food Inspector called at the shop or godown. The respondent No. 2 engaged him in conversation and then gave slip in one case locking up the shop. But in either case he was not found to be available. What happened therefore, has been dealt with by the learned Magistrate. In one case sample was taken in presence of the witnesses and in the other case, the shop was sealed and then broken open under the order of a Magistrate and thereafter sample was taken and in either case the sample of ghee was found to be highly adulterated. It is clear that the respondent No. 2 played dirty trick and therefore, he cannot be permitted to take advantage of the dirty trick. The primary object of the provision for taking sample is to see that the sample is taken from the shop in such a manner that there may not be any doubt that the samples were taken from the shop where it was stored as food. What is important is whether the sample is within the meaning of

Section 2 and whether it is taken from the shop so as to leave no doubt about the manner of taking and if that is so, failure to comply with such provisions as are rendered impossible of performance or as do not affect the quality of sample or give rise to a doubt as to whether sample was taken from the shop does not vitiate the taking of sample. It has transpired in evidence that when the Food Inspector called at the shop at No. 8, the respondent No. 2 was there and after engaging the Food Inspector into conversation, he somehow gave a slip. If thereafter sample was taken in the manner stated, it is a continuation of the same process and the proprietor or seller shall be deemed to have been present.

14. In the result, we find that samples taken were samples under the law and samples were found to be highly adulterated ghee. The order of acquittal is not therefore, proper and this order cannot be supported.

15. It appears from the evidence that the respondent No. 2 is the sole proprietor of M/s. Rathie & Company and under the law both the firm and the sole proprietor cannot be convicted. We, therefore, do not convict the firm. So far as P. C. Rathie is concerned he has not only kept a huge stock of adulterated ghee, but the evidence shows that he was actually preparing large quantities of adulterated ghee, obviously for human consumption. He was not only doing this in a large scale, but when the Food Inspector came, he played a trick and slipped away. We, therefore, find no reason to take any lenient view of the offence committed by him. We have it in evidence that he was convicted prior to this also and the sentence should therefore, be deterrent and we therefore, convict the respondent No. 2 P. C. Rathie under Sections 7 (i)/16 (1) (a) (ii) of the Prevention of Food Adulteration Act and sentence him in respect of each case to rigorous imprisonment for one year and a fine of Rs. 2,000, in default to rigorous imprisonment for another six months. The sentences of imprisonment are to run concurrently.

16. K. K. MITRA, J.: I agree.
Order accordingly.

AIR 1970 CALCUTTA 437 (V 57 C 83)

A. K. DAS AND K. K. MITRA, JJ.

Aravinda Mohan Sinha, Appellant v. Prohlad Chandra Samanta, Respondent.

Criminal Appeal No. 476 of 1969 with Criminal Revn. Cases 635 and 636 of 1969 D/- 28-11-1969.

(A) Defence of India Rules (1962). Rule 126-P (2) — Minimum sentence is imprisonment for six months and also fine — This sentence cannot be substituted by a sentence of fine. (Para 7)

(B) Defence of India Rules (1962), Rule 126-P — Accused sentenced under

LM/EN/G82/69/TVN/Z

Section 135 of Customs Act — Accused also to be sentenced under Rule 126-P of Defence of India Rules — No provision of the General Clauses Act bars such sentence — (Customs Act (1962), Section 135) — (General Clauses Act (1897), Section 20).

(Paras 3, 7 and 12)
(C) Defence of India Rules (1962), Rule 126-P(2) — Offenders under the Rule can be dealt with under Section 3 or Section 4 of Probation of Offenders Act — (Probation of Offenders Act (1958), Sections 3 and 4).

Offenders under Rule 126-P of the Defence of India Rules can be dealt with under Section 3 or Section 4 of the Probation of Offenders Act, if the court deems it expedient to take such action. R. 126-P, sub-rule (2) provides a minimum punishment but it does not override the provisions of the Probation of Offenders Act. Fixation of minimum sentence is not in conflict with Probation of Offenders Act where the Magistrate deems it expedient and this probation or admonition is in lieu of sentence.

(Para 11)
(D) Probation of Offenders Act (1958), Sections 11, 3 and 4 — Order under Section 3 or Section 4 of the Act — Appeal lies notwithstanding Section 411, Criminal P. C. — Revisions against those orders are incompetent — (Criminal P. C. (1898), Sections 411, 439).

(Paras 14, 15)
(E) Limitation Act (1963), Article 115 — Sixty days for appeal under Criminal P. C. — Right of appeal under Section 11 of Probation of Offenders Act is not governed by this Article — Appeal must, however, be filed within reasonable time — Revision, which is incompetent filed 70 days after order — Revision entertained as an appeal — (Probation of offenders Act (1958), Section 11).

(Para 17)
(F) Defence of India Rules (1962), Rule 126-P — Gold to be declared under Rule 126-P legal gold not smuggled gold — Declaration of smuggled gold not intended by legislature — Failure to declare smuggled gold not punishable under Rule 126-P.

(Para 21)
(G) Defence of India Rules (1962), Rule 126-P — Declaration of possession of smuggled gold does not protect the smuggler or the gold — They can be dealt with under the Customs Act.

(Para 21)
Balai Chandra Roy, for Appellant; (In both Nos.), Bejoy Ghose, J. K. Chatterjee, for Respondent in Appeal No. 476 of 1969, Amal Chandra Chatterjee, (in Cri. Revn. No. 635 of 1969; M. A. Rezaek, (in Cri. Revn. No. 636 of 1969), for Opposite Party and Bejoy Ghose, for the State.

DAS, J.: Revisional Applications Nos. 635 and 636 of 1969 and Appeal No. 476 of 1969, are heard together and this judgment will cover all of them.

2. Aravinda M. Sinha, Asstt. Collector of Customs is the applicant in all these matters against orders passed by different Presidency Magistrates under Section 135,

Customs Act and Rule 126P of the D. I. Rules. The accused persons were convicted under both Customs Act and D. I. Rules, R. 126P but the sentences were different. In Rule No. 635 and appeal No. 476, the learned Magistrate dealt with them under the Probation of Offenders Act on executing a bond and undertaking thereby to keep peace and be of good behaviour for a period of 2 years and appear to receive sentence whenever called upon.

3. In Rule No. 436, the learned Magistrate sentenced the accused to fine only under S. 135, Customs Act and refrained from passing any sentence under R. 126P of the D. I. Rules.

4. Under the Customs Act, the convictions were based on a finding that they were in possession of smuggled gold and under Rule 126P of the D. I. Rules for failure to give necessary declaration.

5. Mr. Balai Ray, learned Advocate for the Customs has raised the following points.

1. Punishment for an offence under Rule 126P (2) is imprisonment for a term of not less than six months and not more than 2 years and also fine. The sentence of fine and orders dealing under the Probation of Offenders Act are therefore bad in law.

2. Persons convicted under Rule 126P of D. I. Rules, cannot be dealt with under the Probation of Offenders Act.

5A. The arguments advanced raise the following further points:—

3. Whether a revision petition lies in view of the provision u/s. 11 of the Probation of Offenders Act for appeal in respect of an order under the Act.

Whether the prayer for treating Rules 435 and 436 as appeals is maintainable in view of Article 115 of the Indian Limitation Act.

4. Whether on the facts, conviction under Rule 126P (2) is maintainable.

6. Point No. 1.

Sub-Rule (2) of Rule 126P, provides for declaration of possession of gold other than ornament and sub-rule (2) of R. 126P makes failure of such declaration "punishable with imprisonment for a term of not less than six months and not more than two years and also with fine".

7. The provision is clear and the minimum sentence provided is imprisonment for six months and also fine. This sentence cannot be substituted by a sentence of fine, nor can the Magistrate refuse to pass any sentence, after passing a sentence in respect of the offence under Customs Act, under any provision of the General Clauses Act. On facts besides, the offence under the Customs Act is for possession of smuggled gold while it is non-declaration of gold that makes it an offence under Rule 126P.

8. The next question is whether the offenders can be dealt with under the Probation of Offenders Act, in view of the provision for punishment under Rule 126P.

9. Section 3 of the Probation of Offenders Act empowers the Court to release

certain offenders after admonition; Section 4 empowers it to release on probation of good conduct. The only limitation for releasing under Sec. 3 is that the offences must be certain specified offences under the I. P. C. or any offence punishable with imprisonment for not more than two years or with fine or with both under I. P. C. or any other law, that no previous conviction is proved against him and the Court thinks it expedient to take action under the Act.

10. Section 4 provides for release on probation if the offence is not punishable with death or imprisonment for life and the Court is of opinion that it is expedient to release him on probation.

11. Rule 126P, sub-rule (2) provides a minimum punishment but it does not override the provisions of the Probation of Offenders Act. This relates to term of the sentence, in respect of which a minimum is fixed, but it does not take away the Magistrate's power to take action under Section 3 or 4 of the Probation of Offenders Act, if he deems it expedient to take such action. Fixation of minimum sentence is not in conflict with Probation of Offenders Act where the Magistrate deems it expedient and this probation or admonition is in lieu of sentence. Infliction of sentence follows a conviction — whatever may be its extent or form but this Act provides for admonition or probation in place of sentence under certain conditions and therefore provision for a minimum sentence does not affect Court's power under Sections 3 and 4 of the Probation of Offenders Act.

12. In Rule No. 436, the learned Magistrate did not pass any order under Probation of Offenders Act but refrained from passing any sentence. This is not permissible where a minimum sentence is provided for.

13. Point No. 3.

We are dealing with 2 Rules and one appeal. In respect of the Rules, there are prayers for treating them as appeals. The opposite parties have raised an objection, on the ground of limitation under Article, 115 of the I. L. Act.

14-15. Sub-section (2) of Section 11 of the Probation of Offenders Act provides for appeal and it reads as follows:

Notwithstanding anything contained in the Code, where an order under Section 3 or S. 4 is made by any Court trying the offender (other than a High Court) an appeal shall lie to the Court to which appeals ordinarily lie from the sentences of the former Court.

It is clear that this section provides for an appeal from any order passed under Sections 3 and 4, notwithstanding anything contained in the Code of Criminal Procedure. This is important in view of the provisions of Section 411 of Criminal P. C. which bars appeal from certain orders passed by a Presidency Magistrate.

16. Two of the matters before us are revision applications but in view of clear provision for appeal under Section 11 of the

Probation of Offenders Act, revision applications under Section 439, Criminal P. C. are misconceived. Mr. Roy, realised this position and had earlier applied for treating these Rules as appeals. Mr. N. C. Banerjee, appearing for the opposite parties relied on Article 115 of the I. L. Act and pleaded limitation.

17. Article 115 provides for a limitation of sixty days for an appeal under Code of Criminal Procedure, 1898 from any other sentence or any order or any order not being an order of acquittal to the High Court. We have already pointed out that the right to appeal against the order passed by a Presidency Magistrate is not under the Code of Criminal Procedure but under Section 11 of the Probation of Offenders Act and Article 115, I. L. Act, has therefore no application. No limitation is provided for under the amended Limitation Act where right to appeal flows from some Act other than the Criminal P. C. and the period therefore must be taken to be a period which appears to be reasonable to the Court, in the facts and circumstances of the case. For this view, we may point out, by way of analogy, the new provision for limitation for revisional applications under the Criminal P. C., under Article 131. This is a new provision fixing 90 days as the period of limitation from the date of the order or sentence. Before this amended Act came into operation, the period was always considered to be such as appeared to be reasonable in the facts and circumstances of the case. In the instant cases, the petitioners filed revisional applications obviously on wrong advice or misconception and then applied for treating them as appeals before date of hearing. The petitions were delayed by about a week or 10-days beyond sixty days and obviously, within a reasonable period and the prayers should be allowed and these should be treated as appeals. The objections raised are overruled.

18. We have pointed out that in two cases, the learned Magistrates dealt with petitioners under the Probation of Offenders Act and in our view, this is not in conflict with the provisions of Rule 126P providing for a minimum sentence of R. I. for 6-months and fine. In Rule No. 436, the learned Magistrate sentenced the accused to fine under the Customs Act but refrained from passing any sentence under Rule 126P. We have also found that the minimum sentence is R. I. for 6-months and also fine and the Magistrate is required to pass this sentence if the accused is found guilty.

19. We may however now consider whether on the facts of these cases, a charge under Rule 126P and conviction thereunder is justified. If this is not justified, the conviction and the sentence must be set aside.

20. The accused are prosecuted under the Customs Act for possession of smuggled gold and under R. 126P for failure to give necessary declaration. Did the legisla-

ture expect or intend smuggled gold to be declared and were the relevant provisions under the Gold Control Order meant to cover smuggled gold, in respect of which suitable provisions were made in the Customs Act? Gold is defined in Clause (c) of Rule 126A and it reads as follows:—

“Gold” means gold, including its alloy, whether virgin, melted, remelted, wrought or unwrought, in any shape or form, of a purity of not less than nine carats and includes any gold coin (whether legal tender or not), any ornament and any other article of gold;

21. Rule 126P makes possession of undeclared gold punishable. Obviously declaration under Rule 126P would not protect smuggled gold or the smuggler and the legislature also never expected that smuggled gold would be declared. Looking at the object of this Control Order and the time and manner in which it came in the Statute Book, it seems that declaration under Rule 126P is in respect of ‘legal’ gold, as opposed to smuggled gold. Customs Act deals with smuggled gold of foreign origin or marking, illegally imported into India and penalty including seizure is provided for in the Customs Act. The question of declaration in respect of that does not arise at all. Prosecution of the accused persons under Rule 126P is therefore uncalled for and their convictions under Rule 126P and the punishment inflicted are set aside.

22. In view of this, the question of awarding legal punishment under R. 126P in Rule No. 536 does not arise at all.

23. In the result, the convictions of the respondents under Rule 126P and the sentence inflicted are set aside but the convictions under Customs Act and the sentence inflicted thereunder are upheld. The orders under the Probation of Offenders Act in appeal No. 476 and Rule 635 remain.

24. The appeals are disposed of accordingly.

25. E. K. MITRA, J.: I agree.
Order accordingly.

AIR 1979 CALCUTTA 440 (V 57 C 84)

T. K. BASU, J.

M/s. Laduram Ramrichpal and Co., Appellant v. Income-tax Officer, E Ward, (Income-tax-cum-Excess Profits Tax) District I and others, Respondents.

Matter No. 28 of 1966, D/- 24-6-1969.

Income-tax Act (1961), Ss. 297 (2) (a), 271 — Assessment proceedings taken and completed under old Act by virtue of Sec. 297 (2) (a) — Are not “proceedings under new Act” within the meaning of S. 271. AIR 1969 Madh Pra 72, Dissented from.

The enabling provisions of Section 297 authorise assessment under the old Act. But the same enabling provisions also intro-

duce a legal fiction, viz., that the new Act has not come into the Statute Book at all. That being the position the assessment proceedings which are taken and completed under the old Act by virtue of the enabling provisions of S. 297 of the new Act cannot be said to be proceedings under the new Act within the meaning of Section 271 thereof. 1969-75 ITR 781 (Cal) and Matter No. 157 of 1967 (Cal), Rel. on; AIR 1969 SC 498, Disting.; AIR 1969 Madh Pra 72, Dissented from. (Para 7)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 408 (V 56) =

71 ITR 804, Third Income Tax Officer, Bangalore v. M. Damodhar Bhat

(1969) Matter No. 213 of 1966 = 75 ITR 781 (Cal), Narendra Sharma v. I. T. Officer, Central Circle 15 Calcutta

(1969) AIR 1969 Madh Pra 72 (V 56) = 72 ITR 417, Commr. of I. T., M. P. and Nagpur v. Champa-lal Sukharam

(1967) Matter No. 157, of 1967 (Cal), Bansidhar Durgadutta v. I. T. Officer

ORDER: In this application the petitioner challenges three notices dated the 21st April, 1964, the 18th December, 1965 and the 21st December, 1965 for imposition of penalty issued under the provisions of Section 274 read with Section 271 of the Income-tax Act, 1961. The assessment was made under the provisions of the Indian Income-tax Act, 1922, now repealed.

2. Mr. Siddharta Roy appearing on behalf of the petitioner contends that this point is concluded in favour of the petitioner by my judgment in the case of Narendra Sharma v. Income-tax Officer, Central Circle 15, Calcutta, Matter No. 213 of 1966 (Cal).

3. Counsel for the Revenue submitted before me that there are certain aspects of the matter which have not been considered by me in my above judgment. Considering the importance of the subject-matter, I gave leave to the Revenue to agitate these points in this application.

4. Mr. Dipankar Gupta appearing on behalf of the Revenue drew my attention in the first place to the provisions of Section 297 (2) (a) of the new Act which provides that, where a return of income has been filed before the commencement of the new Act, proceedings for assessment for that year may be taken and continued as if the new Act had not been passed. Mr. Gupta contended that since the return of income in the present case was filed before the commencement of the new Act, proceedings for assessment could and had in fact been taken under the provisions of the repealed Act by virtue of the enabling provisions of Section 297 (2) (a) of the new Act. Since the assessment proceedings were carried on under the old Act by virtue of the empowering provisions of Section 297

(2) (a) of the new Act, the assessment proceedings should be held to be proceedings under the new Act. In that view of the matter, it should be held that the first precondition to the applicability of Section 271 of the new Act which is that the Income-tax Officer or the Appellate Assistant Commissioner is satisfied "in the course of any proceedings under this Act" has been complied with in the present case.

5. In support of this contention, Mr. Gupta drew my attention to a decision of the Madhya Pradesh High Court in the case of Commissioner of Income-tax, Madhya Pradesh and Nagpur v. Champalal Sukhrām, reported in 72 ITR 417 = (AIR 1969 Madh Pra 72). At p. 419 of the Report (at p. 73 of AIR) the following passage occurs:—

"The reasoning given by the Tribunal that, as Section 271 (1) of the 1961 Act uses the expression 'in the course of any proceedings under this Act' and as the assessment proceedings in this case were under the 1922 Act, therefore, Section 271 could not be invoked for levy of penalty is altogether fallacious. Under clause (g) of Section 297 (2) the initiation of proceedings for imposition of penalty and the levy of penalty under the Act of 1961 is not with reference to the fact whether the assessment was made under the 1961 Act or the 1922 Act. That apart, in this case, the return having been filed on 19th October, 1961, that is, before the commencement of the 1961 Act, the assessment under the 1922 Act was by virtue of the provisions of Section 297 (2) (a) of the Act of 1961. The proceedings for assessment under the Act of 1922 were thus proceedings under the 1961 Act itself."

6. Mr. Roy sought to repel this contention by drawing my attention to the language of Section 297 (2) (a) of the new Act which provides that in cases covered by that subsection, the assessment may be taken and continued as if the new Act had not been passed. Since the assessment, according to Mr. Roy, in this case was continued under the old Act as if the new Act had not been passed, it must follow that those assessment proceedings could not possibly be proceedings under the new Act.

7. In my view, the contention of Mr. Roy should be accepted. The enabling provisions of Section 297 (2) (a), as I read them, authorise assessment under the old Act. But the same enabling provisions also introduce a legal fiction, viz., that the new Act has not come into the Statute Book at all. That being the position, I am unable to hold that assessment proceedings which are taken and completed under the old Act by virtue of the enabling provisions of Section 297 (2) (a) of the new Act can be said to be proceedings under the new Act within the meaning of Section 271 thereof.

8. With the utmost respect, I am unable to follow the reasonings of their Lordships of the Madhya Pradesh High Court or to agree with them.

9. The next contention of Mr. Gupta was based on a decision of the Supreme Court in the case of Third Income-tax Officer Mangalore v. M. Damodar Bhat, reported in 71 ITR 804 = (AIR 1969 SC 408). In that case, it was held by their Lordships of the Supreme Court that although Section 156 of the new Act did not apply in terms where the assessment was made under the old Act, it should apply *mutatis mutandis* in view of the provisions of Section 297 (2) (j) of the new Act. Mr. Gupta invited me to follow the same principle and hold that although Section 271 may not apply in terms in the present case, it should be held to be applicable *mutatis mutandis* even when the assessment proceedings were completed under the old Act.

10. This contention has been dealt with by me in my judgment in the case of Bansidhar Durgadutt v. Income-tax Officer, Matter No. 157 of 1967 (Cal). For the reasons stated therein, I reject this contention of Mr. Gupta.

11. In the result, I hold that in view of my decision in Narendra Sharma's case, Matter No. 213 of 1966 (Cal), this application must succeed. The rule is made absolute. There will be a writ in the nature of Mandamus directing the respondents to forthwith recall, cancel and withdraw the notices dated the 21st April, 1964, the 13th December, 1965 and the 21st December, 1965 and a writ in the nature of Prohibition restraining the respondents from giving any effect to the said notices in any manner whatsoever. The respondents would, however, be at liberty to proceed according to law.

12. There will be no order as to costs.
Rule made absolute.

AIR 1970 CALCUTTA 441 (V 57 C 85)

DEB AND SABYASACHI MUKHARJI, JJ.

Shewkissen Bhat, Applicant v. Commissioner of Income-tax, West Bengal, Respondent.

Income-tax Reference No. 202 of 1963, D/- 28-1-1969.

Income Tax Act (1922), S. 9 (1) (iv) — Interest on "such capital" — Interest on outstanding — Interest capitalised not allowable — Income-Tax Act (1961), S. 24 (1) (vi).

The expression "such capital" in the last part of Section 9 (1) (iv) is descriptive of the capital employed for the acquisition or construction or repair or renewal or reconstruction of the property. It is this capital which is a borrowed capital which has been indicated by the expression and it is only interest on "such capital" that is an allowable expenditure. Where under the terms of the contract between the parties the interest remaining unpaid is capitalised and compound interest on such capitalised

interest is payable thereon then the compound interest on such capitalised interest is not interest on "such capital" but interest on something else and hence does not come within the provision for allowance under Section 9 (1) (iv). (Para 3)

Cases Referred: Chronological Paras
(1945) 13 ITR 39 = 1945 AC 360.

Inland Revenue Commrs. v. Oswald 3
(1922) 1 Ch 126 = 128 LT

281, Morris, In re Mayhew 3

D. Pal with R. N. Dutt, for Applicant;
Ajay Mitra, for Respondent.

SABYASACHI MUKHARJI, J.: This reference arises out of the assessment for the assessment year 1955-57. The relevant previous year ended on 31st December, 1955. The assessee is the trustee to the estate of Sm. Anardeyi Sethani. A title suit being Suit No. 61 of 1923 was filed by one Durga Prosad Chamarla against Sm. Anardeyi Sethani and others claiming title over certain properties including the property at Chandmari Road, Howrah. A consent decree was passed on the 19th April, 1923. Under the terms of the said decree it was provided that the said Chandmari Road property was to belong to Sm. Anardeyi Sethani and she on her part was to make a payment of the sum of Rs. 8,61,000 to the plaintiff in that suit. There was a stipulation of payment of compound interest on the unpaid amount at Rs. 6% per cent with yearly rests. It was further provided that Rs. 4,25,000 was to be paid on the execution of the terms of settlement and then monthly instalments of Rs. 35,000 for 17 months and the balance was to be paid on the 18th month. The terms of the compromise were not adhered to and there were defaults of payments. After making the last payment on 10th February 1965 there still remained an outstanding of Rs. 2,70,506 as the balance of the principal amount. The interest on this amount at 6% per cent for the year in question worked out to be Rs. 18,000. The assessee, however, claimed that he was entitled to a deduction of Rs. 38,221 on the basis of the calculation of the total interest payable on the total outstanding comprising of the principal and the compound interest. The Income-tax Officer disallowed the claim of the assessee and only allowed the claim to the extent of Rs. 18,000, against income from the said property. In appeal the Appellate Assistant Commissioner upheld the order of the Income-tax Officer and on further appeal the Tribunal also upheld the said decision.

2. The question that fell for decision by the Tribunal was what is the amount of interest that an assessee is entitled to as an allowance under Section 9 (1) (iv) of Indian Income Tax Act, 1922. It was contended before the Tribunal that the allowance provided for under Section 9 (1) (iv) of the Act was interest payable on "such capital", in other words the interest allowable was interest on original capital as well as interest

due on accumulated interest capitalised. The Tribunal was unable to accept that contention and on an application, being made under Section 66 (1) of the Act referred to this Court the following question: "Whether on the facts and in circumstances of the case and on a true construction of the words 'interest payable on such capital' under Section 9 (1) (iv) of the Indian Income-tax Act, 1922 the amount of interest allowable was Rs. 18,000 or Rs. 38,221?"

3. In our opinion, for the purpose of answering this question, it is important to bear in mind that what is allowed, is interest on "such capital". The expression "such capital" in the last part of clause (iv) of Section 9 (1) is descriptive of the capital employed for the acquisition or construction or repair or renewal or reconstruction of the property. It is this capital which is a borrowed capital which has been indicated by the expression "such capital". What the assessee is claiming here is interest on that capital plus the interest on interest that has remained unpaid. In our opinion that would not be interest payable on "such capital". It would be interest on such capital or part thereof and interest on accrued interest which has remained unpaid. It is a well settled principle that provisions of this nature should receive strict construction. It was urged by Dr. Pal that there was no provision which disentitled an assessee from entering into an agreement whereby the assessee would become liable to pay compound interest. He further urged that compound interest also retained the character of interest. He drew our attention to the decision of the House of Lords in the case of Inland Revenue Commissioners v. Oswald, (1945) 13 ITR 39 (Supplement). He referred us to the observations of Lord Thankerton at p. 43 of the said judgment where his Lordship was quoting the observation of Lord Sterndale in Morris, in re Mayhew, (1922) 1 Ch. 123 at p. 123 to the effect: "when these sums of interest came to be paid at the end of the time, when payment is made, although interest has been charged upon them and although as a matter of book-keeping, they have from time to time been added to capital, they do not cease to be interest of money — that is to say, they are overdue interest upon which interest has been paid." It is true the compound interest will still remain to be interest but the question is where the capital or any portion thereof remains unpaid and interest is added and on this sum further interest is charged, it is interest on what? When the unpaid interest has been capitalised and added to the original capital or part thereof is it still interest on such original capital or is it interest on something else? If it is interest on something else then in our opinion it does not come within the provision for allowance under clause (iv) of Section 9 (1) of the said Act. It is clear that in this case what has happened is that the remaining unpaid portion of interest has been capitalised and what

is being claimed is interest on that. So, even though it is interest, it is not interest on "such capital". In that view of the matter we are of the opinion that the decision arrived at by the Tribunal was right and the question must be answered by saying that the interest allowable was Rs. 18,000 and not Rs. 38,221. The assessee will pay the costs of this reference.

4. DEB, J:— I agree.

Reference answered against the assessee.

AIR 1970 CALCUTTA 443 (V 57 C 86)

S. K. CHAKRAVARTI AND

S. K. DUTTA JJ.

Dungarmall Sarewalla Jain and others,
Petitioners v. Rukma Kumar Jalal, Opposite
Party.

Civil Revn. No. 681-F of 1969, D/- 3-10-1969.

Limitation Act (1963), Section 12, Explanation — Time requisite for copy — Computation of — Time taken to prepare decree or order — "Shall not be excluded" — Mean "shall be included" in time requisite.

The words "shall not be excluded" in the Explanation mean that the time taken to prepare the decree or order shall be included in computing the period for obtaining certified copy. Accordingly, if after the decree or order is prepared, an application is made for copy, then under the Explanation the time required for preparation of the decree or order, will be included in the time for copy and thus necessarily for limitation. Again, if application is made before the preparation of the decree or order, then time under the Explanation as being the requisite for copy will include the time between the pronouncement of the judgment and the date of application for copy, and the rest of the period as may be taken by the Court to prepare decree or order will be the time required for obtaining the copy as provided in Section 12 (2) to (4). AIR 1966 Pat 1 (FB) and C. R. No. 3810 (S) of 1964, D/- 19-7-1967 (Cal), Foll. (Paras 6A and 7)

Cases Referred: Chronological Paras

(1967) C. R. No. 3810(S) of 1964,

D/- 19-7-1967 (Cal), Gopal Mahato

v. Ranglal Mahato 6

(1966) AIR 1966 Pat 1 (V 53) = ILR

45 Pat 393 (FB), State of Bihar

v. Md. Ismail 6

Mahabir Chand Surama, for Petitioners;
Gouri Sankar Gupta, for Opposite Party.

CN/DN/A922/70/GMJ/M

1. 15.11.68 — Date of judgment.
2. 26.11.68 — Date of drawing up of the decree.
3. 12.12.68 — Date of application for copy.
4. 13.12.68 — Date of notification for stamps and folios
5. 16.12.68 — Date of delivery of stamps and folios.
6. 21.12.68 — Date on which copy was made ready for delivery.
7. 24.12.68 — Date when copy made over to the applicant.

SALIL KUMAR DUTTA J.:—This rule arises out of an application under Section 5 of the Limitation Act, 1963, (Act XXXVI of 1963), for condoning the delay in filing the appeal. The appeal was filed on January 6, 1969, and according to the Stamp Reporter, the appeal would be in time if filed on January 3, 1969, but was out of time for 3 days. The memorandum of appeal was returned to the learned Advocate for the appellants on February 20, 1969, and the application on which this rule has been issued was filed on February 21, 1969.

2. The plaintiffs appellants' explanation for this delay is that the judgment under appeal was delivered on November 15, 1968, and the decree was prepared on November 26, 1968. The appellant No. 2 who was in charge of the suit, on receipt of the news of death of his brother-in-law left Calcutta in the third week of November 1968 and returned to Calcutta on December 10, 1968. The application for copy was made by him on December 12, 1968, through Deonandan Ojha, the clerk of their Advocate. The clerk received the certified copy on December 24, 1968, but unfortunately misplaced the same. The Court was closed for the Christmas holidays during December 25, 1968 to January 1, 1969, both days inclusive. After the reopening of the Court on January 2, 1969, the said Ojha came to know from another Advocate's clerk that he found one certified copy lying on the Advocates' clerks' room of the Court on December 24, 1969, and at his request the said clerk brought and handed over the said copy to Deonandan Ojha on the following day on January 3, 1969. The appellant No. 2 received the copy on January 3, 1969, and immediately handed it over to his Advocate, who prepared the memorandum of appeal on the evening January 4, 1969, and the appeal was filed on January 6, 1969, the intervening January 5, 1969, being a Sunday. The allegations are also supported by the affidavit of the said clerk Deonandan Ojha.

3. The rule is opposed by the defendant opposite party, who denied the material allegations made in the petition filed by the appellant. It was further contended that the time for filing the appeal expired on December 23, 1968, and as such in absence of any explanation for delay from December 24, 1968, the application for condonation of the alleged delay should be dismissed and this rule should be discharged.

4. To appreciate the argument of the parties, it is necessary to consider the relevant dates which are as follows:

It will appear therefrom that the time for filing appeal is December 15, 1968 under S. 8(2)(a) of the City Civil Court Act, 1953 (W. B. Act XXI of 1953) and to this will be added the time for certified copy. According to the appellants, they are entitled to—

(a) 2 days for 12th and 13th December, 1968;

(b) 6 days from 16th to 21st December, 1968;

(c) 11 days from 15th to 25th November, 1968, the period between the pronouncement of judgment and drawing up of the decree.

The limitation on above calculation would expire on January 3, 1969.

5. The opposite party has seriously disputed the right of the appellants petitioners to have the period (c) above. It was submitted that on an interpretation of the Explanation to Section 12 of the Limitation Act, 1963, it would appear that the petitioners are not entitled to have the benefit of the period (c) above.

6. The appellants have relied on the decision of the Full Bench of the Patna High Court in the State of Bihar v. Md. Ismail, AIR 1966 Pat 1 (FB), in which case Mahapatra, A. B. N. Sinha JJ., U. N. Sinha J., dissenting, held that the time between the pronouncement of the judgment and the drawing up of the decree shall be included within the time required for obtaining a copy. We were also referred to a decision of Chatterjee J. in C. R. No. 3810 (S) of 1964 (Cal), Gopal Mahato v. Ranglal Mahato (unreported), the judgment being delivered on 19-7-1967, which also supports the above majority view of the Patna Full Bench.

6-A. On perusal of the relevant provisions of Section 12, it appears that while sub-sections (1) to (4) thereof provide the exclusion of time in computing the period of limitation, the Explanation provides for inclusion of the time mentioned therein for obtaining a certified copy. Sub-sections (2) to (4) provide that in computing the period of limitation, the time requisite for obtaining a certified copy of the decree, judgment or award shall be excluded. The Explanation again provides that the time taken by the Court to prepare the decree or order before an application for a copy thereof is made shall not be excluded in computing the period for obtaining a certified copy of such decree or order. In other words, the time so taken, as contemplated in the said Explanation, shall be included in computing the period for obtaining certified copy and thus of limitation for an appeal or application and an appellant or applicant will be entitled to the benefit of the time so taken for preparing the decree or order. In the view we have taken, we respectfully follow the decisions of Chatterjee J. and of the Full Bench of the Patna High Court referred to above.

7. Accordingly, if after the decree or order is prepared, an application is made

for copy, then under the Explanation the time required for preparation of the decree or order, shall be not excluded from the time required for obtaining a certified copy, in other words, it will be included in the time for copy and thus necessarily for limitation. Again, if application is made before the preparation of the decree or order, then time under the Explanation as being the requisite for copy, will include the time between the pronouncement of the judgment and the date of application for copy, and the rest of the period as may be taken by the Court to prepare decree or order will be the time required for obtaining the copy as provided in sub-sections (2) to (4) of Section 12. The Explanation is clear and there will be no ambiguity if one remembers that while sub-sections (2) to (4) of Section 12 of the Act relate to exclusion of time for obtaining certified copy of relevant judgment, decree or order, the Explanation concerns not with the limitation for appeal or application, but with the computation of time required for copy.

8. In the above view, it must be held that the appellants here are entitled to the period mentioned in (c) above and the limitation for filing the appeal expired on January, 3, 1969.

9. We have further considered the explanation given by the appellants and we accept the same. We are satisfied that the appellants had sufficient cause for not preferring the appeal in time. The delay in filing the appeal, in the circumstances, is condoned and the rule is made absolute there being no order as to costs. The appeal may now be registered and proceed according to law.

9-A. S. K. CHAKRAVARTI, J.: I agree.
Rule made absolute.

AIR 1970 CALCUTTA 444 (P 57 C 57)

P. N. MOOKERJEE AND AMIYA
KUMAR MOOKERJI, JJ.

Krishna Sardar, Appellant v. Sindhu Bala Dast, Respondent.

L. P. A. No. 7 of 1964 D/- 16-12-1969, against Judgment of Bijayesh Mukharji J. in S. A. No. 1587 of 1955.

(A) Transfer of Property Act (1882), Section 53-A — Plea of part performance — When not available — Memorandum recording fact of taking possession under agreement of exchange — Such memorandum is not a contract of exchange or deed of exchange which alone on registration can pass title to parties concerned — Section 53A not attracted for perfecting title. (Para 3)

(B) Civil P. C. (1908), O. 22, R. 2 — Death of pro forma defendant — Abatement against him — Right to sue surviving against contesting defendant — Nature of decree to be drawn.

CN/DN/A935/70/HGP/C

Where in a suit for declaration of title and for joint possession along with a co-sharer, who was made pro forma defendant, the latter died during the pendency of appeal and the appeal abated so far as he was concerned, the plaintiff can only get a decree for declaration of his title to the extent of his share and for joint possession along with the contesting defendant.

(Para 4)
Cases Referred: Chronological Paras
 (1935) AIR 1935 Cal 646 (V 22) =
 40 Cal WN 81, Joy Gopal Sinha v.
 Probodh Chandra Bhattacharjee 4
 (1929) AIR 1929 Cal 28 (V 16) =
 49 Cal LJ 83, Naresh Chandra Basu
 v. Hayder Sheikh Khan 4

Jitendra Nath Guha and Jnan Ranjan Ganguli, for Appellant; B. N. Chakravarty Thakur and Gaganendra Krishna Deb, for Respondent.

P. N. MOOKERJEE, J.: This is a Letters Patent appeal against the judgment of our learned brother, Bijayesh Mukharji, J. The appellant before us was the contesting defendant in the suit, which was brought by the plaintiff-respondent for declaration of title and recovery of joint possession along with pro forma defendant No. 3.

2. The suit was dismissed by the two Courts below, but, in second appeal, this Court decreed the plaintiff's suit.

3. The whole controversy between the parties rests on the effect of a Memorandum on the rights of the parties under Sec. 53A of the Transfer of Property Act. That Memorandum, as we read the same, records the fact of taking of possession by the parties concerned in pursuance of an exchange or agreement of exchange, made by them in respect of their respective properties in Pakistan and India. It is the defendant's case that, in view of the said Memorandum, he is entitled to have his possession protected under Section 53A of the Transfer of Property Act. The Memorandum has been set out in the judgment of our learned brother on a translation from the original, which is in Bengali. The translation appears to be a proper translation and, proceeding upon the same, we read the Memorandum as only a record of the fact of taking of possession by the respective parties in pursuance of an agreement for exchange. In our opinion, the said Memorandum cannot be treated either as a contract of exchange or as a deed of exchange, which, on registration, may pass title to the parties concerned. In this view, we hold that our learned brother was justified in rejecting the defence contention on this point and in decreeing the plaintiff's claim in respect of the share, claimed by him.

4. The decree, however, that was ultimately passed by our learned brother, was a decree for recovery of possession after ousting the contesting defendant. It appears from the record that, on the plaintiff's own

case, he was only a co-sharer, holding a particular share in the disputed property, the remaining share, belonging to the pro forma defendant No. 3. It appears further that the said pro forma defendant No. 3 died during the pendency of the appeal in this Court and the plaintiff's second appeal abated, so far as he was concerned. In the circumstances, our learned brother was right in holding that there could not be a decree for joint possession with pro forma defendant No. 3. At the same time, however, that would not entitle the plaintiff to a decree for possession against the contesting defendant after ousting him from the disputed property. The plaintiff can only get a decree for possession to the extent of his share, and, accordingly, although the plaintiff's suit will be decreed, it will be decreed only to the extent of declaring his title to the share, claimed by him in the disputed property, and granting him a decree for joint possession along with the contesting defendant, however much he may be a trespasser in the disputed land. (Vide 49 Cal LJ 83) = (AIR 1929 Cal 28), affirmed in L. P. A. No. 104 of 1928 and 40 Cal WN 81 = (AIR 1935 Cal 646)).

5. We would, accordingly, allow this appeal only to this extent that the decree, passed by our learned brother Bijayesh Mukharji, J., will be modified by converting the decree for possession against the contesting defendant, who is the appellant before us, after ousting him from the disputed property, into a decree for joint possession of the disputed property along with the said contesting defendant.

6. There will be no order as to costs in this appeal.

7. **AMIYA KUMAR MOOKERJI, J.:** I agree.

Order accordingly.

AIR 1970 CALCUTTA 445 (V 57 C 88)

**SANKAR PRASAD MITRA AND
 P. CHATTERJEE, JJ.**

Commissioner of Income-tax, W. B. Applicant v. M/s. Mahabir Finance Ltd., Calcutta, Respondent.

Income-tax Reference No. 177 of 1963, D/- 11-12-1968.

(A) Income-tax Act (1922), Section 16 (2) — Dividend, inclusion of — Amount declared at the general meeting as dividend and not value or money's worth is the dividend. (1935) 19 TC 174, Ref. (Para 13)

(B) Income-tax Act (1922), S. 18 (5) — Payment of dividend in specie — Deduction allowed of actual sum shown in certificate, and not actual value of specie which may be higher.

When dividend is declared but instead of being paid in cash was paid in specie i.e. in shares the deduction that is allowed,

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would be of the sum mentioned in the certificate that is furnished and not of any higher sum. (Para 15)

(C) Income-tax Act (1922), S. 49-B — Tax deducted by Company at source on dividend declared — Dividend declared in specie — Shareholder entitled to benefit on actual tax deducted from his dividend — Grossing up is to be limited to actual money portion, the shareholder receives.

When dividend is declared in specie, the shareholder may actually get a sum larger than the declared amount by virtue of a higher market rate of the specie prevailing on the date of the declaration; but that is only money's worth which the shareholder receives for which the shareholder may be assessed. The dividend paying Company cannot be assessed in respect of this money's worth. The grossing up is to be confined to the actual money portion out of the money's worth the shareholder receives. And when the shareholder claims the benefit of tax deducted at the source he is entitled to the benefit of what was actually deducted from his dividend income. (1935) 19 Tax Cas 174 and 1930-2 KB 248 (253) and AIR 1943 Bom 409 and (1954) 25 ITR 431 (Cal), Rel. on. (Para 19)

Cases Referred: Chronological Paras

(1981) AIR 1901 SC 1038 (V 48) =

41 ITR 275, Kantilal Manilal v. Commr. of I. T. 6

(1954) 25 ITR 431 = 24 Com Cas 186 (Cal), Angus Co., Ltd. v. Commr. of I. T., W. B. 18

(1948) AIR 1948 Bom 409 (V 35) = 16 ITR 78, Accountant General, Baroda State v. Commr. of Bombay 18

(1935) 19 Tax Cas 174 = 151 LT 410, Wright v. Salmon 19

(1930) 1930-2 KB 240 = 99 LJKB 532, Gimson v. I. R. Commr. 19

B. L. Pal with B. Gupta, for Applicant; D. Pal with R. Murarka, for Respondent.

SANKAR PRASAD MITRA, J.: The assessee is a shareholder of the Bharat Nidhi Limited and also an investment company.

The paid-up capital of the Bharat Nidhi Limited including (included?) a certain number of ordinary shares of Rs. 10.00 each. Some of these shares were fully paid up and some paid up to Rs. 2-8-0 per share. During the financial year ending on the 28th February, 1959 (assessment year 1959-60), the assessee received 11,750 shares of the New Central Jute Mills Company Limited from the Bharat Nidhi Limited, by way of dividend in specie.

2. The Income-tax Officer found that the face value of the shares of the New Central Jute Mills Company Limited was Rs. 10.00 only; but the market value was Rs. 14.56 per share. According to the Income-tax Officer, the value of 11,750 shares was, in the premises, Rs. 1,71,080.00. Now, at the general meeting of the New Central Jute Mills Company Limited held on the

31st October, 1958, the amount of dividend declared was Rs. 1,17,500.00 and the Income-tax Officer was of the view that grossing up could be allowed only to the extent of this amount. The difference between Rs. 1,71,080.00 and Rs. 1,17,500.00 was the sum of Rs. 53,580.00. The Income-tax Officer added this difference to the assessee's income on the ground that it "had come out of the unassessed and undisclosed income of the dividend paying company."

3. The Appellate Assistant Commissioner did not agree with the Income-tax Officer's views and directed him to make a fresh assessment after scrutiny of the balance-sheet of the Bharat Nidhi Limited and after consulting the Income-tax Officer assessing the Bharat Nidhi Limited. He did not, however, give any specific direction regarding the amount of dividend or the amount to be grossed up.

4. The Department appealed to the Tribunal contending that the Appellate Assistant Commissioner should not have set aside the assessment and that the correct amount to be grossed up was Rs. 1,17,500.00.

5. The Tribunal looked into the annual report of the Bharat Nidhi Limited for the calendar year 1957, and the resolution passed at the general meeting on declaration of dividend. The relevant extracts from the resolution are as follows:—

"Resolved that dividend as under for the year 1957 be and is hereby declared payable to the Shareholders whose names stand in the Register of Members as on 31st day of October, 1958:

On 53,572 Preference shares at Rs. 8 (less Income-tax) per share.

On 808,844 fully paid ordinary shares at 50 Np. per share (without deduction of income-tax).

On 2,683,262 partly paid ordinary shares at Rs. 12.5 Np. per share (without deduction of income-tax).

On 338 Ordinary shares to be issued in exchange of fractional share coupons at 5 per cent (without deduction of income-tax), and that fraction of less than 1 Np. in respect of amount payable to a shareholder be ignored.

Further Resolved that holders of Ordinary shares be given option (which should be received by the Company in writing from the shareholders not later than the 15th day of November 1958 with liberty to the Directors to extend the time) to receive payment of the aforesaid dividend in the form of old ordinary share (cum-dividend) of Rs. 10 each in New Central Jute Mills Company Limited, at par value i.e., one ordinary share in New Central Jute Mills Company Limited as dividend for every 20 fully paid or 80 partly paid ordinary shares in the Company provided, however that if the dividend on ordinary shares whether fully paid and/or partly paid or any portion thereof amounts to less than the equivalent of one ordinary share in New Central Jute Mills Company Limited, on the basis afore-

said, cash only shall be paid for such dividend or portion thereof.

Also Resolved that the deficit arising out of distribution of Ordinary shares in New Central Jute Mills Company Limited valued at par as aforesaid be debited to Investment Reserve Account."

6. It was admitted that the cost price to the Bharat Nidhi Limited of the ordinary shares of the New Central Jute Mills Company Limited was Rs. 12.05 per share (par value Rs. 10.00) and the market value was Rs. 14.56 per share. The Tribunal was of opinion that it appeared from the resolution passed at the general meeting that the option to take dividend in specie had resulted in payment to the shareholders of the Bharat Nidhi Limited, in excess of 5%. The Tribunal relied on the Supreme Court's decision in *Kantilal Manilal v. Commissioner of Income-tax*, 41 ITR 275 = (AIR 1961 SC 1038), and held that the market value of the shares received by the assessee would be the amount of dividend it had received as a shareholder. In the Tribunal's view the net amount of dividend should, therefore, be taken to be Rs. 1,71,080.00.

7. On the question of grossing up, the Tribunal observed that the Bharat Nidhi Limited held the shares of the New Central Jute Mills Company Limited at cost which amounted to Rs. 12.05 per share. In these premises, the distribution of dividend in specie entailed a further release of Rs. 2.05 per share by debit to the Investment Reserve Account. In the Directors' report it was stated that "the deficit arising out of distribution of ordinary shares in New Central Jute Mills Company Limited valued at par as aforesaid be debited to Investment Reserve Account." The Tribunal did not express any opinion as to whether the Bharat Nidhi Limited could be regarded as having realised the market value of the shares by reason of release thereof for the benefit of the shareholders. The Tribunal held that the assessee received dividends in money's worth amounting to Rs. 1,71,080.00 and that sum had to be grossed up with reference to the percentage of taxable profits to the total profits of the Bharat Nidhi Limited. The Dividend Warrant of the Bharat Nidhi Limited showed that this percentage amounted to 95%. That is why, the Tribunal said that the sum of Rupees 1,71,080.00 had to be grossed up on the footing that it was paid out of profits which had borne tax to the extent of 95%.

8. The following question of law has been referred to this Court:—

"Whether for the purpose of inclusion in the total income of the assessee, the entire sum of Rs. 1,71,080.00 (and not merely Rs. 1,17,500.00) was liable to be "grossed up" as to 95% thereof under Section 16 (2) of the Indian Income-tax Act, 1922".

9. Mr. Debi Pal, learned counsel for the assessee, contends that the Appellate Assistant Commissioner has found that the

declaration of dividend, in the instant case, was a declaration in specie and not a cash declaration (vide page 8 of the paper book). The Appellate Assistant Commissioner has further found, says Mr. Debi Pal, that there is no material on which it can be suggested that dividend has been declared out of the unassessed and undisclosed income of the dividend paying Company (see page 8 paragraph 4). On these findings the Appellate Assistant Commissioner's conclusion, according to Mr. Debi Pal, is that if the dividend declared is a declaration in specie, the entire dividend is to be grossed up (see page 8 paragraph 5).

10. Mr. Debi Pal has then urged that in its appeal to the Tribunal the department did not contest the Appellate Assistant Commissioner's view that this was a case of declaration of dividend in specie. The Tribunal reading the Company's resolution as a whole, also independently came to the same conclusion (page 33 Lines 6 and 7). The Tribunal has said further that the Income-tax Officer's remarks that the difference between Rs. 1,17,500.00 and Rs. 1,71,080.00 has come out of unassessed and undisclosed income of the dividend paying Company is unjustified and uncalled for (p. 33 lines 18 to 20).

11. On these observations of the Appellate Assistant Commissioner and the Tribunal, the assessee's counsel submits that, if there has been a declaration of dividend in specie and if no part of this dividend has come out of unassessed and undisclosed income of the dividend paying company, the necessary inference is that the entire sum which the assessee actually received is to be grossed up. The taxable profit of the Company is Rs. 18,15,183.00 (page 29 line 12); the dividend declared in specie can only come out of the company's profits (Section 205 of the Companies Act, 1956); and if such a dividend has not come out of unassessed profits, the grossing up has to be made in respect of the amount actually received as dividend at the rate applicable to the dividend paying Company i.e. 95%.

12. Now, in this reference the sections of the Indian Income-tax Act, 1922, which need consideration are Sections 16 (2), 18 (5) and 49B. Section 16 (2), inter alia, provides that for the purposes of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous year in which it is paid, credited or distributed or deemed to have been paid, credited or distributed to him and shall be increased to such amount as would, if income-tax (but not super-tax) at the rate applicable to the total income of the Company (without taking into account any rebate allowed or additional income-tax charged) for the financial year in which the dividend is paid, credited or distributed, or deemed to have been paid, credited or dis-

tributed, were deducted therefrom, be equal to the amount of dividend.

13. It appears that this sub-section speaks not of the value or money's worth of the dividend to the shareholder but of the actual dividend that is either paid by the Company or credited in the books of the Company or distributed by the Company or is deemed to have been paid or credited or distributed. The juxtaposition of words "paid, credited or distributed" is not without significance. In the Company's books only the sum which is declared at the general meeting, would be credited and if the words "paid" or "distributed" are to be understood in the same sense, (from the point of view of quantum) as the word "credited" should be understood, then one has obviously to restrict oneself only to the amount declared at the general meeting.

14. We next come to Section 18 (5). It says *inter alia*, that any deduction made and paid to the account of the Central Government in accordance with the provisions of this section and any sum by which a dividend has been increased under sub-section (2) of Section 16 shall be treated as a payment of income-tax or super-tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the shareholder, as the case may be, and credit shall be given to him therefor on the production of the certificate furnished under sub-section (9) of Section 20, as the case may be, in the assessment, if any, made for the following year under the Act.

15. Here, again, the clear indication is that the deduction that is allowed, would be of the sum mentioned in the certificate that is furnished and not of any higher sum. And the certificate that is furnished shows the actual amount that has been paid to the Central Government or is proposed to be paid to the Central Government.

16. Lastly, we come to Section 49B. This section lays down, *inter alia*, that where a dividend has been paid, credited or distributed or is deemed to have been paid, credited or distributed to any of the persons specified in Section 3 who is a shareholder of a Company which is assessed to income-tax in the taxable territories or elsewhere, such person shall, if the dividend is included in his total income be deemed in respect of such dividend himself to have paid income-tax (exclusive of super-tax) of an amount equal to the sum by which the dividend has been increased under sub-section (2) of Section 16.

17. We have already discussed, while dealing with Section 16 (2), what is meant by the expression "paid, credited or distributed" with reference to the quantum of dividend. We now find that the same expression has been used in Section 49B in relation to income-tax on the Company's dividend that is deemed to have been paid by the shareholder. In other words, it is the actual amount paid to the Central Gov-

ernment as tax that is deemed to have been paid by the shareholder.

18. The Bombay High Court in explaining these provisions in *Accountant General, Baroda State v. Commr. of I. T., Bombay City*, 16 ITR 78 = (AIR 1948 Bom 409), has observed that a Company is taxed in its capacity as a Company; it can never be said that a shareholder is taxed through the Company; and it is only for the purposes of avoiding double taxation that Sections 49B and 48 have been enacted. The Calcutta High Court also has observed in *Angus Co., Ltd. v. Commr. of I. T., West Bengal*, (1954) 25 ITR 431 (Cal), that the funds of the Company are affected, in the case of a declaration of dividend, only to the extent of the sum which the company has to pay because of the declaration and which it would not have to pay otherwise and that sum obviously is the sum which it actually distributes as dividend.

19. The facts in the present reference have, in our view, to be approached in the light of the relevant provisions contained in Sections 16 (2), 18 (5) and 49B. It seems to us that the amount of dividend paid to a particular shareholder has to be ascertained from the relevant facts and figures appearing in the directors' report submitted to the shareholders at the general meeting and the resolution passed thereon authorising declaration and payment of dividend. Secondly, the amount of dividend declared by the Company and mentioned in the dividend warrant is the exact sum of money on which the Company is entitled to deduct tax. When dividend is declared in specie, the shareholder may actually get a sum larger than the declared amount by virtue of a higher market rate of the specie prevailing on the date of the declaration; but that is only money's worth which the shareholder receives for which the shareholder may be assessed (*Wright v. Salmon*, 19 TC 174). The dividend paying Company cannot be assessed in respect of this money's worth. It necessarily follows that the grossing up is to be confined to the actual money portion out of the money's worth the shareholder receives. And when the shareholder claims the benefit of tax deducted at the source he is entitled to the benefit of what was actually deducted from his dividend income and paid by the dividend paying Company to the Central Government. If any refund is to be made to the shareholder, the refund would be naturally limited to the amount which the Central Government has actually received and cannot be extended to an amount which the Government has not received. The dictum of Rowlatt, J. in *Gimson v. Inland Revenue Commrs.*, 1930-2 KB 246 at p. 253, that a shareholder can only recover back tax which the money he received, has suffered, is, in our view, attracted to these cases.

20. In these premises, the answer to the question in this reference, is in the negative.

The assessee will pay to the Commissioner his costs of the reference.

21. P. CHATTERJEE, J.: I agree.

Reference answered.

AIR 1970 CALCUTTA 449 (V 57 C 89)

P. N. MOOKERJEE AND A. K.

MOOKERJI JJ.

Sailendranath Sadhukhan and another, Appellants v. Chhotelal Shaw and others, Respondents.

Letters Patent Appeal No. 42 of 1964 D/- 12-12-1969, from judgment of R. N. Dutta J., in Second Appeal No. 67 of 1962.

Easements Act (1882), Section 13 — Easement of necessity — Test of — Effective user.

To support the claim of easement of necessity, it is necessary to prove that the property for which easement is claimed cannot be enjoyed or used without such right. Effective user apart from convenient or reasonable user is the test of it. Such effective user of property for residential purpose in a Municipal town is not possible without an outlet for discharge of its water to the Municipal drain. Hence in a town where there was no outlet for discharge of water from one holding to another except through the disputed drain leading to the Municipal drain, it was held that the right of easement satisfied the above test. (1912) 16 Cal LJ 417 and AIR 1921 Cal 231 and AIR 1960 Cal 592 and (1890) ILR 14 Bom 452 and (1964) 2 All ER 119, Ref. (Para 5)

Cases Referred:	Chronological	Paras
(1964) 1964-2 All ER 119		6
(1960) AIR 1960 Cal 592 (V 47) =		
Harilal v. Gora Chand		6
(1921) AIR 1921 Cal 231 (V 8) = 34		
Cal LJ 518, Tustee Mondal v.		
Kenaram Mondal		6
(1912) 16 Cal LJ 417 = 17 Ind Cas 966		
C. H. Crowdy v. L. O. Reilly		6
(1890) ILR 14 Bom 452, Purshotam		
Sakharam v. Durgoji Tukaram		6
Jitendranath Guha and Padmabindu Chatterji, for Appellants. A. K. Motilal and Dhruva Kumar Mukharji, for Respondents.		

P. N. MOOKERJEE J.: This appeal is by the defendant (added defendant) under cl. 15 of the Letters Patent against a judgment of our learned brother R. N. Dutta, J. The appeal arises out of a suit for declaration of the plaintiffs' right of easement for discharging water from their holding No. 72 of the Municipality of Howrah through the appellant's holding No. 71 and for an appropriate injunction.

2. The claim is a claim of easement of necessity and, although there was also another ground, namely, of implied grant, the first appellate Court has rightly pointed out that the case of implied grant cannot exist apart from easement of necessity in the circum-

stances of this case. All the three Courts below have decreed the plaintiffs' suit and, against their concurrent decision, the instant appeal has been filed by the added defendant.

3. As already observed, the only point for consideration is whether the right claimed is an easement of necessity. The original two holdings Nos. 71 and 72 belonged to the same person. Holding No. 71 was leased out in the year 1894 to the defendant's predecessor. Holding No. 72 was retained by the owner (landlord). It has now been acquired by the plaintiffs and the basic title claimed is on the basis of a lease from the same landlord. The question is whether, having regard to the situation and configuration of the two holdings, the disputed right can be claimed as an easement of necessity.

4. It is well established, on the findings of the Courts below, that, from holding No. 72, there is no outlet for discharge of water except through the disputed drain in Holding No. 71. It is apparent, accordingly, that, apart from this disputed drain, Holding No. 71 would have no outlet for discharge of water to the Municipal drain.

5. Mr. Guha, arguing this appeal on behalf of the defendant-appellant, raised a contention that, in order to support the claim of easement of necessity, it must be established by the party, claiming it, that the property, for which this easement is claimed, cannot be enjoyed or used at all without this right of easement. He contends that it must be absolutely necessary for the use or enjoyment of the particular property, or, in other words, that, without it, the said property cannot be used or enjoyed at all. We need not dispute the suggested test, but in our view, the proper meaning of the above test will be that the user contemplated is 'effective user', although it is different and distinct from convenient or reasonable user. On the facts, found by the three Courts below in the instant case, the position is clear that, having regard to the situation and configuration of Holding No. 71, it cannot be effectively used without this right of easement. It is impossible to conceive an effective user of a property for residential purpose in a Municipal town without an outlet for discharge of its water to the Municipal drain. From that point of view, the right claimed would be necessary for the user and enjoyment of the disputed property in Holding No. 71 and would, accordingly, satisfy the test, put forward by Mr. Guha himself.

6. Before concluding this judgment, we deem it necessary to mention the decisions, cited before us by the two parties, namely, (1912) 16 Cal LJ 417, AIR 1921 Cal 231, and AIR 1960 Cal 592, cited by Mr. Guha, and (1890) ILR 14 Bom 452 and (1964) 2 All ER 119, cited by Mr. Motilal. We do not, however, think that any useful purpose will be served by adverting to the discussions in the above two sets of cases, except stating that they lay down the general principles,

applicable to cases of easement of necessity. As a matter of fact, in the English case cited, the test of necessity has been laid down with reference to user of the property and the surrounding circumstances and that suffices for our present purpose. We may also add that, although Mr. Cuha contended that, of easement of necessity, there are only two varieties, — right of way and right of support, — his contention would be opposed even to the authority cited by him, namely, Gale on Easements, Thirteenth Edition, p. 87, where the learned author or commentator makes inter alia the following observation:

"The exceptions to the prima facie rule (that no grant or reservation can be implied in favour of the owner or in favour of the grantor) have never been exhaustively stated"

which, obviously, means that easements of necessity have never been exhaustively mentioned or enumerated, although the two familiar instances are right of way and right of support.

7. We would, accordingly, dismiss this appeal. There will be no order as to costs.

8. A. K. MOOKERJEE, J.: I agree.

Appeal dismissed.

AIR 1970 CALCUTTA 450 (V 57 C 90)

A. K. DAS AND K. K. MITRA, JJ.

Beharilal Agarwalla and another, Accused-Appellants v. The Corporation of Calcutta, Opposite Party.

Criminal Appeal No. 388 of 1964, D/- 12-2-1970.

(A) Prevention of Food Adulteration Act (1954), S. 19 (2) — Defence of Warranty — When available to Vendor.

Proof of purchase of food article with a written Warranty from the Supplier as regards its nature, substance and quality, taken with its storage and sale in the same condition, makes the defence of Warranty available to the Vendor. AIR 1970 SC 520, Ref. to. (Paras 8 and 10)

(B) Prevention of Food Adulteration Act (1954), S. 19 (3) — Prosecution for adulteration — Vendor pleading Warranty — Prosecution disputing the same — Vendor not bound to examine him as defence witness.

(Para 8)

Cases Referred: Chronological Paras (1970) AIR 1970 SC 520 (V 57) =

Criminal Appeal No. 141 of 1967, D/- 9-10-1969 = 1970 Cri LJ 599, K. Ranganath v. State of Kerala, 8

Prasann Ch. Ghosh and Promode Ranjan Roy, for Appellant; J. M. Banerjee and K. Ganguly, for Corporation; Mrs. Dipty Kana Bose, for the State.

DAS J.: This is an appeal against conviction under S. 7(b)(16)(i)(a) of the Prevention of Food Adulteration Act. The appel-

lant Beharilal was sentenced to rigorous imprisonment for six months and to pay a fine of Rupees 1000 while the appellant Giridharilal was sentenced to rigorous imprisonment for one month and to pay a fine of Rs. 500.

2. The prosecution case is as follows: On November 29, 1963 the Food Inspector, Calcutta Corporation, visited the shop of Beharilal Omprakash at 149 Cotton Street, Calcutta. The appellant Giridharilal was then present. He took sample from one tin of lanka powder in presence of witnesses after observing the rules. He also took charge of the tin and then went to the godown of the firm at 37 Cotton Street across the street. There also he found 41 tins of lanka powder and took sample from one such tin. All formalities were complied with and one sample of each seizure was handed over to the appellants. He also seized all the 42 tins of lanka powder under two lists and thereafter sent the samples to the Public Analyst for analysis. The public analyst found the samples to be highly adulterated and thereafter with sanction from the Health Officer they were charged with offences under the Food Adulteration Act and convicted.

3. The defence was a plea of innocence. They pleaded that the samples were not taken according to law and that Beharilal was not a partner of the firm. They also pleaded warranty from the supplier at Bombay.

4. The learned Magistrate overruled the objections and held on the evidence of D. W. 6, a partner of the Bombay firm Madhabdas Raghavi and Co., that there was no warranty in respect of the tins from which samples were taken.

5. Mr. Dutta the learned Advocate for the appellants, pleaded the defence under Section 19 of the Prevention of Food Adulteration Act. Their contention is that they purchased mirchi in sealed tins from the firm Mangaldas Raghavi and Co., of Bombay and the tins were sent from time to time by railway with usual warranty. They contend that not only were the contents of mirchi powder (sic) but they stocked and sold the articles in the same condition they purchased from the Bombay firm. They had the necessary warranty of purity from the Bombay firm and as such they were not liable if the contents were adulterated. The relevant portion of Section 19(2) as follows:

"A vendor shall not be deemed to have committed an offence pertaining to the sale of any adulterated or misbranded article of food if he proves—

(a) that he purchased the articles of food—
(ii) in any other case, from any manufacturer, distributor or dealer, with a written warranty in the prescribed form; and

(b) that the article of food while in his possession was properly stored and that he sold it in the same state as he purchased it." Sub-section (3) of Section 19 provides that—

"Any person by whom a warranty as is referred to in Section 14 is alleged to have been given shall be entitled to appear at the hearing and give evidence."

The appellants, therefore, shall not be deemed to have committed an offence pertaining to the mirchi powder, if they can prove that they purchased the articles from Mangaldas Raghavji and Co., a firm at Bombay, with a written warranty in prescribed form and that the articles while in his possession were properly stored and that he sold it in the same state as he purchased it.

6. The learned Magistrate rejected the plea on the finding that the plea was taken at a very late stage and is after-thought. He accepted the denial by a partner of the firm at Bombay that the rubber stamp warranty was manufactured and the tins containing the powder were changed while under attachment, though he accepted the appellants' story of purchase from time to time of a large number of tins from the same firm. The learned Magistrate finally held that the lanka powder seized did not come from the Bombay firm. There is no dispute that the appellants purchased mirchi or lanka powder from the Bombay firm Mangaldas Raghavji and Co. It appears from the evidence of D. W. 7 Padan Kumar, a Clearing Agent, that on 27-11-62 he cleared 26 tins of mirchi powder for appellants by R. R. No. 897933 and on 23-11-62 he cleared 75 tins and he identified the tin shown in Court as one of those tins. In cross-examination he stated that he was definite that this very tin was taken delivery by him. He is not connected with the appellants' firm and his evidence not only proves the purchase but he also identifies the container as one of those in which the consignment was cleared from the railway station.

7. The next witness is D. W. 2, the Durwan of the godown at 37, Cotton Street. He says that P. W. 7 Padan Kumar brought the tins of mirchi and he also identifies the tin shown in Court as one of those tins. He stated that he opened the padlock when the Corporation Inspector came and he proves "that the tins were kept in the same condition as kept by him as brought by Padan Kumar". P. W. 6, partner of Mangaldas Raghavji and Co., admitted sale by them of the mirchi powder to appellants' firm and the correspondence and transport of the tins by railway, though he suggested that the tins were replaced and contents tampered. The learned Magistrate relied on him forgetting that he was interested to deny, for otherwise the liabilities would come on them. He however conceded that the tins produced were of the same size but he could not say what distinguished these tins from those in which they supplied. It is besides the prosecution case that the Food Inspector attached the tins after taking sample and the question of replacement of the tins should not, therefore, arise at all. The

evidence of D. Ws. 7 and 8 who identified the tins and who were not even cross-examined on this point should have persuaded the learned Magistrate to reject the interested evidence of the partner of the firm denying that the consignments were not in identical tins. Sub-section (3) of Section 19 gives right to the firm to appear at the hearing and give evidence. But no attempt was made to produce standard containers to show the difference with those produced by the appellants. Needless to say that the Bombay firm had a great stake and it is not, therefore, proper to give due importance to their denial and throw out the appellants' defence in limine. The appellants again adduced evidence to show that the tins had railway labels affixed on those tins.

8. The Bombay firm denied the rubber stamp warranty; obviously they would, as the liabilities would otherwise come on them. They however adduced no evidence to show that the nature of warranty they used to give and a mere denial is not sufficient. The alleged warranty is written in Gujarati language. The firm witness D. W. 6, claimed it to be in incorrect Gujarati, but the witness who translated it did not say that. In any case, it is of little importance whether the writing is grammatically correct or not but the writing disclosed warranty within the meaning of Section 19. In the recent Supreme Court decision in Criminal Appeal No. 141 of 1967, (K. Ranganath v. State of Kerala), reported in Blue Print dated 9-10-1969 = (AIR 1970 SC 520), it was pointed out that the warranty is not a document drafted by a solicitor; it is a document using the language of the tradesman. Any tradesman when he is assured that the quality of the article is upto the mark will readily conclude that he is being assured that the article is not adulterated. If the words in the warranty can be reasonably interpreted to have the same effect as certifying "the nature, substance and quality" of an article of food, the warranty will fall within the proviso. The language or the correctness of the language is therefore of no consequence. The learned Magistrate again was not right in treating D. W. 6 as a defence witness, though cited as a defence witness. According to the provisions of the Food Adulteration Act, he would face the prosecution instead of the appellants, if the appellants' contention is accepted and they were really at cross-roads. The initial onus is on the vendor, and if he proves that he purchases the article of food with a written warranty in the prescribed form, he shall not be deemed to have committed any offence. This onus, in our view, is discharged by proving the purchase and the warranty by the manufacturer, distributor or dealer. If the prosecution disputes the warranty, it is its duty to notify the dealer giving the warranty. The dealer is given the extraordinary right to appear and give evidence. If he chooses not to appear,

the vendor must be deemed to have discharged the onus and he has committed no offence. The vendor cannot be a defence witness, for a defence witness cannot either have right of appearance or adduce evidence in support. In a prosecution where warranty is pleaded, the seller does not become a defence witness. We find that the seller was not only cited as defence witness but the defence had to pay a considerable amount as travelling expenses of the witness. After the notice is given to the seller, it is their option to appear, in view of sub-section (3) of Section 19 and it is not the duty of the defence to produce him. The scheme of the Act makes them liable as suppliers and if they chose not to come, they take the responsibility of answering when the provisions of law are applied against him.

9. The learned Magistrate's approach treating the partner as a defence witness or relying upon his denial as such is misconceived. The learned Magistrate disbelieved the evidence that railway labels were attached to the tins, as such labels could be easily manufactured. But unless there is evidence that these were so manufactured or procured, the learned Magistrate should have given due weight to the labels attached to the tins in deciding the genuineness of these tins.

10. The learned Magistrate unfortunately did not give any importance to this plea of warranty on the ground of delay. It is however, in evidence that the challan was shown to P. W. 1 on the date of taking sample and the warranty is impressed on the challan. P. W. 1, the Food Inspector did not deny that the warranty in the rubber stamp was impressed on the challan shown to him and the only object of showing a challan was to raise the plea of warranty. The appellants have also adduced the evidence from D. W. 8 to show that the tins were kept in the same condition as brought by P. W. 7 Padankumar, the Clearing Agent. The consignment, therefore, undoubtedly came from the Bombay firm and on the evidence, a large number of tins were brought from time to time. It is unthinkable and not perhaps in usual business course to alter contents of so many tins for purpose of adulteration and if, therefore the adulteration was there, in all probability the adulteration was at source. We have already referred to the challans which disclosed the warranty and the tins were kept in the same condition as received. The appellants, therefore, must be deemed under sub-section (2) of Section 19 not to have committed any offence.

11. Mr. Dutt, the learned Advocate for the appellants, has raised other points viz., about the legality of taking sample and whether the test applied in the case of mirchi powder. It is not necessary in view of our finding to go into this question but we may briefly refer to this. The prosecution

case is that the samples were taken in presence of two witnesses, one of them was examined and in cross-examination he stated that he was called to the spot after the samples were taken. The other witness was present even on the date on which P. W. 1 was examined. The learned Magistrate did not examine him on the ground that his appearance was suspicious and he might not tell the truth. It is not for the learned Magistrate to make that impression in the absence of any allegation from the prosecution and such impression on the part of the learned Magistrate shows a bias in favour of the prosecution. After the defence cross-examined P. W. 2, the learned Magistrate put a question which was not for clarification but was in the nature of cross-examination to nullify the effect of cross-examination. The learned Magistrate should not do this at the risk of taking sides. In any case however, leaving aside the evidence of two witnesses, the evidence of the Food Inspector clearly shows that the samples were taken from the shop and then from the godown and looking at his evidence we are not prepared to say that the samples were not taken or that be deposed falsely.

12. Mr. Dutt has also challenged the Food Analyst's report. It appears that when this seizure was made there was no different standard laid down for mirchi powder which has since been done. There was however A. 05 in Appendix B where it was stated. "Spices, the standard, specified for various spices given in this clause shall apply to spices in whatever form whole or partly ground or in powder form". Even before the chilli and chilli powder were separated, this provision fixing standard for chilli would apply to chilli powder. Judged by that standard the present sample is adulterated.

13. We have however found that the appellants purchased the lanka powder from the Bombay firm under warranty and therefore no offence was committed.

14. In the result, the appeal is allowed, the conviction and the sentence passed on the appellants are set aside and they are acquitted. They be discharged from the bail bond.

15. K. K. MITRA, J.: I agree.

Appeal allowed.

AIR 1070 CALCUTTA 452 (V 57 C 01)
RAMENDRA MOHAN DATTA J.

Doomi Lal Seal and another, Plaintiffs v. Smt. Giniya Devi Rateria and others, Defendants.

Suit No. 2071 of 1967, D/- 9-2-1970.

(A) Civil P. C. (1908), O. 8, R. 6 — Set-off — Suit for ejectment and for payment of rent — Defendants without making valid claim for set off by payment of requisite

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stamp cannot agitate the claim in suit.

(B) Civil P. C. (1908), O. 7, R. 1 — Suit for ejectment — Determination of lease — Pleadings — Language of pleadings may sufficiently indicate determination.

It is no doubt true that the factum of determination of lease is a cause of action in a suit for ejectment against the tenant but the purpose of pleading determination can be fulfilled if by the language used in the pleadings, its sense can be otherwise conveyed or ascertained. The language must be such that it must express the paramount intention to put an end to the lease. Even though the "determination of the lease" is not pleaded expressly yet if there is sufficient pleading of determination of the lease by the lessors against the lessee by necessary implication, the provision of O. 7, R. 1 is sufficiently complied with. AIR 1964 Pat 401 (FB), Distinguished.

(C) T. P. Act (1882), S. 114A — Determination of lease — Suit for ejectment — Determination of lease should be pleaded — This can be inferred from the language of the pleading — Word 'determination' need not be used. (Paras 19, 21, 26)

(D) T. P. Act (1882), S. 114A — Payment of lump sum by lessee to be adjusted towards rent — Payment, on facts, held not payment of advance rent — Non-payment of rent — Breach of covenant, held capable of remedy — Covenant held not one of forfeiture — Notice under S. 114A is required.

One of the clauses in the lease was in the terms: That the lessee shall at any time within period of six months from the said lease pay to the lessors either at a time or by two equal monthly instalments the aggregate sum of Rs. 21000 as and by way of advance rent provided, however, that the defendant would be at liberty to adjust the said advance rent of Rs. 21000 so to be paid by deducting at the rate of Rs. 300 per month out of the total monthly rent payable by her, provided further that the defendant would start such deducting at the rate of Rs. 300 per month out of the total monthly rent after the period of 13 years 8 months from the said date of the lease and would continue to do so until the sum of Rs. 21,000 would have been fully adjusted, provided also that if the lease was determined at any time before the said sum of Rupees 21,000 would be adjusted as aforesaid due to any breaches of any covenant under the lease committed by the lessee, the lessors would not be required and/or called upon to refund and/or adjust the sum of Rupees 21000 or any portion thereof which might then remain outstanding.

Held that the payment of the sum of Rs. 21,000 could not be called payment of advance rent and the covenant relating to the payment of Rs. 21,000 could not be called the covenant relating to forfeiture by reason of non-payment of rent in which

case Section 114A of the T. P. Act would not have applied. The covenant for the payment of Rs. 21,000 in the lease, was a covenant which was capable of remedy in case of breach and accordingly a notice under Section 114A was necessary to be given to enable the lessors to file a suit against the lessee. (Paras 30, 31)

(E) Transfer of Property Act (1882), Section 114A — Notice under — Nature of — Discussed.

Section 114A should be so reasonably construed and in such a manner that an effective meaning could be attached to it. The question that has to be answered is whether the lessors after determining the lease could ask for rent during the period of the notice. There is no reason why the lessors cannot ask the lessee to pay the rent in the meantime. There can be no point in asking the lessee to remedy the breach and at the same time asking him to pay the occupation charges as compensation or damages or as mesne profits, more so, when by the statute itself the lessors have no right to file any suit without giving the lessee reasonable chance to remedy the breach. There is no provision for waiver of forfeiture as contemplated under Section 114A. Where the breach complained of is capable of remedy the notice must be in accordance with Section 114A read with Section 111, clause (g). The notice must not only specify the breach but also give reasonable time to the lessee who is called upon to remedy the breach within such reasonable time. It is then and then only the cause of action to file a suit for eviction by the lessor against the lessee would arise. In such a case if the said provision is not complied with then the suit by the lessor would be barred because the notice would be bad in law. Until the expiry of the notice under Section 114A the lessor would claim not mesne profits but rent for the said period. In the case of Section 114A it is not relief in that sense that is granted but the forfeiture itself does not become operative until the expiry of the reasonable period mentioned in the notice. The relief is granted by allowing the lessee some time to remedy the breach by keeping the forfeiture in abeyance.

In the case of Section 114A it would no doubt be provided in the notice an expression of the like that "the lessor hereby determines the lease" but the meaning that has to be attached to the said expression and the effect thereof is that the forfeiture would take effect not from the date of the notice but upon the failure of the lessee to remedy the breach within the reasonable time granted by the notice. (Paras 37, 47)

(F) T. P. Act (1882), S. 114A — Marginal note has created confusion.

The marginal note against Section 114A which reads: "Relief against forfeiture in certain other cases" has created a lot of confusion in the matter of interpretation of the new section 114A. Whereas with regard to

section 114 the marginal note which reads "Relief against forfeiture for non-payment of rent" clearly fits in with the language of the said provision, the marginal note in section 114A far from being descriptive of the section in a nutshell would go to create a lot of confusion vis-a-vis the concept of forfeiture as understood by section 111 clause (g) as amended. (Para 41)

(G) Civil P. C. (1908), O. 7, R. 7 — Joint demise by way of lease — Suit for ejectment and possession by some lessors only, others being made party defendants for valid reasons — Lessor defendants also interested in obtaining recovery of possession and supporting plaintiff-lessors — Plaintiff-lessors can be given decree for recovery of possession jointly with defendant lessees. AIR 1934 PC 58 and AIR 1934 Cal 127 and (1908) 35 Ind App 73, Applied. (Para 58).

Cases Referred: Chronological Paras

(1964) AIR 1964 Pat 401 (V 51) =

1964 BLJR 593 (FB), Niranjan Pal v. Chaitanyalal Chose 20

(1938) AIR 1938 Cal 559 (V 25) =

ILR (1938) 2 Cal 434, Pravat Chandra v. Bengal Central Bank 43

(1934) AIR 1934 PC 58 (V 21) = 61

Ind App 35, Baraboni Coal Concern Ltd. v. Gokulananda Mohanta Thakur 55

(1934) AIR 1934 Cal 127 (V 21) = 58

Cal LJ 133, Jerman Gomez v. Ram Kumar Kaibarta 50, 58

(1908) 35 Ind App 73 = 7 Cal LJ 139,

Raja Pramatha Nath Roy v. Raja Ramani Kanta Roy 57

JUDGMENT: This suit is, inter alia, for the recovery of possession of the north-western portion of premises No. 12/2 Kyd Street and the entirety of premises No. 13, Kyd Street, Calcutta (hereinafter called the said premises). By a registered Deed of Lease dated October 18, 1966 the said premises were demised by the lessors on a lease for 99 years in favour of the defendant No. 1. Besides the re-entry clause in case of non-payment of three months' rent and/or breach of any of the covenants contained therein the said lease, inter alia, provided the following clause:—

"Clause 6 (a). That the lessee shall at any time within period of six months from the said lease pay to the lessors (plaintiffs and the defendants Nos. 2 to 5 and their mother) either at a time or by two equal monthly instalments the aggregate sum of Rs. 21,000 as and by way of advance rent. Provided, however, that the defendant would be at liberty to adjust the said advance rent of Rs. 21,000 so to be paid by deducting at the rate of Rs. 300 per month out of the total monthly rent payable by her. Provided further that the defendant would start such deducting at the rate of Rs. 300 per month out of the total monthly rent after the period of 13 years 8 months from the said date of the lease and would continue to do so until the sum of Rs. 21,000 would

have been fully adjusted. Provided also that if the lease was determined at any time before the said sum of Rs. 21,000 would be adjusted as aforesaid due to any breaches of any covenant under the lease committed by the defendant No. 1 the lessors (the plaintiffs and the defendants Nos. 2 to 5 and their mother) would not be required and/or called upon to refund and/or adjust the sum of Rs. 21,000 or any portion thereof of which might then remain outstanding."

2. The said lessee paid rent only for the broken period of October 1966 calculated at the rate of Rs. 1500 per month but failed and neglected to pay any further rent. As regards the said payment of rent the lessees granted different rent receipts in respect of their shares of rent in terms of the said lease.

3. On June 7, 1967 a notice was served upon the defendant, through the lawyer Sri P. K. Ghose, inter alia, determining the lease, specifying the breaches of the covenant and calling upon the lessee to quit and vacate and deliver up peaceful possession on the expiry of the month of July 1967. The defendant No. 1 having failed to comply with the said notice, two of the lessors filed this suit impleading the other lessees as party defendants herein and claimed arrears of rent upto the month of July 1967 and mesne profits from August 1, 1967 until possession would be delivered. The two plaintiffs who have filed this suit are the two brothers and the defendants Nos. 2, 3, 4 and 5 are the sons of another pre-deceased brother. The two plaintiffs and the sons and the widow of the said pre-deceased brother were the lessors under the said lease. The widow Annabati Dassi died sometime prior to the notice dated June 7th 1967. It is stated that the said notice was caused to be served under instructions from the plaintiffs and the defendants Nos. 2, 3, 4 and 5 being the sons of the said pre-deceased brother.

4. The defendants Nos. 2, 3, 4 and 5 filed a joint written statement supporting the plaintiffs and claiming similar reliefs as claimed by the plaintiffs.

5. The defendant No. 1 in her written statement took various points in defence. It is alleged that the said lease was executed on the basis of various representations made on behalf of the plaintiffs and pursuant thereto the defendant No. 1 paid a sum of Rs. 31,000 in cash without any receipt. It is further alleged that the plaintiffs themselves committed breach of the condition of the said lease and as such they were not entitled to claim a sum of Rs. 21,000 under the lease. The authority of the lawyer in sending the notice of forfeiture dated June 7, 1967 on behalf of the defendants Nos. 2, 3, 4 and 5 has also been denied. The further allegation is that after the date of the said notice, Pramatha the defendant No. 2, herein, accepted two several sums of Rs. 1000 and Rs. 1200 from the defendant No. 1

against two receipts and the same were received on account of rent which became due in his share. Accordingly, the notice of forfeiture had been waived. The defendant No. 1 also claimed set off for the sum of Rs. 31,000 but it appears that no requisite stamps were put in to entitle her to agitate the said point.

6. On behalf of the defendant No. 1 two interesting points were raised. It was urged that the determination of the lease was a matter of pleading and in the absence of such pleading the plaint would not disclose any cause of action. The other point that was canvassed was that the notice dated June 7, 1967 itself was inherently bad inasmuch as even though the said notice determined the lease the lessors claimed rent upto the end of July 1967 and having done so they waived the forfeiture. In other words, the notice itself could not be held to be a valid and sufficient notice.

7. At the trial the following issues were settled :—

1. Did the defendant No. 1 commit any breach of covenant of the lease as alleged in paragraph 3 of the plaint?

2. (a) Are the averments made in paragraphs 4 and 7 of the plaint relating to notice sufficient?

(b) If not, does the plaint disclose any cause of action relating to recovery of possession?

(c) Was there any waiver of the forfeiture of the alleged acceptance of money towards rent after notice dated June 7, 1967 as alleged in paragraph 5 of the written statement of the defendant No. 1?

(d) Was there any waiver of forfeiture by reason of the lessor's claiming rent for the month of July 1967 as stated in paragraph 8 of the plaint?

(e) Was the notice in suit valid and sufficient?

3. Did Shri P. K. Ghose, Advocate have any authority from the defendants Nos. 2, 3, 4 and 5 to send the notice dated June 7, 1967? If not, to what effect?

4. Is the suit not maintainable for reasons as alleged in paragraph 11 of the written statement of the defendant No. 1?

5. To what relief or reliefs, are the plaintiffs and the defendants Nos. 2 to 5 entitled?

8. Issue No. 1: There was hardly any contest in respect of this issue. Surajbhan Rateria the husband of the defendant No. 1 gave evidence on behalf of Giniya Devi. It appeared that he was acting all throughout on behalf of his wife by holding a power of attorney and he was conversant with the facts of this case. He admitted in his evidence that after the lease was executed on October 18, 1966 rent was paid only for the said broken period of October 1966. Thereafter no further rent under the said lease was paid except as hereinafter stated. He also admitted that the sum of Rs. 21,000 as provided in the lease was not paid. It was argued that the said sum of Rs. 21,000

was not payable because the lessors themselves committed breach of the conditions of the said lease.

9. There was no proof of the allegations regarding the breach of the conditions of the lease on the part of the plaintiffs or on the part of the lessors or any of them. In the absence of a valid claim for set off for the said sum of Rs. 31,000 the defendant No. 1 could not be allowed to agitate the said claim for Rs. 31,000 in this suit.

10. In my opinion, the plaintiffs and the defendants Nos. 2, 3, 4 and 5 have clearly established that there was a breach of the covenant of the lease by the defendant No. 1 by non-payment of rent on and from the month of November 1966 and onwards and also by non-payment of the said sum of Rs. 21,000 which became payable under the said lease. On the basis of my aforesaid findings I answer the issue No. 1 in the affirmative.

11. Issue No. 3: On behalf of the defendant No. 1 it has been contended that from the averments made in the plaint it would appear that the defendants Nos. 2, 3, 4 and 5 refused to join as co-plaintiffs and as such they were made party-defendants in this suit. From the above averments, it has been argued before me that instructions could not have been given on behalf of all the lessors to send the notice of forfeiture and notice by one of the lessors could not, in any event, be a valid notice of forfeiture. The question therefore to be decided by me under this issue is whether such instructions and/or authority was given to the lawyer to send the notice by all the lessors including the defendants Nos. 2, 3, 4 and 5.

12-14. (His Lordship perused the evidence on this issue and proceeded).

15. I hold from the evidence on record that the said Shri P. K. Ghose had authority from the defendants Nos. 2 to 5 as well to send the notice dated June 7, 1967. The issue is accordingly answered in the affirmative.

16. Issues Nos. 2 (a) and (b): On behalf of the defendant No. 1 it has been argued that the plaint does not disclose any cause of action because of want of pleading as to the determination of the lease. On behalf of the plaintiffs and the other defendants Nos. 2 to 5 it was contended that the determination of the lease has been sufficiently pleaded though the word "determination" has not been used in the plaint. The substance is to be found from the language used in the various paragraphs in the plaint and reliance has been placed on paragraphs 4, 7, 8 and 9 thereof. Secondly, it has been urged that this being a case under Section 114A of the Transfer of Property Act, 1882 both the form of notice as also the averment in the plaint should be in the manner as provided therein. In other words, in the case of a notice in the facts and circumstances of the case of this nature, the determination has to take effect on the ex-

piry of the reasonable time as stated in the notice and as such in the case of the pleading in the plaint, on a true construction thereof, it will appear that determination has been substantially pleaded. It has been pleaded that the defendant No. 1 failed to comply with the notice and as such she was in wrongful occupation thereof from the expiry of the period mentioned in the notice; and that should be construed as valid determination of the lease. My attention was drawn to the written statement filed by the defendant No. 1 and from the averment made therein it would appear that the defendant No. 1 well understood that the lease had been validly determined and that the substance of the determination had been pleaded in the plaint.

17. It has been further contended that the notice under Section 114A of the Transfer of Property Act, in case the breach is capable of remedy, would be different from the notice under Section 111 clause (g) of the said Act and that the instant case is a case of a notice which is governed under Section 114A of the Transfer of Property Act read with Section 111 clause (g) thereof.

18. In my opinion, even though the words "determination of the lease" had not been pleaded expressly yet, there is sufficient pleading of determination of the lease by the lessors against the lessee by necessary implication. In Halsbury's Laws of England Volume 23 Simonds Edition, Article 1155 it is provided as follows:

"Determination by landlord. Anything which amounts to a demand of possession, although not expressed in precise and formal language, is sufficient to indicate the determination of the landlord's will. Thus, the landlord may expressly demand possession or state that the tenant is in against his will, or send for the keys; and if the notice states terms, and intimates that if they are not accepted the landlord will take steps to recover the premises, and the terms are rejected, that is a sufficient notice to determine the tenancy."

19. It is no doubt true that the factum of determination is a cause of action in a suit for ejectment against the tenant but the purpose of pleading determination can be fulfilled if by the language used in the pleading, its sense can be otherwise conveyed or ascertained. The language must be such that it must express the paramount intention to put an end to the lease.

20. On behalf of the defendant No. 1 it was contended following the case of Niranjani Pal v. Chaitanyalal Ghose, AIR 1964 Pat 401 (FB) that in the case of contractual tenancy the lease must be determined before the landlord could maintain an action for the ejectment of the tenant and the plaintiff must not only plead the fact of such determination of the lease but must also prove the same because the fact of determination is one of the facts which constitute the cause of action in the suit for

ejectment. That was the case in which the effect of Section 11 of the Bihar Building (Lease, Rent and Eviction) Control Act (3 of 1947) was under consideration by the Full Bench of the Patna High Court. There is no provision in Section 11 of the said Control Act for the determination of a lease. It was held that there was no conflict between that section and Section 111 of the Transfer of Property Act, 1882 and as such Clause (h) of Section 111 was applied. It was held that Section 11 of the said Control Act would strike at the stage of recovery of possession of the premises from the tenant and not at the stage of the re-acquisition by the landlord of the right to possession on determination of the lease which would be governed by Section 111 of the Transfer of Property Act. There is no conflict with the proposition laid down in the said Patna case in so far as the case before me is concerned. As stated above, the language used in the plaint before me is sufficient to imply the determination of the lease.

21. In my opinion, by the pleading as indicated above the provision of Order VII Rule 1 of the Code of Civil Procedure 1908 has been sufficiently complied with.

22. In paragraph 5 of the written statement the defendant No. 1 admitted that she understood the said notice to be a notice to determine the said lease. In paragraph 12 of the written statement also the defendant No. 1 has pleaded as follows:

"The plaintiffs are not, in any event, entitled to claim relief on the ground of the purported forfeiture of lease against this defendant."

23. There is no dispute in the case before me that by the said notice dated June 7, 1967 the fact of determination was sufficiently stated. The question before me is whether there was sufficient pleading in the plaint about the said fact of determination. In my opinion, the fact that there was sufficient pleading of determination in the plaint was also understood by the defendant No. 1 and as such in her written statement she made the aforesaid pleadings.

24. Mr. Sahl Kumar Roy Chowdhury also drew my attention to the Encyclopaedia of Court Forms and Precedents in Civil proceedings by Atkin Volume 10, Form No. 103 where the pleading in respect of forfeiture for breach of covenant against assignment was considered sufficient by using the language as follows:

"7. On the day of 19 the plaintiff served upon the defendant a notice in writing specifying the aforesaid breach of covenant and requiring him to remedy the same and to make compensation in money therefor.

8. The defendant has failed to remedy the said breach or to make compensation within a reasonable time or at all.

9. By reason of the matters aforesaid the plaintiff has suffered damage."

25. In paragraph 7 of the plaint herein the plaintiffs referred to the said notice

dated June 7, 1967 whereby the plaintiffs called upon the defendant No. 1 to yield up possession of the said premises. It is also pleaded therein that the defendant No. 1 had not complied with the said notice and had been continuing in the wrongful occupation of the said premises. The plaintiffs have also claimed mesne profits from August 1, 1967 and have pleaded to that effect in paragraph 9 of the plaint. As stated above, the defendant No. 1 sufficiently understood, as would appear from her written statement, that the lease in her favour was determined by the said notice. The said notice which is the basis of the plaintiffs' claim in the suit, expressly mentions the words "determine the said deed of lease". The lawyer of the defendant No. 1 by his letter dated July 21, 1967, denied the right of the lessors to determine the lease.

26. Accordingly, my finding is and I hold that the pleading is sufficient relating to the notice under Section 114A of the Transfer of Property Act of 1882 and I answer issue No. 2(a) in the affirmative. It necessarily follows, therefore, that the plaint does disclose the cause of action relating to recovery of possession on the ground of forfeiture and the issue No. 2(b) is, accordingly, answered also in the affirmative.

27-28. Issues Nos. 2(c), 2(d) and 2(e): As regards issue No. 2(c) the defendant No. 1 has stated in her written statement that the lessors have waived the forfeiture by accepting money towards rent after giving the said notice. The notice was dated June 7, 1967. The allegation was that Pramatha Lal Seal accepted a sum of Rs. 1000 on May 6, 1967 and a further sum of Rs. 1200 on September 6, 1967 from the defendant No. 1 against clear receipts granted by him. (His Lordship considered the evidence and proceeded.)

I have no hesitation to disbelieve the evidence of Rateria on this point and to believe Pramatha when he said that these amounts were received by him in part payment of the sum of Rs. 3000 which Giniya Devi wanted to pay to Pramatha for procuring the lease. In view of my finding the question of waiver cannot arise.

29. To determine the validity and sufficiency of the notice dated June 7, 1967 it is necessary to decide whether in the facts and circumstances of this case a notice under Section 111 clause (g) of the Transfer of Property Act was necessary to be given or whether in this case a notice as provided in Section 114A of the Transfer of Property Act was required to be given by the lessors to the lessee. The relevant clause being clause 6(a) of the lease has been set out hereinabove in full. The question is whether the payment of Rs. 21,000 in the said clause was payment of rent or was it a clause for the breach whereof the lessors would be entitled to re-enter the said premises under the lease. If the said clause 6(a) of the said Deed of Lease is analysed it would appear that the parties thereto intended that:

(a), within a period of six months the said sum would be payable;

(b) if the lease would subsist then the said sum of Rs. 21,000 would be adjusted against future rent;

(c) the adjustment would be effected not to the full extent of the rent but to the extent of Rs. 300 per month and that would also commence after the period of 13 years 8 months from October 18, 1966;

(d) in case there would be a breach of covenant under the lease on the part of the lessee and if the adjustment would not take effect by that time then the balance remaining due out of the sum of Rs. 21,000 would have to be refunded or adjusted;

(e) in any event, the lessee would not be liable to refund any part of the sum of Rupees 21,000.

30. It follows, therefore, the sum of Rs. 21,000 became due and payable within a period of six months and the said sum not having been paid within that time the lessee committed breach which entitled the lessors to re-enter. The lessee having committed such breach could not be entitled to have any interest in the said sum by having the same adjusted against future rent. The said sum became due and payable to the lessors absolutely and the lessors could utilise the same for their own purpose. Even if the said sum had been paid within the said period of six months, the lessors would have utilised the said sum for 13 years without being obliged to return the same or to have the same adjusted against rent. The lessee not having any interest over the said sum for 13 years the said sum could not be called rent or advance rent.

31. In the premises, the covenant relating to the payment of Rs. 21,000 could not be called the covenant relating to forfeiture by reason of non-payment of rent in which case Sec. 114A of the Transfer of Property Act 1882 would not have applied. The covenant for the payment of Rs. 21,000 in the lease, in my opinion, was a covenant which was capable of remedy in case of breach and accordingly a notice under Section 114A was necessary to be given to enable the lessors to file a suit against the lessee.

32. That being the position, it has now to be considered whether the notice dated June 7, 1967 was a valid and proper notice as contemplated under Section 114A of the Transfer of Property Act.

33. To consider this question it is necessary here to set out the relevant portion of the said notice.

"I now understand from my said clients that although you paid to them the rent of the demised premises for the period of 18th October 1966 to 31st October 1966 you have in spite of repeated demands wrongfully failed and neglected to pay the rent of the same for all subsequent period viz., November 1966 to May 1967.

"I have now received instructions from my said clients to give you notice which I hereby do that in terms of the provisions contained in the said Deed of Lease and also call upon you to quit, vacate and deliver up peaceful possession of the said demised premises on the expiry of the month of July 1967 being a calendar month's notice ending with the month of your tenancy failing which my said clients shall take necessary legal action against you and hold you liable for all costs and consequences thereof."

34. On behalf of the lessors it was contended that this was a valid notice as contemplated under Section 114A of the Transfer of Property Act. The reasonable time to remedy the breach had been granted up to the end of July 1967. It was contended that the language used in the notice might not be very happy but the sum and substance thereof was to the effect that the lessee was called upon to remedy the breach by the said notice and in default thereof, to deliver up possession to the lessors. The question would arise as to whether the lessors should have claimed rent after the determination of the lease in respect of the period which was granted by way of reasonable time to remedy the breach. It would appear that if the breach would have been remedied then the lessee could have been entitled to rely against forfeiture under the statute. It was argued that if that possibility was there then there could hardly be any reason in not claiming rent for the said unexpired period which was granted to remedy the breach.

35. It was represented from the bar that the point was of first impression and there was no decided case laws on this point. Both in the notice as also in the plaint filed by the plaintiffs rent has been claimed for the said unexpired period of the notice. Had this been a case under Section 111 clause (g) and Section 112 of the Transfer of Property Act then it could be urged that the forfeiture of the lease had been waived because that might be said to have amounted to an affirmation of the continuance of the lease. The statutory provision of waiver of forfeiture under Section 112 is restricted to the case of forfeiture as provided under Section 111 clause (g) of the Transfer of Property Act. What has been provided in Section 114A is that in case of forfeiture being incurred the lessors would be bound to serve on the lessee a notice as provided therein and the lessee would be given an opportunity to remedy the said breach and relief would be granted to the lessee by the statute in the sense that no suit would be filed for such forfeiture until the expiry of such notice and the non-compliance thereof.

36. In my opinion, until the expiry of the reasonable period as provided in the notice, the lessee would remain liable to pay rent and in receiving such rent there would be no question of the forfeiture being waived and that is the reason why there is no

express provision for waiver of forfeiture under Section 114A as is provided by Section 112 of the Transfer of Property Act in respect of forfeiture under Section 111 clause (g) of the said Act.

37. In my opinion, Section 114A of the Transfer of Property Act should be so reasonably construed and in such a manner that an effective meaning could be attached to it. The question that would have to be answered was whether the lessors after determining the lease could ask for rent during the period of the notice. I see no reason why the lessors could not ask the lessee to pay the rent in the meantime. There could be no point in asking the lessee to remedy the breach and at the same time asking him to pay the occupation charges as compensation or damages or as mesne profits, more so, when by the statute itself the lessors had no right to file any suit without giving the lessee reasonable chance to remedy the breach. As already stated hereinabove, there is no provision for waiver of forfeiture as contemplated under Section 114A of the Transfer of Property Act. The provision of Section 112 of the Transfer of Property Act is restricted to forfeiture as was provided under Section 111 clause (g) of the Transfer of Property Act.

38. In the case of Section 111 clause (g) of the Transfer of Property Act 1882, a written notice has to be given to the lessee signifying the lessor's intention to determine the lease. Until such notice would be given forfeiture under that provision would not be incurred for the purpose of determining the lease of an immovable property.

39. But where the breach complained of is capable of remedy the notice must be in accordance with Section 114A read with Section 111 clause (g) of the Transfer of Property Act. The notice must not only specify the breach but also give reasonable time to the lessee who is called upon to remedy the breach within such reasonable time. It is then and then only the cause of action to file a suit for eviction by the lessor against the lessee would arise. In such a case if the said provision is not complied with then the suit by the lessor would be barred because the notice would be bad in law.

40. The next question that arises for consideration is when does the forfeiture take effect and when does the lease stand determined? To consider this question it should be remembered that by the Amendment Act XX of 1929 Section 111 clause (g) has been amended whereby written notice signifying the intention of the lessor to determine the lease would constitute determination of a lease by forfeiture. Similarly, by the said Amendment Act XX of 1929 a new provision has been introduced by enacting Section 114A of the Transfer of Property Act, whereby the relief against forfeiture was extended in certain cases other than for non-payment of rent in respect whereof

Section 114 of the Transfer of Property Act already existed.

41. In my opinion, the marginal note against Section 114A which reads: "Relief against forfeiture in certain other cases," has created a lot of confusion in the matter of interpretation of the new Section 114A. Whereas with regard to Section 114 the marginal note which reads: "Relief against forfeiture for non-payment of rent" clearly fits in with the language of the said provision, the marginal note in Section 114A far from being descriptive of the section in a nutshell would go to create a lot of confusion vis-a-vis the concept of forfeiture as understood by Section 111 clause (g) as amended.

42. The relief as provided in Section 114 is the statutory relief which is granted after the determination of the lease by forfeiture for non-payment of rent by giving discretion to the court to consider whether such relief would be granted or not at the hearing of the suit and if the Court would exercise its discretion in favour of granting such relief then the lease would not be revived thereby but the lessee would continue in the manner as provided by the expression used therein viz., "the lessee shall hold the property leased as if the forfeiture had not occurred". In other words, there would be a notional lease which would govern the rights of the parties on the same terms and conditions as before.

43. Whereas the statutory relief is granted by Section 114 to the lessee if the Court would so think fit and a notional lease is created thereby, under Section 114A what is provided is not relief in that sense i.e. to relieve against forfeiture which has already occurred. The form of the notice is provided by the said section. Until the expiry of that notice the forfeiture is not complete. The forfeiture remains in an inchoate state. The expression "where a lease of immovable property has been determined by forfeiture" in Section 114A does not suggest that a notice has already been given under Section 111 clause (g) but suggests that in a case of that nature the determination by forfeiture has to be notified by the very same notice wherein the breach capable of remedy will have to be specified and wherein the reasonable time to remedy the breach will have to be indicated. In other words, one comprehensive notice is contemplated for determining the lease by forfeiture in certain cases where it is applicable. *Pravat Chandra v. Bengal Central Bank Ltd.*, AIR 1938 Cal 589. The scope of Section 114A contemplates that to be a valid notice it must signify the lessor's intention to determine the lease; it must specify the breach which is capable of remedy; and reasonable time must be given to the lessee to remedy the breach by the said notice. Otherwise the notice would be bad. The cause of action to file a suit would not arise and the lease would continue as before. The lessor would be without a remedy so far as the for-

feiture is concerned. In the case of a valid notice the forfeiture, if any, remains in an inchoate state until the expiry of the period provided by the notice. Under such circumstances, the lease would continue as before until the expiry of the notice and the lessor would be entitled to claim rent till that period. In default of compliance with the said notice forfeiture would become operative as per intention signified in the very same notice and the lease would stand determined on and from the date of the expiry of the period provided in the notice. If the requirement as provided in the notice is complied with the intimation to the lessee of the forfeiture by the lessor becomes ineffective in law as if the same stands withdrawn. The right to sue the lessee also does not accrue to the lessor under such circumstances.

44. Accordingly, there could be no doubt that until the expiry of the notice under Section 114A, the lessor would claim not mesne profits but rent for the said period. A confusion has been created also to a great extent by equating the marginal writing of Section 114A with that of Section 114 of the Act. In the case of Section 114 the notice under Section 111 (g) determines the lease as soon as it is served on the lessee. The contractual relationship of the lessor and the lessee comes to an end. In such a case the Court may grant relief after the filing of the suit under the said provision in appropriate cases. But in the case of Section 114A it is not relief in that sense that is granted but the forfeiture itself does not become operative until the expiry of the reasonable period mentioned in the notice. The relief is granted by allowing the lessee some time to remedy the breach by keeping the forfeiture in abeyance.

45. In my opinion, the expression "where a lease of immovable property has been determined by forfeiture" in Section 114A conveys the meaning that so far as the lessor is concerned he is doing all that he is required to do under Section 111 clause (g) but whether the lease will stand determined by forfeiture or not will depend upon whether the lessee will comply with the notice or not.

46. The distinction between the two provisions would seem to be this. In the case of Section 111 clause (g) the intention of the lessor is the predominant factor—as soon as that intention is communicated by writing and the same reaches the lessee the forfeiture takes effect and is complete. Once forfeiture takes effect the parties cannot by their unilateral action bring themselves back into their original position. There would be nothing left for the lessor to call upon the lessee to remedy the breach. There would also be nothing left to the lessee to continue as such. The contractual relationship between the lessor and the lessee under the lease determines except for

the limited statutory relief which is granted by Court under Section 114 in a proper case.

47. In the case of Section 114A it would no doubt be provided in the notice an expression of the like that "the lessor hereby determines the lease" but the meaning that has to be attached to the said expression and the effect thereof is that the forfeiture would take effect not from the date of the notice but upon the failure of the lessee to remedy the breach within the reasonable time granted by the notice. If the lessee would allow the reasonable time to expire the forfeiture would take effect and would be complete. The relief that is provided under Section 114A is the reasonable time and opportunity that is provided to the lessee to enable him or her to remedy the breach. Until the expiry of that period the lessor is debarred from filing the suit to seek his redress.

48. In my opinion, this is the only meaning that can be attached to Section 114A of the Transfer of Property Act, 1882 and to the relief provided therein.

49. In the light of the above, if the notice in suit is examined it would be found that it has complied with the formalities as prescribed by Section 114A of the Transfer of Property Act, 1882. On the 7th June 1967 the lessors had in effect stated that if the lessee would not remedy the breaches complained of in the notice on or before the expiry of the tenancy for the month of July 1967 the lessors would take legal action. The lessee was called upon to pay the said sum of Rs. 21,000 together with all rents up to date. If the lessee had paid the sum of Rs. 21,000 the lessors could not have any right or cause of action to institute this suit in so far as the said breach was concerned as the lessors would have been hit by Section 114A of the Transfer of Property Act, 1882. In my opinion, the lessors rightly demanded the sum calling it as rent up to the end of July 1967. It was a reasonable time given to the lessee to remedy the breach. The expression "they (lessors) hereby determine the said Deed of Lease" in the said notice in suit, if rightly construed, would mean that the determination of the lease would take effect upon failure to remedy the breach on the expiry of the month of July 1967. In my opinion, the notice in suit has substantially complied with the requirements provided in Section 114A of the Transfer of Property Act, 1882.

50. In any event, construing the notice as a whole I cannot come to the conclusion that the lessors ever intended to waive the forfeiture by accepting rent for the month of July 1967. The intention was made clear by the said notice that the lessors intended to give the lessee reasonable time to remedy the breach and to evict her by filing a suit in case of non-compliance with the said notice. No such intention has been expressed by the said notice on the part of the lessors so as to signify the affirmance of the

continuation of the lease when the language of the notice clearly suggests that the lessee was to quit, vacate and deliver up possession on the expiry of the month of July 1967. On that basis mesne profits was also claimed from August 1, 1967.

51. As regards issue No. 2(c) and issue No. 2(d) I have already discussed them in detail hereinabove and my findings are and I hold that there was no waiver of the forfeiture in respect of either of the cases of acceptance of money to the extent of the sum of Rs. 2200 or by claiming rent for the month of July 1967 and I answer both the said two issues Nos. 2(c) and 2(d) in the negative. It follows from my above findings that issue No. 2(c) also fails and I hold that the said notice dated June 7, 1967 was valid and sufficient.

52. Issues Nos. 4 and 5: In paragraph 11 of the written statement of the defendant No. 1 it was stated that the suit as framed was not maintainable inasmuch as all the lessors were not claiming the right of forfeiture or for rent or for mesne profits in the present suit. The said issue No. 4 was restricted only to the extent of the aforesaid pleading. In course of argument Mr. N. C. Roy Chowdhury wanted to contend that the defendants Nos. 2 to 5 had been described in the lease as executors to the estate of Priya Lal Seal deceased but in the plaint they were described in their individual capacity and not as executors. Accordingly, the suit could not be maintained as against the said defendants or on their behalf. While giving evidence before me Rateria admitted that the defendants Nos. 2, 3, 4 and 5 became the owners of 1/3rd share of their father upon the death of Annabati Seal, the mother of the defendants. In view of the aforesaid, in my opinion, there is no substance in the point taken at the time of the said argument and the same is rejected.

53. The real point that was argued under this issue No. 4 was that the suit being a suit for recovery of possession all the lessors must join as co-plaintiffs in order to evict a tenant. In this case only two of the lessors have joined as plaintiffs and the remaining others have been made the defendants. As stated above the said defendants could not be joined as co-plaintiffs due to reasons as stated by and on behalf of the said defendants from the witness box.

54. I am satisfied from the evidence on record that the said defendants Nos. 2, 3, 4 and 5 did not intend to oppose the filing of the suit but on the contrary intended to support the plaintiffs in the matter of recovering possession of the premises from the defendant No. 1. The said defendants were also interested in obtaining recovery of possession and all the time had been siding with the plaintiffs.

55. In the case of Baraboni Coal Concern Ltd. v. Gokulananda Mohanta Thakur, 61 Ind App 35 = (AIR 1934 FC 58) the above point was discussed by the Judicial Committee. In that case a joint demise by

way of lease was made in favour of the lessees by the four shebait and it was observed that no one of the four lessors, with or without the consent of his co-lessors, could sue for an aliquot part of the whole. The Judicial Committee observed: "The suit must be for the whole of the interest demised, else it fails."

56. In the case of Jerman Gomez v. Ram Kumar Kaibarta, 58 Cal LJ 133 = (AIR 1934 Cal 127) the Division Bench of this Court under similar circumstances, passed a decree in favour of the plaintiff jointly with the co-sharer landlords.

57. In the case of Raja Pramatha Nath Roy v. Raja Ramani Kanta Roy, (1908) 35 Ind App 73 the Judicial Committee of the Privy Council gave relief by passing a decree in favour of the plaintiff jointly with the co-sharers defendants. At page 77 the Judicial Committee of the Privy Council observed to the effect that it was a general rule that a sharer, whose co-sharers refuse to join him as plaintiffs, could bring them into the suit as defendants, and could sue for the whole rent of the tenure. The Judicial Committee in that case recognised the right of one sharer to sue to bring the tenure to sale for arrears of rent by making his co-sharers defendants parties when they would not join as plaintiffs.

58. In my opinion, in this case also the situation has arisen which would necessitate the application of the said general rule and to pass a decree in favour of the plaintiff in the manner as indicated in the above case of 58 Cal LJ 133 = (AIR 1934 Cal 127). Accordingly, in this case also the plaintiffs who had made the co-sharers landlords defendants in the suit herein would be entitled to get a decree for recovery of possession of the property in suit jointly with the said defendants Nos. 2, 3, 4 and 5 herein. The result, therefore, is that the suit must be held to be maintainable and I reject the contentions raised on behalf of the defendant No. 1 in respect of issue No. 4 and I answer the same accordingly.

59. I, therefore, pass the following decree:

Decree for arrears of rent to the extent of Rs. 13,500 in favour of the plaintiffs jointly with the defendants Pramatha Lal Seal, Pasupati Lal Seal, Purna Lal Seal, the defendants Nos. 2, 3, 4 and 5 herein. The plaintiffs are also entitled to a decree for recovery of possession of the suit premises jointly with the said defendants Nos. 2, 3, 4 and 5 herein against the defendant No. 1. The plaintiffs jointly with the said defendants Nos. 2, 3, 4 and 5 would be entitled to mesne profits at the rate of Rs. 1500 per month from August 1, 1967 till the date of the suit and thereafter at the same rate until possession would be delivered or until October 18, 1971 whichever would happen earlier. If the decree for recovery of possession would remain unsatisfied on 19th October 1971 the plaintiffs and the defendants

Nos. 2, 3, 4 and 5 would be entitled to mesne profits at the rate of Rs. 4500 per month, as provided in the lease, from the aforesaid date until possession would be delivered or until three years from the date of the decree herein whichever would happen earlier. The plaintiffs would be entitled to the costs of this suit as against the defendant No. 1. For the reasons as stated above, there would be no order as to costs as against or in favour of the defendants Nos. 2, 3, 4 and 5. Certified for two counsel.

Suit decreed.

AIR 1970 CALCUTTA 461 (V 57 C 92)

P. N. MOOKERJEE AND A. K. MOOKERJI, JJ.

Sankar Dome, Appellant v. Kalidasi Dasi, Respondent.

A. F. A. D. No. 434 of 1960, D/- 5-2-1970.

(A) Hindu Law — Dayabhaga School — Succession — Daughter is sapinda — Ayautuka Stridhan — Inheritance — Deceased female's husband's daughter by another wife gets preference over her husband's brother's son's son. (Para 5)

(B) Hindu Law — Dayabhaga School — Succession — Daughter is sapinda — Whether this interpretation given by Jimuta Vahana is correct — Not a matter of enquiry by Judges. (1867) 12 Moo Ind App 397 (PC), Applied. (Para 5)

Cases Referred: Chronological Paras (1867) 12 Moo Ind App 397 = 2

Sar 361 (PC), Collector of Madura v. Mutta Ramalinga Sathupathy 5

Hariprosanna Mukherjee and Narottam Chatterjee, for Appellant; Lala Hemanta Kumar and Gobinda Chandra Pal, for Respondent.

P. N. MOOKERJEE, J.: This is the plaintiff's second appeal, arising out of a suit for declaration of title, permanent injunction and mesne profits.

2. The suit was decreed by the learned trial Judge. On appeal, that decision has been reversed and the learned Subordinate Judge has dismissed the plaintiff's suit upon the view that to the admitted deceased owner of the property, the defendant respondent is a preferential heir to the plaintiff, and that, accordingly, the plaintiff cannot claim title to the same.

3. The whole question is whether the learned Subordinate Judge was justified in holding that the defendant respondent's claim of title by inheritance to the disputed property was to be preferred to the plaintiff's.

4. The suit property, admittedly, belonged to one Santosh Kumari and it was her Ayautuka Stridhan. Santosh Kumari died leaving no issue. Her husband was also dead at the time and it is not disputed that

the disputed property would devolve on Santosh Kumari's husband's sapinda, according to normal rules of preference. The plaintiff appellant is Santosh Kumari's husband's brother's son's son. The defendant respondent is Santosh Kumari's husband's daughter by another wife. The contest is between these two persons.

5. It is clear and beyond dispute that the husband's brother's son's son is a sapinda of the husband. If however, the husband's daughter, though by another wife, be a sapinda, she will, obviously, be a sapinda nearer by one degree and would, accordingly, be preferable. The point for consideration thus reduces itself to this, whether the defendant respondent Kalidasi, who is the daughter of the deceased owner Santosh Kumari's husband by another wife, is a sapinda of Santosh Kumari's husband. The parties are governed by the Bengal or Dayabhaga School of Hindu Law and, under the said system, five females are recognised as special sapindas under special texts on the theory of spiritual benefit. The daughter comes in as a special sapinda after the widow upon the footing that, through her son, she offers funeral oblations to her father. This is stated in Sir Dinshaw Mulla's Commentary on Hindu Law (Vide Art. 88) and that, read with Article 157, confirms the position. The same view is also to be found in Raghavachariar's Hindu Law, 5th Edn. (1965), at p. 524, where, speaking of the daughter as a female heir under the Dayabhaga, the author says that she comes under the class of sapindas. Further confirmation of this is to be found in Mayne's Hindu Law, 11th Edn., Article 563, at p. 684, where the learned author speaks in these terms: "So too, a daughter is a sapinda as she offers funeral oblations by means of her son" and the learned author refers to Dayabhaga, Chapter 11, Section (iv), verses 1, 2 and 15, in support of his above statement. Of these verses, verse 1 speaks of the daughter's right of succession and places it on the footing that she comes in as a descendant within the group, presenting funeral oblations. This is elaborated by verse 2 where it is specifically pointed out that it is the daughter's son in the daughter's line, who alone offers funeral oblations, obviously explaining the position that the daughter presents funeral oblations through her son and gets the right of inheritance or comes within the class of sapinda only in that capacity. The view gets the fullest confirmation from Sloka (verse) 15 of the same section where the opening words are: "Since a daughter's right of succession to the property of her father is founded on her offering funeral oblations by means of her son," It is enough for our present purpose to refer to the above quotations and texts and authorities for holding that the daughter is a sapinda under the Bengal or Dayabhaga School. Whether this interpretation, given in Dayabhaga by Jimuta Vahana, is correct or not, is not a matter of enquiry for us as

it is well known and well established by the decision of the Judicial Committee in the Collector of Madura's case, (1867) 12 Moo Ind App 397 (PC), that "the duty of a Judge at the present day is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular School, which governs the District, with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law." Following the above, Jimuta Vahana's interpretation, as given hereinbefore, must be accepted in the instant case and, upon that interpretation, in the light of the other authorities and commentaries, referred to above by us, we must hold that the defendant respondent was a sapinda—to wit, the nearest sapinda, — of the husband of the deceased lady, who was the admitted owner of the disputed property. That being so, she will be the preferable heir and, accordingly, the plaintiff's claim must be held to have been rightly dismissed by the learned Subordinate Judge.

6. The appeal, accordingly, fails and it is dismissed.

7. Parties will bear their own costs in all Courts.

8. AMIYA KUMAR MOOKERJI, J.: I agree.

Appeal dismissed.

AIR 1970 CALCUTTA 462 (V 57 C 93)

P. B. MUKHARJI, ACTG. C. J. AND
T. K. BASU J.

Commissioner of Wealth Tax, West Bengal II, Applicant v. U. C. Mahatab, Respondent.

Wealth Tax Reference No. 540 of 1968, D/- 20-2-1970.

(A) Wealth Tax Act (1937), S. 2 (c) — Assets — Right to compensation payable to assessee for acquisition under West Bengal Estate Acquisition Act, is not asset.

Unless compensation assessment roll is prepared under Section 14 of the West Bengal Estates Acquisition Act, 1953, the intermediary (assessee) has no right to receive any compensation for the acquisition of his estate from the Government of West Bengal. (Para 54)

Right to compensation under the Act does not constitute an asset within the meaning of Section 2 (c), Wealth Tax Act and specially where such compensation has neither been determined nor paid. Case law discussed. (Para 54)

(B) Tenancy Laws—West Bengal Estates Acquisition Act 1953 (1 of 1954), S. 21 — Intermediary has no right to receive compensation until compensation assessment roll is prepared. (Para 54)

EN/FN/C442/70/BNP/D

(C) Tenancy Laws — West Bengal Estates Acquisition Act, 1953 (1 of 1954), S. 23 — Right to compensation payable under Act is not asset within meaning of Section 2 (e), Wealth Tax Act. (Para 54)

Cases Referred: Chronological Paras

(1969) 71 ITR 180 (Bom), Commr. of Wealth Tax, Bombay v. Purshottam N. Amersey 17, 44

(1968) 69 ITR 552 (Andh Pra), Vadrevu Venkappa Rao v. Commr. of Wealth Tax, Andhra Pradesh 11

(1968) Civil Appeal Nos. 2129-2132 of 1968 (Cal), Ahmed G. H. Ariff v. Commr. of Wealth Tax, Calcutta 18, 44

(1968) AIR 1968 Madh Pra 163 (V 55) = (1968) 69 ITR 336, Sardar C. S. Angre v. Commr. of Wealth Tax, Madhya Pradesh 9A

(1968) AIR 1968 Pat 374 (V 55) = (1968) 69 ITR 545, Lakshmi Kant Jha v. Commr. of Wealth Tax, Bihar and Orissa 11

(1967) 64 ITR 147 = ILR (1968) Andh Pra 184, Chandramani Pattamaha Devi v. Commr. of Wealth Tax, Andhra Pradesh 6, 11, 37

(1967) AIR 1967 Cal 56 (V 54), Abdul Khaleque v. Medaswar Hossain 44

(1966) AIR 1966 Pat 282 (V 53) = (1967) 65 ITR 460, Maharaj Kumar Karnal Singh v. Commr. of Wealth Tax 11, 14

(1965) AIR 1965 SC 1836 (V 52) = (1966) 57 ITR 29, Commr. of Income Tax U. P. v. Kunwar Trivikram Narain Singh 15, 42

(1963) AIR 1963 Cal 392 (V 50) = (1963) 48 ITR 31, Kesoram Cotton Mills Ltd. v. Commr. of Wealth Tax, Calcutta 13

(1959) 1959 AC 1 = (1958) 3 All ER 336, Maori Trustee v. Ministry of Works 20

(1957) AIR 1957 SC 657 (V 44) = ILR (1957) Ker 706, Fernandez v. State of Kerala 21

(1955) 1955-3 All ER 314 = 1955-1 WLR 1219, Dawson v. Preston Law Society Carnishees 8

(1954) AIR 1954 SC 470 (V 41) = (1954) 26 ITR 27, E. D. Sassoon and Co., Ltd. v. Commr. of Income-tax 7

(1949) AIR 1949 PC 1 (V 36) = (1948) 16 ITR 325, Commr. of Income-tax Bihar and Orissa v. Raja Bahadur Kamakhya Narayan Singh 16

(1945) 27 Tax Cas 205 = 1946 AC 119, Canadian Eagle Oil Co., Ltd. v. The King 21

(1944) 48 Cal WN 759, Khantamayee Debya v. Smt. Rukmini Deby 36

(1939) AIR 1939 PC 98 (V 26) = 66 Ind App 104, Narayana Gajapati Raju v. Revenue Divisional Officer, Vizagapatam 19

(1937) 1937 AC 26 = (1936) 1 All ER 762, Inland Revenue Commrs. v. Crossman 44

(1921) 1921-1 KB 64 = 90 LJKB 113, Cape Brandy Syndicate v. Inland Revenue Commrs. 21

(1909) ILR 36 Cal 936 = 13 Cal WN 966 (FB), Bancharam Majumdar v. Adya Nath Bhattacharja 6

(1883) 11 QBD 518 = 52 LJQB 584, Webb v. Stenton 6

Biswarup Gupta with Subrata Roy Choudhury, for Applicant; B. K. Panda with M. M. Saha, for Respondent.

P. B. MUKHARJI, ACTING C. J.: This reference under the Wealth Tax Act raises the following question for answer:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee had no right on the relevant valuation dates to receive any compensation for the acquisition of his estate from the Government of West Bengal".

2. Although the question is framed in that way the real issue by reframing the question is:

"Whether in the facts and circumstances of this case, the right to compensation under the West Bengal Estates Acquisition Act, 1953 constitutes an asset within the meaning of the Wealth Tax Act and specially in view of the fact where such compensation under the West Bengal Estates Acquisition Act has neither been determined nor paid."

The facts of this case lie within a small compass. The statement of case refers to the assessments during 1957-58, 1958-59 and 1959-60. There are six reference applications upon which the statement of case is made raising the combined contention relating to the inclusion within the net wealth of the assessee the value of his right to receive compensation under the West Bengal Estates Acquisition Act, 1953. The admitted fact, as appeared in the statement of case, is that the assessee had extensive zamindari properties which vested in the State of West Bengal under the provisions of the West Bengal Estates Acquisition Act. The Wealth Tax Officer assessed the right to receive compensation at Rupees 32,00,000 for each of the three years under reference. The Appellate Assistant Commissioner, however, reduced the value of the assessee's right to receive compensation to Rs. 3,25,000 for each year. It is said that the Appellate Assistant Commissioner held that there was a debt owed by the Government under the Estates Acquisition Act to the assessee which could be quantified under the provisions of that Act. In other words, the Appellate Assistant Commissioner took the view that the assessee had an actionable claim against the Government the value of which was includible in the net wealth of the assessee as an asset within the meaning of Section 2 (e) of the Wealth Tax Act. The valuation for Wealth Tax

purposes was made on the basis of Agricultural Income Tax paid on these agricultural lands. On behalf of the assessee it was contended that on the relevant date of valuation the assessee had no right to receive any compensation from the Government and, therefore, he had no actionable claim assessable to wealth tax.

2-A. The decision of the Tribunal upholding the contention of the assessee was against the Commissioner of Wealth Tax. The Tribunal's conclusion can be briefly summarised here. In the first instance, it points out that the compensation is only payable to the intermediary whose right has been acquired by the Government under the West Bengal Estates Acquisition Act which provides by Section 14 (1) that the Compensation Officer is required to prepare the Compensation Assessment Roll within 8 years from the date of vesting specifying, *inter alia*, the amount of compensation payable in accordance with the provision of that Act. Therefore, the Tribunal says that when the Compensation Assessment Roll has been prepared and finally published under S. 21 of the Act the Compensation officer is required to make an offer of payment of the compensation to the intermediary. On this basis of reasoning the Tribunal says that as the fact is that no Compensation Roll has been prepared by the Compensation officer as yet under Section 14 (1) of the West Bengal Estates Acquisition Act, there is no right in the assessee to any compensation. This is the first and paramount reason of the Tribunal for not including the alleged right of compensation in the net wealth of the assessee. The Tribunal quoted Sec. 23 (1) (a) of the West Bengal Estates Acquisition Act, where it is provided, *inter alia*, "as soon as may be after the date of the final publication of a Compensation Assessment Roll under Section 21, the Compensation Officer shall, in the prescribed manner, make an offer of payment of the compensation to the intermediary who is entitled to such compensation in terms of the compensation assessment roll together with interest at the rate of three per centum per annum of such compensation accruing from the date of vesting to the date of the offer of payment."

3. The logic of the Tribunal is that the intermediary is not entitled to receive any compensation until the compensation assessment roll has been prepared and finally published under Section 21 of the Act although he may be allowed an interim payment from time to time against the compensation receivable by him after the final publication of the compensation roll. Therefore, the Tribunal came to the conclusion, (1) that the Wealth Tax Officer was wrong in assuming that the assessee had a right to receive compensation upon the claim preferred by him in Form 3A under Rule 10 (3) of that Act and (2) the Appellate Assistant Commissioner was wrong in holding that the assessee had an actionable claim

which had a hypothetical market value, on the valuation date.

4. The Tribunal repelled also the argument made on behalf of the Revenue that the provision for interest suggests a different conclusion. It was argued that under Section 23(1) of the West Bengal Estates Acquisition Act, which is quoted above interest was payable at the rate of 3% on that compensation accruing from the date of vesting. Therefore it was argued by the Revenue that the fact the intermediary was entitled to receive interest from the date of vesting was itself evidence that he acquired a right to receive compensation from the date of vesting. The Tribunal came to the conclusion that such a provision merely related to the fixation of the claim of the interest payable on the compensation and did not speak of the accrual of the right to receive compensation which, according to the Tribunal arose only after the compensation assessment roll had been prepared and finally published. The Tribunal was categorical in holding that the assessee had no right to demand payment of compensation before the final publication of the compensation assessment roll. The final conclusion of the Tribunal was expressed in the following way:

"We would, therefore, hold that the assessee had no right on the valuation date to receive any compensation for the acquisition of his estate. Accordingly, we delete the addition of Rs. 8,25,000 from his net wealth as at the material valuation dates."

5. This question raises a point of fundamental importance in taxation. It raises the question whether the right to compensation itself apart from the actual compensation is a kind of wealth on which wealth tax is attracted under the Wealth Tax Act. The more far-reaching implication is that this alleged right to compensation springs from agricultural land which is expressly excluded from the definition of "assets" under Sec. 2 (c) (i) (b) of the Wealth Tax Act. The relevancy of this consideration will be clear when it is recalled that the property acquired under the West Bengal Estates Acquisition Act in this case was zamindari property, which was agricultural land. It is also important to bear in mind the significant fact that the Wealth Tax Officer in this case calculated the value on the basis of the agricultural income determined by the Agricultural Income Tax Officer in this very case. The order of the Wealth Tax Officer in its material part records this:

"The assessee had extensive zamindari properties which were vested in the Government under the Estates Acquisition Act of 1953. In the said Act the assessee is to receive compensation partly in cash and partly in non-negotiable bonds. Such right to receive the compensation constitute wealth. The assessee's representative objects to the inclusion of this compensation on the ground that the amount receivable has not been finally determined and not known when

fore, when the question again arose in *M. P. Industries Ltd. v. Union of India*, AIR 1966 SC 671, Subba Rao, C. J., observed in paragraph (10) of the judgment as follows:

"As regards the second contention, I do not think that the appellant is entitled as of right to a personal hearing. It is no doubt a principle of natural justice that a quasi-judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him. Indeed, R. 55 of the Rules, quoted supra, recognises the said principle and states that no order shall be passed against any applicant unless he has been given an opportunity to make his representations against the comments, if any, received from the State Government or other authority. The said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal. The facts of the present case disclose that a written representation would effectively meet the requirements of the principle of natural justice."

15. A little reflection would show that it would be impossible for the Central Government to summon applicants from all over India to come to New Delhi merely for the purpose of an oral hearing. The slightest acquaintance with the functioning of the Central Government would show that the Central Government cannot deal with applications under Section 33 as Courts would have done. Further at various stages under the Aet and the Rules, full oral hearing is given to the petitioner and it was not, therefore, thought necessary by the legislature to give oral hearing under Section 33. This is why the legislature deliberately refrained from providing in Section 33 for the grant of any hearing to the applicant and the Central Government did not provide for an oral hearing to applicants under Sec. 33 in framing the Rules under the Aet. A perusal of Rule 105 would show that the Central Government was clearly aware of what was meant by "oral hearing" and when it should be given and when it should not be given. Therefore, after providing for the application of Order 41 of the Civil Procedure Code to appeals and revisions, it added a proviso to Rule 105 giving "oral hearing" to an applicant under Section 24 (4). It is significant that the application under Section 24 (4) is by way of a revision to the Central Government. The Central Government was careful to provide for an oral hearing to such an applicant, but was equally careful not to provide for any oral hearing to an applicant under Section 33. As observed by the Supreme Court in *M. P. Industries' case*, AIR 1966 SC 671 in the absence of any provision by the statutes and

the Rules, it is in the discretion of the Tribunal to give opportunity either by a written representation or by a personal hearing depending on the facts of each case. As a rule, the Central Government does not find it necessary to give oral hearing to an applicant, inasmuch as the likelihood of injustice being done to an applicant after he had oral hearing before a number of officers acting under the Aet was very small. But if the Central Government were of the view that a certain point could not be understood by it except on oral hearing, it would be open to the Central Government to give oral hearing to an applicant in a special case. It is for the Central Government to decide whether it cannot understand a certain case except with the help of an oral argument. It is not for the petitioner to insist that he must be heard orally. The order passed by the Central Government under Section 33 was not, therefore, in any way vitiated because it was passed without giving an oral hearing to the petitioner.

16. The order is not a self-contained one and does not itself give the reasons for the dismissal of the application of the petitioner. Was it incumbent on the Central Government to give such reasons in the order itself? After an exhaustive review of the case law, the question has been answered in the negative by the Supreme Court in *Bhagat Raja v. Union of India*, AIR 1967 SC 1606. The principle laid down by the Supreme Court in paragraph (9) of the judgment in that case was this. Where the State Government gives sufficient reasons for its order, the Central Government in affirming the said order may adopt the reasons given by the State Government without repeating them. But, where the reasons given by the State Government were scrappy and nebulous the Central Government must clarify them. Similarly, if the State Government gives reasons some of which are good and some are not the Central Government should state which of them weighed with it in upholding the order of the State Government. In the present case, the order of Shri N. P. Dube, Chief Settlement Commissioner, passed on 20-5-1963 at annexure 'F' of the writ petition, is a fully reasoned order. It cannot be said that the reasons given in that order are either nebulous or scrappy or that some reasons are good and some are not. According to the test laid down by the Supreme Court, therefore, it was open to the Central Government to agree with that order without repeating the reasons given therein. I, therefore, find that the order of the Central Government was not bad for not having repeated the reasons with which it agreed.

(2) The order of the Chief Settlement Commissioner Shri N. P. Dube, took the view that no proceeding for partition was pending on 31-12-1960. This view was arguable inasmuch as the petitioner did not

move the Assistant Settlement Commissioner for the division of the property in accordance with the observation at the end of the remand order dated 11-1-1960. The petitioner merely filed an appeal against the order dated 16-2-1962, which was decided by Shri Parshotam Sarup on 21-7-1962. It could be said, therefore, that between 11-1-1960 and 16-2-1962 there was no proceeding pending for partition of the property. The order could not be said, therefore, to be bad for error of law apparent on the face of the record. Further, the Chief Settlement Commissioner alternatively assumed for the sake of argument that a partition proceeding was pending on 31-12-1960 and held that the property was not partible. Again Shri N. P. Dube fully agreed with the reasons given by Shri Behl and did not think it necessary to repeat those reasons on the principle laid down by the Supreme Court in Bhagat Raja's case, because Shri Dube was entitled to adopt the reasons given by Shri Behl in his order dated 6-11-1962 at annexure 'E' to the writ petition. The order of Shri Dube was not, therefore, bad for want of reasons.

(3) The order of Shri Behl passed on 6-11-1962 is a fully discussed and reasoned order. It was not shown to be wrong in any respect. Further, the merits of the questions decided therein are for the officer acting under the Act to decide. It is not for this Court to go into the merits as this Court is not sitting in appeal over those orders.

17. The learned Counsel for the petitioner relied upon the view expressed by Tatachari, J., in C. W. No. 367 of 1967, D/- 20-10-1968 (Delhi) (Smt. Bishan Devi v. Union of India), that the applicant under Section 33 of the Act was entitled to a 'hearing'. The impugned order in that case, however, suffered from other defects, which are not present in the case before me. On facts, therefore, the case before Tatachari, J., is distinguishable from the one before me. This would explain the different conclusions at which we have arrived.

18. For the above reasons, the writ petition is dismissed. No order is made as to costs.

Petition dismissed.

AIR 1970 DELHI 178 (V 57 C 37)

H. R. KHANNA, C. J. AND
S. RANGARAJAN, J.

Manohar Lal, Petitioner v. Union of India and others, Respondents.

C. W. No. 1913 of 1969, D/- 12-1-1970.

(A) Constitution of India, Article 3 (2) Proviso — Does not prevail over proclamation under Article 356.

Absence of reference of bill affecting area boundaries or name of State to State Legis-

lature does not vitiate validity of the Punjab Reorganisation Act (31 of 1966) where proclamation under Article 356 (1) is validly issued by President and the power of Governor to summon Houses of Legislature is suspended. (Para 9)

(B) Constitution of India, Article 356 (1) (c) — Issue of Proclamation — Expressions 'Incidental and consequential' in clause (c) — Expression 'incidental' is used disjunctively with expression 'consequential' — For giving effect to Proclamation, President can make provisions which are incidental or consequential to it.

A proclamation was issued by President under Article 356 (1) of the Constitution in respect of State of Punjab. Among other provisions of the Constitution, the power of the Governor under Article 147 (1) to summon the House or each Houses of Legislature was suspended by Proclamation.

Held, that in order to give effect to the proclamation, the President could suspend also the power of State Legislature to express its view contemplated by proviso to Article 3. AIR 1968 SC 1450, Rel. on; 1910 AC 87 & 1907 AC 415 & (1961) 3 All ER 1092, Distinguished. (Paras 0, 10)

(C) Commissions of Inquiry Act (1952), Section 3 — Report of Commission appointed under is not binding on Government. AIR 1967 SC 122 & AIR 1969 SC 213, Rel. on. (Paras 14, 16)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 215 (V 50) =

(1968) 3 SCR 789, P. V. Jagannath

Ran v. State of Orissa 13

(1969) AIR 1968 SC 1450 (V 55) =

1969 Cri LJ 10, Ishwar Singh

Bindra v. State of U. P. 8

(1967) AIR 1967 SC 122 (V 54) =

(1966) Supp SCR 401, State of

Jammu and Kashmir v. Bakshi

Culam Mohammad 14

(1967) AIR 1967 SC 944 (V 54) =

(1967) 2 SCR 109, Mangal Singh

v. Union of India 3

(1961) 1961-3 All ER 1002 = 1963

Ch 248, Attorney-General v. Cray-

ford Urban District Council 12

(1917) 1917-1 KB 19 = 85 LJKB 1494,

King v. Christ's Hospital Governors 17

(1910) 1910 AC 87 = 79 LJ Ch 87,

Amalgamated Society of Rly. Ser-

vants v. Osborne 10, 12

(1907) 1907 AC 415 = 76 LJ Ch 568,

Attorney-General v. Mersey Rly. Co. 11

R. V. S. Mani with A. L. Joshi, for Pet-

itioner; Hardev Singh (for State of Punjab)

and D. D. Chowdhry (for Union of India),

for Respondents.

ORDER:— The petitioner, a resident of

Bhiwani, Hissar District in the State of Har-

yana, has sought the following reliefs:

1. That Section 4 and sub-section (b) (ii)

of Section 7 and Sections 78, 79 and 80 of

the Punjab Reorganization Act 1966 be de-

clared as ultra vires and void.

2. That a suitable writ, order or direction may be issued to implement the Shah Commission Report in toto and that Chandigarh Capital Project as also Lalroo, Darabassi, Pathankot and areas of Fazilka and Malaut be declared as included in the territories of the Haryana State; and

3. That a suitable writ be issued ousting the authority of the Central Government from the control and management of the Bhakra Nangal complex and to vest the same in the State of Haryana in order that people of Haryana may have full share in the water of Satluj, Beas and Ravi rivers.

2. The Union of India and the State of Punjab, but not the State of Haryana, have filed returns contesting this petition.

3. The two questions argued before us relate to (1) the validity of the relevant sections of the Punjab Reorganisation Act and (2) the enforceability by this Court of the Shah Commission Report.

4. So far as the first contention is concerned the validity of the Punjab Reorganisation Act (31 of 1966) was upheld by the Supreme Court in *Mangal Singh v. Union of India*, AIR 1967 SC 944. Before the Supreme Court the said Act was challenged on the following two grounds, both of which were repelled by the Supreme Court:—

“(1) Constitution of the Legislative Assembly of Haryana by Section 13 (1) of the Punjab Reorganisation Act, 1966, violates the mandatory provisions of Article 170 (1) of the Constitution; and (2) By enacting that 8 members of the Legislative Council who are residents of the Union Territory of Chandigarh shall continue to sit in the Legislative Council in the new State of Punjab, and by enacting that the members elected to the Legislative Council from the Haryana area shall be unseated, there is denial of equality.”

In the result the said Act was held to be intra vires and valid.

5. The petitioner has now sought to assail the validity of the aforesaid sections of the Act on yet another ground, namely, that proviso to Article 3 of the Constitution had not been complied with. Since we are satisfied that there is no merit in this contention, we propose to discuss this contention at some length to show that it has no force despite the said decision by the Supreme Court regarding the validity of the Act being binding on all Courts within the territory of India according to Article 141 of the Constitution.

6. The relevant portions of Article 3 of the Constitution may now be read:—

“3. Parliament may by law—

- (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;
- (b) increase the area of any State;
- (c) diminish the area of any State;
- (d) alter the boundaries of any State;

(e) alter the name of any State;

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.”

7. The argument on behalf of the petitioner based on the above said proviso to Article 3 of the Constitution, is that Act 31 of 1966 could not have been introduced in the Parliament without the President referring to the Legislature of the concerned State for expressing its views thereon. The answer to this contention by the contesting respondents is based on Article 356 of the Constitution, the relevant portion of which reads as follows:—

“356 (1) — If the President on receipt of a report from the Governor of a State or otherwise is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation—

(a) * * *

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State.”

8. On 5th July, 1966, the President made his Proclamation under Article 356 of the Constitution after expressing satisfaction that the Government of the State of Punjab could not be carried on in accordance with the provisions of the Constitution. He, therefore, among other things, declared that the powers of the Legislature of the said State shall be exercisable by or under the authority of Parliament. He also suspended the following, among other, provisions of the Constitution, in relation to that State. Among the provisions of the Constitution which were suspended and are relevant for the present purpose were so much of the proviso to Article 3 as relates to the reference by the President to the Legislature of the State and clause (1) and sub-clause (a) of clause (2) of Article 174, Article 174 (1) and (2) (a) read as follows:—

“174 (1) The Governor shall from time to time summon the House or each House of

the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session."

(2) The Governor may from time to time—

(3) prorogue the House or either House."

9. On reading Article 3 and Article 174 (1) of the Constitution along with the above proclamation of the President it is seen that the President had suspended the power of the Governor to summon the House or each House of the Legislature of the State, which by itself prevented the State Legislature from meeting, and also suspended the State Legislature from meeting, and also suspended so much of proviso to Article 3 of the Constitution relating to the reference by the President to the Legislature of the State. It will thus be seen that the power to summon the Legislature, of the Governor having been suspended no occasion could thereafter arise, during the period when such suspension was in operation, for the Legislature to meet for the purpose of expressing its views on the Bill to be introduced in Parliament affecting the area, boundaries or name of the concerned State. This would be the direct result of the suspension of the power of the Governor to summon the Legislature of the State, even without suspension of so much of the proviso to Article 3 relating to the reference by the President to the Legislature of the State. However, in order to make the matter clearer, the operation of so much of the proviso to Article 3 had also been suspended by the President. In view of the clear power conferred by Art. 356 (1) (a) (b) to declare that the powers of the Legislature of the State shall be exercisable by or under the authority of the Parliament, it enacted Act 31 of 1966 by which all the powers of the Legislature of the concerned State (State of Punjab) to make laws were conferred on the President. We can find no warrant for the contention of the petitioner that what was transferred by means of Article 356 (1) (b) of the Constitution was only the legislative power of the State Legislature but not the power to meet and express its views as contemplated by the proviso to Article 3 of the Constitution. According to the petitioner Article 356 (1) (c) only enabled the President to make such "incidental and consequential" provisions as appeared to him to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of the Constitution to any body or authority in the State but not to make provisions which were not both "incidental or consequential". This argument of the petitioner would appear to have no validity for two reasons: Firstly, the expression "incidental and consequential" may be read as "incidental or consequential", to suit the context; that this is a per-

missible mode of construction, if the context so requires it is well settled. It will be sufficient to refer, on this question, to the following observations of the Supreme Court in *Ishwar Singh Bindra v. State of U. P.*, AIR 1968 SC 1450 on page 1454:

"Now if the expression 'substances' is to be taken to mean something other than 'medicine' as has been held in our previous decision it becomes difficult to understand how the word 'and' as used in the definition of drug in Section 3 (b) (i) between 'medicines' and 'substances' could have been intended to have been used conjunctively. It would be much more appropriate in the context to read it disjunctively. In Stroud's Judicial Dictionary, 3rd Edn., it is stated at page 185 that 'and' has generally a cumulative sense, requiring the fulfilment of all the conditions that it joins together, and herein it is the antithesis of 'or'. Sometimes, however, even in such a connection, it is, by force of a context, read as 'or'. Similarly in Maxwell on Interpretation of Statutes, 11th Ed, it has been accepted that 'to carry out the intention of the legislature it is occasionally found necessary to read the conjunctions 'or' and 'and' one for the other."

10. It can hardly be denied that the dispensing with the need to consult the views of the concerned State Legislature was itself a direct consequence of the Legislature being unable to meet for any purpose whatever during the period when the Governor's power to summon the Legislature was itself suspended. The petitioner does not advance his case in any manner, therefore, by laying stress on the expression "incidental" alone in Article 356 (1) (c). Secondly, the petitioner cannot seek to derive any assistance from the English decisions which he quoted in order to show what he contended was the restricted meaning given to the said expression. The decision of the House of Lords in *Amalgamated Society of Rly. Servants v. Osborne*, 1910 AC 87 was concerned with a situation where a registered trade union was limited by its memorandum of association from levying contributions from its members for the purpose of securing parliamentary representation. This levy was sought to be justified as a power "incidental" in the purposes of the trade unions.

11. The second case relied upon on behalf of the petitioner for this purpose was *Attorney General v. Mersey Rly. Co.*, 1907 AC 415 where the question was whether a railway company without express power to run omnibuses could do so. The argument that the running of omnibuses was incidental to the railway enterprise was repelled.

12. The third case relied upon, in this connection, was *Attorney-General v. Crayford Urban District Council*, (1961) 3 All ER 1002. That again was a case concerned with the limit of powers of local authorities as statutory bodies. The following

meaning which Lord Macnaghten, in 1910 AC 87, had attributed to the expression "incidental" was followed by Pennycuik, J., "what might be derived by reasonable implication from the language of the Act", but not equivalent to "in connection with". The former was said to be a narrower meaning than the latter. It seems to us that the petitioner can derive no assistance whatever from any of the said rulings because even adopting the narrower meaning of "incidental" given by Lord Macnaghten the Proclamation of the President in this case seems to fall well within the scope of Article 356 (1) (c) of the Constitution; as pointed out earlier the expression "incidental" being used "disconjunctively" with the expression "consequential" would altogether militate against the contention of the petitioner. The ground of invalidity urged by the petitioner, so far as the above sections of Act 31 of 1966 are concerned, therefore, fails.

13. There is still less merit in the contention of the petitioner that he is entitled to have the Shah Commission Report enforced through Court. It was stated in the counter affidavit filed by Miss Shyama Bahl, Deputy Secretary to Government Punjab, Reorganization Department, on behalf of the State of Punjab (vide paragraph 8) that the Shah Commission was set up under the Commissions of Inquiry Act (LX of 1952). This fact has not been controverted by the filing of a rejoinder. Section 3 of the Commissions of Inquiry Act provides that the appropriate Government may, if it is of opinion that it is necessary so to do and shall, if a resolution in this behalf is passed by the House of the People or, as the case may be, the Legislative Assembly of the State, by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly. It is seen from the Shah Commission (called Punjab Boundary Commission) Report, which has been made Annexure 'A' to the petition, that the Government of India resolved to reorganise the then State of Punjab on a linguistic basis so as to constitute from its territories two States, namely, Punjab and Haryana. The Resolution has been printed as Appendix IV (pages 60-61) of the said Report. In chapter 1 of the said Report (page 2) it has been stated that on April 23, 1966, the Government of India published a Resolution appointing the said Commission. It is clear, therefore, on the material placed before us that the said Commission was appointed under the Commissions of Inquiry Act, 1952 even though the Resolution of the Government of India dated 23rd April, 1966, Appendix IV, at pages 60-61 of the Report, does not expressly set this out.

14. The Supreme Court had, on two occasions, pointed out that a Commission of Inquiry appointed under the Commissions of Inquiry Act was for fact finding purposes and that the report of the Commission had no force *proprio vigore*; vide *State of Jammu and Kashmir v. Bakshi Gulam Mohammad*, AIR 1967 SC 122 and *P. V. Jagannath Rao v. State of Orissa*, AIR 1969 SC 215.

15. It is seen even from the above said Resolution of the Government of India dated 23rd April, 1966, (vide paragraph 2) that the Commission was to examine the existing boundary of the Hindi and Punjabi Regions of the then State of Punjab and to recommend what adjustments, if any, are necessary in that boundary to secure the linguistic homogeneity in the proposed Punjab and Haryana States. In Paragraph 4 of the Resolution, the Commission was asked to make its recommendations to the Government of India not later than 31st May, 1966. It is further seen from Chapter II, Paragraph 26, page 9 of the said Report that the Commission was asked to recommend—

(i) adjustments of the existing boundary of the Hindi and Punjabi regions of the present State to secure linguistic homogeneity;

(ii) to indicate boundaries of the hill areas of the present State which are contiguous to Himachal Pradesh and have cultural and linguistic affinities."

16. It is thus clear that the Commission was only asked to make the recommendations, which were made by that Commission. The Commission's Report, therefore, could have no force *proprio vigore*, to use the expression adopted by the Supreme Court in both the above said decisions.

17. In this context the learned counsel for the petitioner very feebly relied upon the *King v. Christ's Hospital Governors*, (Ex Parte DUNN) reported in (1917) 1 KB 19, where under a scheme, made under the Endowed Schools Act, for the management of Christ's Hospital a certain number of the Council of Almoners were to be appointed by the Governors "on the recommendations" of the Lord Mayor and Aldermen of the city of London, among other bodies. When such recommendations were made a contention was raised that the recommendations should not be construed as a nomination upon which the governors were bound to act. Darling, J., observed as follows:—

"The word "recommendation" is not there used in its ordinary sense as when one says "I recommend you to do so and so", or as when a doctor says to his patient "I recommend you to take a change of air". Although put in the form of a recommendation, the clause really empowers those bodies to say "we nominate such and such a person and you must appoint him an almoner; we cannot put him there ourselves; you are the governors of the institution and you have

the means of including him in the list". I think that what was in the mind of those who framed the scheme was something equivalent to a *conge d'elire* which, though in words a permission or invitation to elect, is really a command to do it. So here a nomination is called a "recommendation". The most definite language has not been used, but, as I have said, I think the word "recommendation" is used not in the mild sense, but as really meaning a nomination."

18. The said decision has obviously no application to the present case.

19. It is hardly necessary for us to add that the further relief sought by the petitioner, asking for a direction to oust the Central Government from the control and management of the Bhakra Nangal complex and vesting it in the State of Haryana is not one which is within the province of this Court to grant.

20. Since we find that the writ petition has no merits the same is dismissed, but without costs.

21. Civil Misc. No. 1 of 1970, which has been filed to add the States of Rajasthan and Himachal Pradesh as respondents (in view of the dismissal of the main petition) is consequently dismissed.

Petition dismissed.

there should be a unity in the work carried on in the factory premises by the factory and its contractors. (Paras 5, 10)

(B) Employees' State Insurance Act (1948), Section 40 — Liability for payment of contribution on principal employer — Principal employer's right for contributions from immediate employer.

Liability for payment of contributions is under Section 40 on the "principal employer". Under Section 41 of the Act the principal employer has to recover the contributions in respect of an employee of the immediate employer from the immediate employer. It would, therefore, be contrary to the Scheme of the Act to ask a factory to pay the arrears of the employees' contributions in respect of the employees engaged by the factory as well as by the independent contractors where the factory is not the principal employer and the contractors are not the immediate employers. (Para 12).

(C) Employees' State Insurance Act (1948), Section 82 — Appeal when lies to High Court.

Appeal lies to the High Court from the order of Employees' Insurance Court only if it involves a substantial question of law.

(Para 2)
C. L. Joseph, for Appellant; Banerjee, for Respondent.

JUDGMENT: This and the connected two appeals (8-D of 1901 and 4-D of 1981) are filed by the Employees' State Insurance Corporation against the decision of the Employees' Insurance Court dismissing the applications of the Corporation, one for the period from 12-11-1956 to 30-6-1958 and the other for the period from 1-7-1958 to 31-3-1959, for the recovery of contributions under the Employees' State Insurance Act, 1948, (hereinafter called the Act) from Shri Dharam Bir, proprietor Messrs. Peter Sewing Machine Company and accepting the counter application of Shri Dharam Bir that he was not liable to pay the contributions. The findings of fact given by the Employees' Insurance Court are that the Peter Sewing Machine Company was carrying on the business of making and assembling sewing machine parts by the use of power. It did not itself employ twenty or more persons. But it allowed at first two contractors, namely, Duaba Sewing Machine Company and Krishan Sewing Machine Company to work in its premises on its machines and with its power.

Subsequently, in place of these two contractors, it allowed Vijay Engineering Works and M. K. Repair Works to carry on their businesses in the factory premises on factory machines and with factory power. The employees of the Peter Sewing Machine Company coupled with the employees of these contractors numbered twenty or more persons. These contractors also manufactured sewing machine parts which were occasionally bought by the Peter Sewing Machine Company. But there was no definite con-

ALR 1970 DELHI 182 (V 57 C 38)

V. S. DESHPANDE, J.

Employees' State Insurance Corporation,
Appellant v. Peter Sewing Machine Co. etc.,
Respondent.

F. A. O. Nos. 2-D to 4-D of 1901, D/-
16-2-70.

(A) Employees' State Insurance Act (1948), Section 2 (12) — Factory, essentials of — Definite economic unit possessing four unities or identities, (1) Geographical or physical unity, (2) Unity of ownership or Occupation, (3) Unity of employment and (4) Unity in work — Employment of 20 or more persons — No factory if any of the Unities are absent.

The question whether the premises are a "factory" under Section 2 (12) depends on whether twenty or more persons were employed in these premises during the relevant period.

A "factory" under the Act is a certain definite economic unit which must possess the following unities or identities namely:— (1) a geographical or physical unity of being confined to its premises including the precincts thereof, (2) the unity of ownership or occupation of the factory, (3) the unity of employment is essential in the sense that the employees must be engaged either by the principal employer or by him through the immediate employers. (4) it is necessary that

tract between the Peter Sewing Machine Company on the one hand and these contractors on the other hand by which the former was bound to purchase the machine parts manufactured by the latter. Nor was any raw material supplied by the Peter Sewing Machine Company to these contractors. Nor did the Peter Sewing Machine Company in any way manage the affairs of these contractors. On the other hand, these contractors were said to be the sub-tenants of the Peter Sewing Machine Company. The premises of the Peter Sewing Machine Company were not, therefore, a "factory" within the meaning of Section 2 (12) of the Act.

2. Under Section 82 of the Act, no appeal shall ordinarily lie from the order of an Employees' Insurance Court. The appeal lies to the High Court only if it involves a substantial question of law.

3. The question for decision, therefore, is whether on the facts found by the Employees' Insurance Court, the premises of the Peter Sewing Machine Company were covered by the definition of "factory" in Section 2 (12) of the Act and if so whether this is a substantial question of law.

4. The following provisions of the Act are useful in deciding the above question. Section 1 (4) says that the Act shall apply, in the first instance, to all factories, including factories belonging to the Government other than seasonal factories. The word "belonging" would show that the factory has to belong to somebody so that the owner or occupier of the factory must be a definite person or corporation and must be capable of being identified. Section 2 (12) defines "factory" to mean:—

(1) any premises including the precincts thereof;

(2) whereon twenty or more persons are employed;

and (3) in any part of which a manufacturing process is carried on with the aid of power.

The expression "manufacturing process" has the same meaning as is assigned to it by Section 2 (k) of the Factories Act, 1948, i. e., any process for making, altering, repairing etc., or adapting any article or substance with a view to its use, sale, transport, delivery or disposal.

5. Out of the three constituent elements of "factory" described above, the first and the third are satisfied in the present case inasmuch as a manufacturing process is carried on in the premises occupied by the Peter Sewing Machine Company. The question whether the premises are a "factory", therefore, depends on the second requirement being fulfilled, namely, whether twenty or more persons were employed in these premises during the relevant period.

6. The employment of twenty or more persons would require on the one side an employer and on the other side the requisite number of employees. If the requisite num-

ber of employees is directly employed by the owner or occupier of the factory, then this employer would be called the "principal employer" as defined in Section 2 (17) of the Act. It is not necessary, however, that the principal employer should directly employ twenty or more persons in the factory. Some or all of these employees may be employed either by or through what are called "immediate employers" defined in Sec. 2 (13) of the Act. The essentials of the definition of an "immediate employer" are that:—

(1) he has undertaken the execution of the whole or any part of any work;

(2) which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment;

(3) on the premises of the factory.

7. The third essential is satisfied in the present case as the contractors work in the premises of the factory. The first essential is also satisfied inasmuch as the contractors are doing work involving a manufacturing process in the factory premises. It is again the second essential which is in dispute. Can it be said that the whole or any part of the work of the contractors consists of any work which is ordinarily a part of the work of the factory or establishment of the principal employer? The Peter Sewing Machine Company makes and assembles sewing machine parts. The contractors also make sewing machine parts. The contractors, therefore, make goods which are either of the same type or similar to the goods manufactured by Peter Sewing Machine Company. But the finding of fact is that the contractors manufacture their goods independently and not as a part of the goods manufactured by the Peter Sewing Machine Company. It cannot be said, therefore, that the contractors have undertaken to execute "the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer" within the meaning of Section 2 (13) of the Act.

The next question is whether the work carried on by the contractors can be said to be "preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment"? The answer here again depends on the question of the meaning to be attached to the words "preliminary to" and "incidental to". In my view, both these expressions imply that there must be some connection between the work of the contractors and the work of Peter Sewing Machine Company. Such a connection could be based on a contract by which the contractors have undertaken to do the work which is preliminary to or incidental to the work or the purpose of any such factory. But the finding of fact is that there is no contract by which the contractors would be obliged to sell any of their products to the Peter Sewing Machine Company. The contractors may sell all their products to persons other

than the Peter Sewing Machine Company. It cannot, therefore, be said that the work of the contractors is either incidental to or is preliminary to the work or the purpose of the factory.

8. The same nexus or connection between the contractors and the Peter Sewing Machine Company is necessary before the employees engaged by the Peter Sewing Machine Company and those engaged by the contractors can be covered in a common category of "employees" as defined in Section 2 (9) of the Act. Such an employee is a person employed for wages—

(1) in connection with the work of a factory or establishment to which the Act applies; and

(2) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of the factory; or

(3) who is employed by or through an immediate employer on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory.

9. The use of the article "a" before the word "factory" again implies that there is a definite factory which employs the employees. Further, these employees must be employed for the work of or incidental or preliminary to the work of the factory. Lastly, they have to be employed by or through the immediate employers for doing the work of the factory or work preliminary to or incidental thereto. The two sets of employees namely those employed by the Peter Sewing Machine Company and those employed by the contractors are not employed by one factory. Nor are they employed to do the work of one factory. Nor are the contractors' employees employed to do the work of the factory in question.

10. On a survey of the above provisions of the Act it seems to me that a "factory" under the Act is a certain definite economic unit which must possess the following unities or identities namely:—

Firstly, a geographical or physical unity of being confined to its premises including the precincts thereof. In the present case, the "factory" in question possesses only this unity. But the concept of a "factory" is not confined merely to a geographical or physical entity. It cannot be said that any premises would be regarded as a factory if twenty or more persons are employed therein on a manufacturing process. For, if these employees are not working either under a "principal employer" or under "immediate employers" then they would be working under independent employers. The employees of the independent employers cannot be totalled to make up the requisite number of employees to constitute a "factory". Therefore, the unity or the identity of the factory has to be secured by the presence of three more

cementing factors which contribute to the concept of a "factory". Therefore, a "factory" requires secondly the unity of ownership or occupation of the factory. In the present case, part of the factory is occupied by the Peter Sewing Machine Company while the rest of it is occupied by the contractors who have no definite contractual relationship with the Peter Sewing Machine Company as to what they should produce and whether they should sell their products to the Peter Sewing Machine Company. This unity is, therefore, lacking in the present case. Thirdly, the unity of employment is essential in the sense that the employees must be engaged either by the principal employer or by him through the immediate employers. The contractors in the present case are independent employers and not immediate employers for the reasons stated above. There is, therefore, no unity of employment between the Peter Sewing Machine Company and the contractors and the former is not the principal employer and the latter are not the immediate employers within the meaning of Sections 2 (17) and 2 (13) of the Act respectively. Lastly, it is necessary that there should be a unity in the work carried on in the factory premises by the Peter Sewing Machine Company and its contractors. But there is no co-ordination and no contractual relationship between them and this unity also, therefore, is found to be lacking.

11. The upshot of the above discussion is that the Peter Sewing Machine Company and the contractors are carrying on their respective businesses independently of each other. The employees employed by all of them cannot, therefore, be clubbed together to find out if the total of the employees is twenty or more persons. It is necessary that the contractors should be proved to be the "immediate employers" before the Peter Sewing Machine Company can be held to be the "principal employer".

12. The Scheme of the Act is that the liability for payment of contributions is under Section 40 of the Act on the "principal employer". Under Section 41 of the Act, the principal employer has to recover the contributions in respect of an employee of the immediate employer from the immediate employer. It would, therefore, be contrary to the Scheme of the Act to ask the Peter Sewing Machine Company to pay the arrears of the employees' contributions in respect of the employees engaged by the Peter Sewing Machine Company as well as the contractors inasmuch as the Peter Sewing Machine Company is not the principal employer and the contractors are not the immediate employers. The former has, therefore, no authority and no locus standi to recover the contributions from the contractors. The result of asking the Peter Sewing Machine Company to pay the contributions would be that it will have to pay not only the contributions in respect

of its own employees but also in respect of the employees of the contractors without the right to be reimbursed from the contractors under Section 41. This was not the intention of the legislature and cannot, therefore, be countenanced.

13. The legal position on the admitted facts, therefore, is that no contributions in respect of the relevant periods were payable by the Peter Sewing Machine Company. The question whether the contributions were so payable or not was a substantial question of law inasmuch as a large number of cases having similar facts and circumstances would arise for decision for which the present case may provide a precedent. The question is, however, decided against the appellant and the appeals are dismissed but without any order as to costs,

Appeals dismissed.

AIR 1970 DELHI 185 (V 57 C 39)

S. N. ANDLEY AND P. S. SAFEER, JJ.

Union of India through Chief Controller of Imports and Exports, New Delhi, Appellant v. Gian Singh Kadian, Respondent.

Regular First Appeal Case No. 131-D of 1960, D/- 26-2-1970, against decree of Sub-J. First Class Delhi, D/- 3-8-1960.

(A) Constitution of India, Article 311 — Suspension — Suspension of temporary employee on account of his arrest in a criminal case which was later on dropped — Notice of termination of services by paying one month's full salary and allowances in lieu of notice held could not be construed, in circumstances of case, as one by way of punishment — It was implicit in the notice that the order of suspension must be deemed to have been revoked before issue of notice. Case Law discussed. (Para 8)

(B) Civil Services — Central Civil Services (Temporary Service) Rules (1949), R. 5, proviso — Suspension of services of temporary Civil Servant — Termination of his services by one month's full pay and allowances in lieu of one month's notice — Employee would be entitled to claim his full pay and allowances for period of suspension — As in view of proviso to Rule 5, full pay and allowances were payable on basis that the employee was entitled to draw them immediately before termination of his services, the conclusion would be that his services were terminated on basis that the order of suspension stood revoked and was ineffective. (Para 8)

(C) Limitation Act (1908), Article 102 — Cause of action when accrues — Employee suspended on 19-11-1953 — Notice of termination of services given on 26-1-1958 — Suit for full wages filed on 10-9-1959 — Part of claim for period beyond three years preceding the filing of suit cannot be said to be

barred by time — As order of suspension stands revoked on date of order of termination of service, in view of Rule 53 Fundamental Rules, prior to that date claim of full wages would not accrue to the employee and he would have no cause of action.

(Paras 10, 11)
Cases Referred: Chronological Paras
(1967) AIR 1967 Madh Pra 231 (V 54) =
1967 Jab LJ 79, V. P. Gidroniya v. State of M. P. 8
(1966) AIR 1966 Punj 500 (V 53) =
ILR (1966) 2 Punj 907, Union of India v. Ram Nath Chitroy 11
(1964) AIR 1964 Mad 243 (V 51) =
1964-2 Mad LJ 78, General Manager, Southern Railway v. J. B. Purushottam 8
(1962) AIR 1962 SC 8 (V 49) = 1962-1
SCR 888, Madhar Laxman Vaikunthe v. State of Mysore 9
(1962) AIR 1962 Mad 376 (V 49) =
ILR (1962) Mad 375, Union of India v. T. L. Dakshinamurthy 8
(1947) AIR 1947 FC 23 (V 34) =
1947 FCR 89, Punjab Province v. Tara Chand 9
B. N. Kirpal, for Appellant; G. S. Vohra, for Respondent.

S. N. ANDLEY, J.:— One of the interesting questions that has been raised in this appeal is whether a temporary Government servant under suspension whose services are terminated by notice under Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, without any order of reinstatement, can claim full salary for the period of suspension?

2. The respondent filed the suit out of which this appeal arises for recovery of Rs. 8,950/- against the appellant. He was an Assistant in the office of the Chief Controller of Imports and Exports and worked as such till November 19, 1953, when he was suspended on account of his arrest in a criminal case. Nothing was done in the criminal case which appears to have been dropped. On January 21, 1958, the appellant issued a notice under Rule 5 of the said Rules to the respondent intimating that the services of the latter were no longer required and that the respondent would be paid one month's salary including allowances in lieu of notice. It is not disputed that one month's full pay and allowances in lieu of the notice were paid to the respondent. During the period of suspension from November 19, 1953, to January 21, 1958, when the said termination notice was issued, the respondent had been paid subsistence allowance in accordance with Fundamental Rule 53 which was undoubtedly much less than the full pay and allowances to which the respondent would have been entitled but for the suspension. In the suit that the respondent filed the validity of the order of suspension or the notice of termination of services was not challenged. Since the said notice was received on or about 26-1-1958,

the respondent claimed full salary and allowances for the period of suspension (19-11-1953 to 26-1-1958) amounting to Rs. 8,950/-. The case of the appellant was that the respondent was not entitled to full pay and allowances for the period of suspension and was entitled only to the subsistence allowance fixed, which was admittedly paid. Without prejudice to this contention, the appellant submitted that the amount claimed by the respondent was not correct and that if the respondent were held entitled to full pay and allowances for the suspension period, the amount due to him would be Rs. 8,511.51 Paise. The correctness of this amount of Rs. 8,511.51 Paise was not disputed by the respondent as is clear from the statement to that effect made in paragraph 8 of the replication filed by him.

3. It may here be stated that the appellant did not raise any objection in his written statement that any part of the respondent's claim was barred by limitation. Later, however, upon an application by the appellant, an additional issue was framed on the basis of which the trial Court has gone into the question of limitation. The issues framed in the suit were these:

"1. Whether the plaintiff is entitled to the full pay and allowances inclusive of the increments for the period 19-11-1953 to 26-2-1958?

2. Whether the plaintiff is entitled to any amounts as gratuity from the defendant?

2A. Whether the dates when the cause of action arose to the plaintiff as given in the plaint are correct? If not when the cause of action arose to the plaintiff and to what effect?

3. Relief."

The trial Court came to the conclusion that the respondent was entitled to full pay and allowances and increments for the suspension period, that the respondent was not entitled to his claim for gratuity as it had been given up and the suit was within limitation. In the result, the trial Court granted the respondent a decree for Rs. 8,511.51 Paise with proportionate costs.

4. It is contended on behalf of the appellant that no challenge has been made to the validity of the order of suspension and the respondent having admittedly been paid the subsistence allowance to which he was entitled, no claim for full pay, allowances or increments could be made by the respondent. On the other hand, it is contended on behalf of the respondent that the order of suspension must be taken to have been revoked by reason of the issue of the termination notice under Rule 5 of the said Rules and the further fact that the respondent was paid his full pay and allowances for the month of notice, which would not have been done if the order of suspension subsisted until the issue of the said notice.

5. The notice of termination is in these terms:—

"Under Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, the service of Shri G. S. Kadian is hereby terminated with effect from the date of service of this Order on him. He will be paid a sum equivalent to the amount of his pay plus allowances for one month, which is the period of notice due to him. The payment of allowances will, however, be subject to the conditions under which such allowances are otherwise admissible."

6. Sub-rule (1) of Fundamental Rule 54 provides inter alia, that when a Government servant who has been dismissed, removed, compulsorily retired or suspended is re-instated, the authority competent to order the re-instatement shall consider and make a specific order regarding the pay and allowances to be paid to the Government servant for the period of suspension and whether or not the period of suspension shall be treated as a period spent on duty. Admittedly no such order was made in the case of the respondent. As we read the rule, it appears to us that the order regarding pay and allowances has to be made by the competent authority at the time of re-instatement. Instead of doing that the appellant merely terminated the services of the respondent as aforesaid but while doing so the appellant paid to him the full pay and allowances for the month of notice which would have been paid to the respondent if he had not been under suspension. The proviso to Rule 5 of the said Rules says:—

"Provided that the service of any such Government servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances, at the same rates at which he was drawing them immediately before the termination of his services, for the period of the notice or, as the case may be, for the period by which such notice falls short of one month or any agreed longer period."

The payment to the respondent of his full pay and allowances for the month of notice can only lead to one inference, namely, that the respondent was entitled to draw full pay and allowances for the period immediately before the termination of his services and this could have been done only if the respondent was treated as not being under suspension. Therefore, there is a great deal of force in the contention on behalf of the respondent that such payment amounts to a revocation of the order of suspension. Any other conclusion would be unjust because in a given case a Government servant may be validly suspended under the Service Rules and kept under suspension, even as in this case, for years together and then issued a notice under Rule 5 of the said Rules with the result that even though no enquiry has been held against him, the punishment of lesser pay in the shape of subsistence allowance is inflicted upon him.

7. There is abundant authority for the proposition that if a Government servant is

suspended and his services are terminated without holding any enquiry against him, such termination would amount to a punishment which will attract the provisions of Article 311 of the Constitution.

8. In AIR 1967 Madh Pra 231, V. P. Gidroniya v. State of Madhya Pradesh a Division Bench of that Court observed that:

"where the appointing authority elects to dismiss or remove a temporary servant after holding a departmental enquiry and in accordance with Article 311 (2) of the Constitution, then, while the departmental enquiry is pending, neither the temporary Government servant nor the appointing authority can put an end to the services of the Government servant by passing an order in terms of the contract of employment or the relevant rule. The departmental enquiry has to be stopped first before the services of a temporary servant can be terminated in the exercise of the powers under the terms of the contract of employment or the relevant rule."

The principle laid down in this authority applies with greater force to a case where although there is an order of suspension not even a departmental enquiry is commenced against the Government servant concerned. In the case AIR 1962 Mad 376, Union of India v. T. L. Dakshinamurthy, the railway servant concerned was placed under suspension and his services were terminated without any enquiry into the charges and a month's salary was paid to him in lieu of notice. It was held that if the order was regarded only as terminating the services of the railway servant, the railway administration would not be entitled to withhold half the salary which it did by virtue of the order of suspension and that since the order of termination did not nullify the effect of the order of suspension in regard to the withholding of salary, it was by way of punishment and contravened Article 311 of the Constitution. In another case from the Madras High Court AIR 1964 Mad 243, General Manager, Southern Railway v. J. B. Purushottam, it was observed as under:—

"Before parting with this case, it appears to us that in similar cases, the railway administration will be well advised to make up their mind at a sufficiently early stage of the proceedings against a delinquent or unsatisfactory subordinate, regarding the proper way to deal with him, whether it would be by way of punishment, or by way of termination of his service under Rule 148. When they choose the first course, but in the middle of the proceedings thereunder, they change their mind and elect to follow the second course, it will be essential to see that no vestige is left of anything that can be construed as a punishment, and which can be substantially linked up with the order of termination of service under Rule 148 passed under the second course."

In the circumstances of this case, we cannot construe the notice of termination as one by way of punishment. It is implicit in this notice that the order of suspension must be deemed to have been revoked before the notice was issued. If it was not so, there was no reason why the appellant would have paid the respondent his full pay and allowances which, in view of the language of the proviso to Rule 5 of the said Rules, were payable on the basis that the respondent was entitled to draw them immediately before the termination of his services. The respondent could not draw full pay and allowances immediately before the termination of his services if the order of suspension was subsisting. The inevitable conclusion, therefore, is that the services of the respondent were terminated on the basis that the order of suspension stood revoked and was ineffective. If that is the correct conclusion, then the respondent would be entitled to claim his full pay and allowances for the period of suspension, which would admittedly be the sum of Rs. 8,541.51 Paisa.

9. Counsel for the appellant contended that even if the respondent was entitled to his full pay and allowances his claim in respect of the period beyond three years and two months immediately preceding the filing of the suit would be barred by time. In view of the decision of the Federal Court in Punjab Province v. Tara Chand, AIR 1947 FC 23, and the decision of the Supreme Court in Vaikunth's case AIR 1962 SC 8, it cannot now be disputed that a suit by a Government servant for salary is governed by Article 102 of the Indian Limitation Act, 1908, which provides a period of three years from the time when the wages accrue due. It is, therefore, contended that the respondent's claim would be within limitation only with respect to a period of three years and two months immediately preceding the institution of the suit.

10. Article 102 of the said Limitation Act undoubtedly provides that a suit for wages has to be filed within three years of the time when they accrue due. The question, therefore, is whether the respondent did have a cause of action for claiming his full pay and allowances for the period 19-11-1953 to 18-7-1956 in the present suit which he filed on September 10, 1959. On 19-11-1953 the respondent was placed under suspension and the validity of the order of suspension is not challenged. That being so, the only wages to which the respondent would be entitled by reason of Fundamental Rule 53 would be the subsistence allowance granted to him and if he were to file a suit for his full salary and allowances for any period between 19-11-1953 and 18-7-1956, the suit would have had to be dismissed on the ground that full wages had not accrued due and there was no cause of action for the suit. It was only on the date of the receipt of the notice of termination of services, that is, 26-1-1958 that the order of suspension

stood revoked and it would be only on and after 26-1-1958 that the respondent could be entitled to claim full pay and allowances for the period of suspension. Full wages for the period of suspension would, therefore, accrue to him by reason of Fundamental Rule 53 only when the order of suspension is revoked or could be deemed to have been revoked. Prior to that the wages would not accrue and he would have no cause of action.

11. Reliance has been placed by the appellant upon a Division Bench judgment of the Punjab High Court AIR 1960 Punj 500, *In re Union of India v. Ram Nath Chitroy*. In this case Ram Nath had been suspended on April 9, 1946 and he remained under suspension upto January 18, 1952. He was dismissed from service on January 19, 1952, after a departmental enquiry. He filed a suit challenging the order of his dismissal on March 5, 1957, and also claimed arrears of his pay from the date of his suspension till February 28, 1957, and future pay and allowances. In these circumstances, it was observed—

"Mr. Hardy then says that, so far as the suspension order is concerned, we should declare that it falls with the declaration of the dismissal order being held illegal, and consequently, the plaintiff should be allowed a decree for full salary and allowances during the period of suspension. The fate of the suspension order is not really linked with and is not dependant upon the decision as to validity or invalidity of the dismissal order. Validity of the suspension order must stand or fall on its own merits unaffected by the ultimate finding as to the legality or illegality of the dismissal order. The plaintiff, nowhere in the plaint, challenged the legality of the suspension order and it is hardly open to us to examine that question at this stage. The claim of the plaintiff was only based on the plea that the order of dismissal was illegal, and, therefore, he should be held entitled to his pay. In any case, the claim with respect to the suspension period would be barred by time on the construction of Article 102 of the Limitation Act, as discussed hereinabove. Mr. Hardy argues that the cause of action to challenge the suspension order would arise only after the dismissal is set aside. As I have said already, the fate of the suspension order has to be decided irrespective of the validity or invalidity of the dismissal order. It must, therefore, be held that the plaintiff's claim on this account is without merit."

It is clear from these observations that Ram Nath had not challenged the legality of the suspension order and the Court refused to examine it. The claim was based only on the plea that the order of dismissal was illegal and, therefore, he should be held entitled to his pay. There is an observation that the claim with respect to the suspension period would be barred by time on the construction of Article 102 of the Limitation Act and the argument that the cause of ac-

tion to challenge the suspension order would arise only after the dismissal order is set aside was repelled on the ground that the fate of the suspension order has to be decided irrespective of the validity or invalidity of the dismissal order. The question that falls for determination in the appeal before us did not arise in this form before the learned Judges of the Division Bench who decided that case, because in the case before us the order of suspension was not followed by any illegal or invalid order of dismissal. The observations have to be construed in their context and, in our opinion, those observations are not applicable to the case before us. We are of the view that the cause of action for claiming full pay and allowances did not accrue to the respondent during the period of his suspension and it accrued to him only when the order of suspension stood revoked. We, therefore, do not find any substance in the plea of the appellant that a part of the claim is barred by time.

12. As a result, this appeal is dismissed with costs,

Appeal dismissed.

AIR 1070 DELHI 188 (V 57 C 40)

(HIMACHAL BENCH)

H. R. KHANNA, C. J.

State of Punjab, Appellant v. Dev and others, Respondents.

Second Appeal No. 219 of 1967, D/- 12-6-1970.

(A) Civil P. C. [1008], Section 100 — Finding of fact — Interference with

The finding whether the accused had committed breach of his bond for good behaviour is one of fact and when supported by evidence it cannot be interfered with.

(Para 8)

(B) Criminal P. C. (1898), Section 401 (3)

— Remission of sentence on bond for good

behaviour with security — Breach of bond

— Government's opinion as to — It is not

binding in a civil suit for the bond amount

— Independent proof is necessary.

(Para 7)

K. N. Malhotra with S. Malhotra, for Appellant; P. N. Nag, for Respondents.

JUDGMENT:— This second appeal by the State of Punjab is directed against the judgment and decree of learned District Judge, Hoshiarpur, whereby he accepted the appeal of Dev and Duni Chand respondents, and reversed the decision of the trial Court granting a decree for recovery of Rs. 5,000/- in favour of the State of Punjab against Dev and Duni Chand.

2. The brief facts of the case are that Dev was convicted in a case under Section 302, Indian Penal Code, and was sentenced to undergo transportation for life. The order in this respect was made by the

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Sessions Judge on October 3, 1948. The appeal filed by Dev was dismissed by the High Court on December 10, 1949. After Dev had served a sentence of about six years, the Governor of the Punjab in exercise of the powers conferred by Section 401 of the Code of Criminal Procedure remitted the unexpired portion of his sentence and directed Dev to be released on his furnishing security in the sum of Rs. 5,000/- with one surety in the like amount for keeping good behaviour for the period equivalent to the unexpired portion of his sentence. It was also to be provided in the bond that Dev would surrender whenever called upon to do so during the above-mentioned period. Dev executed the requisite bond in the sum of Rs. 5,000/- on May 25, 1954. His brother Duni Chand stood surety for him. The bonds executed by the two brothers were accepted by Additional District Magistrate, Kangra, on May 31, 1954. Dev was therefore released from Central Jail, Ferozepur, on June 2, 1954. The Governor of the Punjab subsequently cancelled the remission of the unexpired portion of the sentence of Dev appellant on the ground that Dev had started his nefarious activities in violation of the terms of the bond. Report to that effect was made by the Superintendent of Police and the District Magistrate. Dev was thereafter re-arrested on July 11, 1957, and was put in jail to undergo the unexpired portion of his sentence. The Additional District Magistrate, Kangra, thereafter called upon Dev and Duni Chand to pay the amount of bonds. During the course of those proceedings the Additional District Magistrate came to the conclusion that the bonds were not covered by Section 514 of the Code of Criminal Procedure and that the only remedy for the State was to file a suit in a Civil Court. The State of Punjab thereupon filed the present suit for recovery of Rs. 5,000 against Dev and Duni Chand respondents.

3. The suit was resisted by the two defendants. They pleaded that the bonds were inadmissible in evidence; that the suit was barred by time and that the bonds were legally not enforceable. Pleas were further taken that Dev had remained of good behaviour and had not indulged in any nefarious activity. According to the defendant the persons, whose son had been murdered, had made false application to the police against Dev. According further to the defendant the forfeiture of the bonds was not justified.

4. Following issues were framed in the case:—

1. Whether the suit is barred by time?
2. Whether the document requires stamp?
3. Whether the document is not enforceable according to law?
4. Whether defendant No. 1 has not complied with the conditions of the bond?
5. In case issue No. 4 is proved, whether defendant No. 2 is not liable as surety to pay the amount in suit?

6. Relief?

5. The trial Court decided issues 1, 2 and 3 against the defendants. It was further held that Dev defendant has not complied with the conditions of the bond inasmuch as he had not kept good behaviour after his release. Decree for recovery of Rs. 5,000/- was awarded against the defendants. On appeal the learned District Judge considered the terms of the bonds and came to the conclusion that the undertaking under the bonds was that Dev would maintain good behaviour and that in case a demand to that effect was made he would present himself before the appropriate authority. It was only in case he made a default in this respect that he and his surety were to be liable to pay Rs. 5,000/-. The learned District Judge then went into the question as to whether Dev had committed breach of the terms of the bonds and came to the conclusion that there was no disinterested evidence to show that Dev had so conducted himself as to merit the penalty provided for in the bonds. The appeal was, accordingly, accepted and the suit of the Punjab State was dismissed.

6. I have heard Mr. Malhotra on behalf of the appellant and Mr. Nag on behalf of the respondents and am of the view that there is no merit in the appeal. Perusal of the judgment of the learned District Judge shows that he considered the evidence which had been adduced on the record and came to the conclusion that there was no disinterested evidence to prove that Dev had mis-conducted himself so as to justify the imposition of penalty. Issue No. 4, was consequently decided against the plaintiff-appellant. The finding of the learned District Judge in this respect was essentially one of fact and as it was based upon consideration of the evidence adduced in the case it cannot be interfered with in second appeal.

7. Mr. Malhotra on behalf of the appellant has referred to the provisions of Section 401 of the Code of Criminal Procedure which deals with the power of the appropriate Government to suspend or remit the sentence. Sub-section (3) of that Section, upon which reliance has been placed on behalf of the appellant, reads as under:—

“(3) If any condition on which a sentence has been suspended or remitted, is, in the opinion of the appropriate Government not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted, may, if at large, be arrested by any police officer without warrant and remanded to undergo the unexpired portion of the sentence.”

Perusal of the above sub-section goes to show that if the appropriate Government is of the opinion that any condition on which a sentence has been suspended or remitted is not fulfilled, the said Government may cancel the suspension or remission and thereupon the person in whose favour the sen-

tence has been suspended or remitted may, if at large, be arrested by any police officer and remanded to undergo the unexpired portion of the sentence. It would follow from the above provision that the only effect of the formation of the opinion by the Government referred to in sub-section (3) is that the person concerned can be arrested and remanded to undergo the unexpired portion of the sentence. It cannot be inferred from the above provision, as is contended on behalf of the appellant, that once the appropriate Government forms the opinion that there has been a breach of the condition on which a sentence was suspended or remitted its opinion is binding upon the Civil Court in a suit brought for the recovery of money on the ground of the alleged breach of the terms of the bond. The plaintiff appellant in the present case seeks to fasten a pecuniary liability on the defendant-respondents and it would, in my opinion, have to be proved independently in these proceedings that there has been a breach of the terms of the bonds which were executed by the defendants. The opinion of the State Government can be no substitute for a finding of the Civil Court regarding the alleged breach of terms of the bond in a suit for recovery of money on the basis of the said bond. As the learned District Judge has arrived at the finding that the plaintiff has failed to prove any such breach of the terms of the bonds, there is no escape from the conclusion that the plaintiff should be non-suited.

8. In the above view of the matter, it is not necessary to go into the question as to whether a pecuniary liability in the shape of payment of the amount of bonds can be fastened upon the respondents, even though Dev surrendered himself to custody. The appeal consequently fails and is dismissed but with no order as to costs.

Appeal dismissed.

AIR 1970 DELHI 190 (V 57 C 41)

S. RANGARAJAN, J.

Jaswantsinghji Ju Deo, Petitioner v. The Union of India through the Secretary, the Ministry of Home Affairs, New Delhi and others, Respondents.

Civil Writ No. 486-D of 1966, D/- 16-1-1970.

(A) Constitution of India, Article 141 — Law declared by Supreme Court — Extent of its binding effect.

A provision in a statute declared to be valid by Supreme Court cannot again be challenged even on a ground on which Supreme Court has not decided its validity.

(Para 4)

(B) Constitution of India, Article 31 — Right to property — Section 87B of Civil P. C. (1908) does not violate Article 31 as it

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does not deprive any person of his property — (Civil P. C. (1908), Sec. 87B) (Obiter).

(Para 3)

(C) Civil P. C. (1908), Section 87B — Consent of Central Government to sue former Ruler of Indian State — Refusal to grant consent — It is not justiciable it being for Central Government to decide whether to grant or refuse consent.

(Para 13)

(D) Civil P. C. (1908), Section 87B — Consent of Central Government to sue former Ruler of Indian State — Refusal or grant of consent is an act of State — Refusal is not subject to judicial review.

(Paras 23, 25)

Cases Referred: Chronological Paras

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Deb Verman v. Union of India 3, 13

(1962) AIR 1962 SC 73 (V 49) =

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Nawab of Carnatic v. East India

Co. 21A

A. N. Goel, for Petitioner; S.

for Respondents. (3)

ORDER: The petitioner, the son, through the second wife, of the late Maharaja, Ruler of Datia (in Bundelkhand) has filed this writ petition challenging (by way of amendment, which was allowed by my order dated 28th April, 1969) the refusal of the Central Government to give permission to sue the present Ruler (being son of the late Maharaja by his first wife) on the basis of a will said to have been executed by the late Maharaja in the year 1938 and a codicil dated 23rd June, 1938; copies of the will and codicil have been made Annexures A and B to the petition. The Maharaja died in Bombay on 3rd September, 1965. The petitioner stated that he learnt of the will and codicil from the present Maharaja of Dharangadhra, the same having been deposited with the father of Maharaja of Dharangadhra. As per the petitioner's request Her Highness the Maharani Sahiba of Dharangadhra sent the copies of the will and codicil to the petitioner along with a covering letter, dated the 2nd July, 1963.

2. The petitioner had applied for permission, in terms of Section 87-B of the Code of Civil Procedure, to the Central Government to sue the present Ruler. The petitioner however, filed a suit on account of the fact that the same was getting time barred and also filed the present writ petition on the 2nd July, 1966, as the writ petition which was originally filed merely sought a declaration, that Section 87-B of the Code of Civil Procedure was unconstitutional, and a direction that the Central Government may be compelled to grant the permission sought for if the provision was held to be valid. Since, even before the filing of the writ petition, the Central Government had refused permission and the petitioner had not known about it, he filed a petition to amend the writ petition seeking to add averments concerning the refusal of permission to sue the present Ruler.

3. The order of refusal to give permission to the petitioner to sue the present Ruler of Datia, which did not contain any reason, was sought to be supported in the return filed by the Union of India on the ground that the Government had an absolute power to grant or withhold consent to sue the present Ruler (of a former Indian State) in a Court of law and that the same was not justiciable. Regarding the contention that Section 87-B of the Code of Civil Procedure offends Articles 14, 19 (1) (f) and 31 of the Constitution of India, it is seen from the decision of the Supreme Court in *Mohanlal Jain v. Sawai Man Singhji*, AIR 1962 SC 73 that S. 87-B was held not to offend Art. 14 of the Constitution. In a later case reported in *Narottam Kishore Deb Varman v. Union of India*, AIR 1964 SC 1590 His Lordship the Chief Justice Gajendragadkar speaking for the Supreme Court referred to *Mohan Lal Jain*, AIR 1962 SC 73 as having correctly repelled the challenge against the said section under Article 14 and did not allow the same contention to be raised once again. The further attack made on the validity of Section 87-B as contravening Art. 19 (1) (f) of the Constitution was also considered and the constitutionality of Section 87-B was upheld. In view of these decisions, *Shri Goyal*, learned Counsel for the petitioner, did not seek to urge that Section 87 of the Code of Civil Procedure was invalid as offending Articles 14 and 19 (1) (f) of the Constitution. He, however, urged that the said provisions offended Article 31 of the Constitution. Article 31 (1) only provides that no person shall be deprived of his property save by authority of law. Section 87-B does not have the effect, plainly, of depriving any person of his property. Hence the reference to Article, 31 (1) is inappropriate.

4. Even apart from this consideration, it is not permissible for the appellant to again attack the constitutionality of Section 87-B before this Court, the same having been upheld, as valid law, by the Supreme Court. According to Article 141 of the Con-

stitution, the law declared by the Supreme Court shall be binding on all courts within the territory of India. The validity of Section 87-B having been upheld by the Supreme Court it is a valid piece of law which is binding on all the courts in the country.

5. The next contention of the petitioner is that the order of the Central Government declining to give permission to the petitioner to sue the present Ruler (of the former Indian State of Datia) has to be struck down as being arbitrary and bad. Section 87-B (1) makes the provisions of Section 85 and of sub-sections (1) to (3) of Section 86 applicable to the Rulers of any former Indian State. We are not concerned with Sec. 85 of the Code of Civil Procedure. Sections 86 (1) and (3) are important and may be set out:—

“86 (1) — No Ruler of a foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government:

Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid a Ruler from whom he holds or claims to hold the property.

(2)
(3) No Ruler of a foreign State shall be arrested under this Code, and except with the consent of the Central Government certified in writing by a Secretary to that Government, no decree shall be executed against the property of any such Ruler.”

6. According to Section 86 (1) read with Section 87-B the present Ruler (of the former Indian State of Datia) could not be sued except with the consent of the Central Government.

7. I have exercised considerably on this question because it seems *prima facie* that the petitioner is not given an opportunity to establish his claim under the will by suing the present Ruler of Datia on account of the Government's refusal or permission to sue the present Ruler of Datia. His Lordship the Chief Justice Gajendragadkar while explaining in *Narottam Kishore*, AIR 1964 SC 1590 the object of Section 87-B of the Code of Civil Procedure observed that the Central Government should normally accord consent to the litigants who want to file suits against Rulers of former Indian States whenever it appeared that the claim disclosed justifiable and triable issues between them and that it was not the function of the Central Government to attempt to adjudicate the merits of the claim intended to be made by the litigants in the proposed suits which was the function of the Civil Courts of competent jurisdiction.

8. In the affidavit filed by *Shri M. S. Sadasivan*, Deputy Secretary to the Government of India, Ministry of Home Affairs, reference was made to the covenant of March 1948 for the formation of the United States of Vindhya Pradesh entered into by the

Rulers of certain States in Bundelkhand and Baghelkhand. According to Article 11 of the said Covenant the Ruler of each covenanting State was entitled to the full ownership, use and enjoyment of all private properties (as distinct from State properties) belonging to him on the date of his making over the administration of that State to the Raj Pramuks. This was emphasised in the Agreement of 26th December, 1949, between the Government of India on the one side and the Rulers of the States forming the United State of Vindhya Pradesh on the other. According to Article 6 of the same agreement the Government of India guaranteed the succession, according to law and custom, to the gaddi of each Covenanting State, and to the personal rights, privileges, dignities and titles of the Rulers thereof. After referring to these and other provisions in the various covenants a plea was taken in the return that under Article 363 (1) of the Constitution neither the covenant nor any dispute or obligation arising therefrom was justiciable. This was further amplified by stating that the decision of the Government of India in withholding the consent was an act of State and hence not justiciable.

9. Sections 86, 87, 87-A and 87-B of the Code of Civil Procedure were placed on the Statute Book by Act 2 of 1951. The object of introducing the said provisions was explained in the following manner (vide page 47 of the Current Indian Statutes 1951) —

"In view of the constitutional absorption of the former Indian States in the polity of the country, it has become necessary to recast the fascicle of five sections relating to 'suits by aliens and by or against foreign Rulers and Rulers of Part B States' contained in Part IV of the Code. Sections 83 to 87 till recently applied to all those Rulers of Indian States who exercised any sovereign powers within their territories, in exactly the same way as they applied to Rulers of independent foreign States. Although their constitutional position is now very different, it is necessary to implement the assurances given to the Rulers of the integrated and merged States that they will continue to be entitled to all the personal privileges enjoyed by them, whether within or outside the territories of their respective States before the 15th August, 1947. It is accordingly proposed in Clause 12 of the Bill that Sections 83 to 87 of the Code should be replaced by a revised set of provisions applicable to Rulers, Ambassadors and Envoys of foreign States and to certain members of their staff who are entitled to these diplomatic privileges and immunities, followed by a special provision on similar lines applicable to Rulers of the former Indian States."

10. It is seen that there was a similar amendment with reference to former Indian Rulers so far as Code of the Criminal Procedure was concerned which was made by Act 1 of 1951. The Statement of Objects

and Reasons for introducing Section 197A in the Code of Criminal Procedure, providing that no Court shall take cognizance of any offence alleged to have been committed by the Rulers of former Indian State except with the previous sanction of the Central Government, has been printed at page 41 of the same Volume. This provision is stated to have been introduced for the reason mentioned below:—

"The opportunity has been taken to insert in the Code a provision designed to protect the Rulers of Indian States from vexatious criminal proceedings. Before the 15th August, 1947, these Rulers enjoyed, even outside their States, complete immunity from criminal proceedings in any Court on principles of international comity. Covenants and agreements executed by them since that date guarantee to them all the personal privileges which were enjoyed by them immediately before the 15th August, 1947 and this guarantee has been incorporated in Article 362 of the Constitution. It is proposed in Cl. 11 of the Bill to make a statutory provision in the Code to the effect that no Court shall take cognizance of any offence alleged to have been committed by a Ruler except with the previous sanction of the Central Government. While giving the Government of India full discretion to let the law of the land have its course in appropriate cases, this provision will enable them to safeguard the Rulers' privileges so far as possible."

11. It will thus be seen that not only with reference to civil actions but also in the matter of criminal prosecutions the above safeguard was considered necessary to implement the assurances given by the Rulers at the time of integration and merger of States, that they will among other things be entitled to the personal privileges enjoyed by them.

12. Hidayatullah, J. (as his Lordship then was) while upholding the validity of Section 87B, by repelling the attack made under Article 14, referred to the historical background which rendered the ex-Rulers a class by themselves and observed as follows:

"A law made as a result of these considerations must be treated as based on a proper classification of such Rulers, who had signed the agreement of the character described above. It is based upon a distinction which can be described as real and substantial, and it bears a just relation to the object sought to be attained." Dealing with the argument that "immunities", an expression employed in other Articles of the Constitution, were different from privileges, his Lordship further observed as follows:—

"Immunity from civil action may be described also as a privilege, because the word 'privilege' is sufficiently wide to include an immunity. The Constitution was not limited to the choice of any particular words, so long as the intention was clearly expressed. In our opinion, the words 'personal

ights and privileges" are sufficiently comprehensive to embrace an immunity of this character." Vide Mohan Lal Jain, AIR 1962 SC 73.

13. In view of the above specific observation and the objects and Reasons of the enactment, which can be taken into account or the limited purpose of understanding the historical background and the purpose for which it was made, the consent of the Central Government to suing or prosecuting an Indian Ruler seems to be on a par with the immunities and privileges extended to foreign Rulers, Ambassadors and Envoys; this is a fair inference from Section 87B being an extension of the same immunity given to the Rulers of any former Indian State that the latter are treated at par with foreign Rulers, Ambassadors and Envoys. To rebut this inference Mr. Goel for the petitioners urged that the decision of the Supreme Court in *Narottam Kishore*, AIR 1964 SC 1590 construing the grant of permission to sue the former Indian Ruler only for a portion of the claim put forward against him but disallowing his claim to sue regarding certain other portions upheld the principles of justifiability of refusal to grant permission by the Central Government in such cases. I am afraid that this would not be a correct understanding of the principle behind the said decision, which was only concerned with pointing out that the Central Government having granted permission to sue the former Indian Ruler in respect of the claim put forward against him went wrong in limiting the said permission to a portion of the claim since it amounted to an adjudication that a portion of the claim against the said former Ruler alone was good, a matter which fell within the jurisdiction of the Court and not of the Central Government. It is appropriate in this context to refer to the significant passage in paragraph 12 of the said judgment to the following effect:—

"In the present proceedings, it does appear prima facie, that the petitioners have a genuine grievance against the Central Government's refusal to accord sanction to them to get a judicial decision on the dispute between them and second respondent. That naturally is a matter for the Central Government to consider."

(Emphasis (here in ' ') added).

14. Shri Goel next referred to the decision of Shah J. in *Jaswant Singhji Fatehsinghji Thakore v. Kcsuba Harisingh Dipsinhji*, AIR 1955 Bom 108, where the question arose as to whether an application under Section 488 of the Code of Criminal Procedure for maintenance against the former Indian Ruler required the sanction of the Central Government under Sec. 197A (as amended in 1951) of the Code of Criminal Procedure. It was held that since an application for maintenance under Section 488 of the Code of Criminal Procedure was not a case of charging the respondent in that

case with the commission of any offence, section 197A did not bar the jurisdiction of the trial Court. That is not the case here. The question of any immunity apart from what had been conferred by Section 197A, was not raised.

15. It is a civil action which is sought to be brought against the former Indian Ruler and Section 87B of the Code of Civil Procedure (as amended in 1951) does apply to such a situation. The fact that Sec. 87B does apply to the instant case is no longer in controversy before me once it is held to be *intra vires*. What is stated is that the refusal of the Central Government to give the requisite consent to sue the former Indian Ruler is justifiable, which is different.

16. Apart from the above aspects, the return has also sought to justify the refusal of the Central Government by reference to Article 363 Clause (1) of the Constitution. The said plea has been couched in the affidavit of Shri Sadasivan as follows:—

"The full ownership, use and enjoyment of his private properties by a Ruler is guaranteed by the Covenant mentioned in paragraph A above which the Ruler of Datia has signed. This Covenant has been concurred in and guaranteed by the Government of India who have approved of the private properties of the Ruler in pursuance of Article XI thereof. Under the provisions of Article 363 (1) of the Constitution of India neither the Covenant, nor any dispute or obligation arising therefrom, is justiciable."

17. Article 363 (1) of the Constitution reads as follows:—

"Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Government was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument."

18. Having regard to the fact that the claim put forward against the former Indian Ruler is one arising under the will of late Maharaja comprising his private properties it does not appear correct to say that such a dispute comes within the ambit of Article 363, Clause (1).

19. It was further contended in paragraph 6 of the return as follows:—

"With reference to para 6 of the petition, I say that under Article VI, of the Merger Agreement quoted in Para D above, the

Government of India have guaranteed personal rights, privileges, etc. to the Ruler of Datia. Article 362 of the Constitution provides that in the exercise of the power of Parliament or of any legislature of any State to make laws or in the exercise of the executive power the Union of a State, duo regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in Clause (1) of Article 291 as it stood then, with regard to personal rights, privileges and dignities of a Ruler of an Indian State. One of the privileges under the agreements and covenants is that of extra territoriality and exemption from civil jurisdiction except with the sanction of the Central Government and that is how Section 87B came to be enacted. The provisions of Section 87B are only supplemental to and do not override the provisions of Articles 291 and 362 of the Constitution of India."

20. This contention has been adverted to in some measure already; it also bears upon the privileges which have been guaranteed to the former Indian Rulers under the Agreements and Covenants. The said privilege is said to be one of extra territoriality and exemptions from civil jurisdiction except with the sanction of the Central Government. In the very nature of things the only possible attack on section 87B of the Code of Civil Procedure which gives effect to and guarantees the assurances regarding the above privilege etc. was on the ground that it differentiated between different classes of Indian citizens, the former Indian Rulers also having since become Indian citizens; but this argument of inequality having been rejected there can be no further attack upon an order passed by the Central Government refusing to give permission to sue a Ruler of a former Indian State in a court of law.

21. The further question is whether this is an act of State simpliciter or not. An act of State is a well-known legal term of constitutional law which has been treated by leading text-writers on the subject. The following passage from Wade and Phillips Constitutional Law (Seventh Edition by E. C. S. Wade and A. W. Bradley — Low Priced Textbook pages 263-64) explains the expression "act of State" in the wide sense:—

"Those acts of the Crown which are done under the prerogative in the sphere of foreign affairs are known as acts of State. Instances of acts of State are the declaration of war, the making of peace and the recognition of foreign Governments. The term, 'act of State', means 'an act of the Executive as a matter of policy performed in the course of its relations with another State, including its relations with the subjects of that State, unless they are temporarily within the allegiance of the Crown. Such an act is not justiciable by the Courts. In Republic of Italy v. Hambros Bank Ltd., 1950-1 All ER 430 the Court refused to adjudicate on,

or to take cognizance of a financial agreement between Italy and the United Kingdom. It gives rise neither to contractual rights nor claims in tort. The term 'act of State' has been defined judicially as: 'an exercise of sovereign power' which 'cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and whatever it be, municipal courts must accept it, as it is, without question' (Per Fletcher Moulton, L. J. in *Salaman v. Secretary of State for India*, (1906) 1 KB 613 at p. 639. Such matters as fall properly to be determined by the Crown as acts of State in this sense are not subject to the jurisdiction of the municipal Courts, and rights alleged to be acquired thereunder, seem even by British subjects, cannot be enforced by such courts. Acts resulting from a treaty of cession or by reason of annexation of territory fall into this class; such acts may confer a title to property on the Crown which must be accepted by municipal law.

In *West Rand Central Gold Mining Co. v. King*, (1905) 2 KB 391 at p. 409, a British corporation failed to establish by petition of right the right to enforce against the Crown a claim for a wrong inflicted upon it by the Government of a State (the former South African Republic) which had been extinguished by acts upon the part of the Crown, namely, conquest and annexation. No interference with the rights of British subjects enforceable in British Courts was thereby involved, and it lay within the discretion of the Crown to determine which, if any, of the liabilities of the extinguished State it was prepared to assume.

In *Nabob of the Carnatic v. East India Co.*, (1792) 2 Ves Jun 56 — there was dismissed a bill in equity founded upon treaties between the Nabob and the Company; the treaties were political and made between a foreign power and subjects of the Crown acting as an independent State under charter and statutory powers; they were therefore not subject to the jurisdiction of the Courts."

21A. In the *West Rand Central Gold Mining Co.*, 1905-2 KB 391 the Court observed as follows:—

"Upon this part of the case there is a series of authorities from 1793 down to the present time holding that matters which fall properly to be determined by the Crown by treaty or as an act of State are not subject to the jurisdiction of the municipal Courts, and that rights supposed to be acquired thereunder cannot be enforced by such Courts. It is quite unnecessary to refer in detail to them all. They extend from 1792-2 Ves Jun 56 down to *Cook v. Spring*. As a great deal of argument was addressed to us upon the latter case, we think it right to say that, although it was contended that the actual decision was not in harmony with the views of the American Courts upon analogous matters, no authority was cited, or, as far as we know, exists, which throws any

doubt upon that part of the judgment which is in the following words: 'The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State and treating Sigcar as an independent Sovereign, which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal Courts administer.' It is no answer to say that by the ordinary principles of international law, private property is respected by the Sovereign which accepts the cession and assumes the duties and legal obligations of the former Sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that, according to the well-understood rules of international law, a change of sovereignty by cession ought to affect private property, but no municipal tribunal has authority to enforce such an obligation."

22. In 1792-2 Ves Jun 56 the Nabob had brought an action against the East India Company praying for an accounting, based upon a contract between the company and the Nabob. Counsel for the Company contended that the transactions covered the period of more than 50 years and that the evidence was more than 3000 miles away from the city of the trial. The counsel for the Nabob urged that the difficulty of accounting should not prevent the Court from ordering it. The Court declined to exercise its jurisdiction in spite of the fact that the East India Company had often been sued in the English Courts. The ground of the decision was that the transaction was of such a nature that it involved matters which the Court thought it expedient to treat as beyond the scope of its review. The accounts were of the type that obtained between sovereigns and not between contracting Corporations. The Nabob was a sovereign 3000 miles away from the Tribunal. The contract itself was said to contain a provision which was diplomatic in nature..

23. Whether the above decision has to be understood as a refusal on the part of the Court to exercise jurisdiction on the ground of the question raised being political or not it was undoubtedly based on the nature of the relationship and obligations between two sovereign bodies. Before the merger of the princely States with the Central Government the princely States, on the one side, and the Government of India, on the other, constituted two sovereign bodies. It was in pursuance of the obligations undertaken and the assurances given that Section 87-B of the Code of Civil Procedure and Section 197-A of the Code of Criminal Procedure were placed on the Statute Book.

24. In the Secy. of State v. Kamachee Boye Sahaba, (1859) 13 Moo P. C. 22 it

was held that the transactions of independent foreign States inter se are acts of States with which a Municipal Court cannot interfere so that the dealings of the Government of India with an Indian Prince could not be made the subject of inquiry in a Municipal Court.

25. This is therefore, not a suitable area for judicial review in any view of the matter.

26. I am not dealing with the further question which was raised during the arguments that even on the ground that the question raised is a "political question" and that the courts should, even as a matter of judicial self-limitation, refuse to adjudicate upon the refusal, since such a plea has not been taken in the return.

27. In the result the petition fails and is dismissed, but in the circumstances without costs,

Petition dismissed.

AIR 1970 DELHI 195 (V 57 C 42)

HARDAYAL HARDY AND T. V. R.
TATACHARI, JJ.

M. K. Mathulla, Petitioner v. N. N. Wanchop and another, Respondents,

Civil Writ No. 895 of 1968, D/- 21-1-1970.

(A) Constitution of India, Article 19 (1) (g) — Right to practise any profession etc. — Ban by Government on employment of citizen — Although full-fledged inquiry under Article 311 or any service rules not necessary, opportunity must be given to him to know evidence against him and to explain it. (Para 32)

(B) Constitution of India, Articles 19 (1) (g) and 226 — Right to practise any profession etc. — Ban on — Circular letter issued by Government to all States reflecting on citizen's conduct indicating that such person should not be employed — No privilege on ground of affairs of State — Government's action can be challenged in writ petition. (Para 37)

(C) Constitution of India, Articles 19 (1) (g), 14 — Right of citizen to practise any profession etc. — Extent of — State can restrict such right — Restrictions must be consistent with Article 14.

Although the right under Art. 19 (1) (g) to carry on avocation does not mean to exact work or to force oneself on another for employment and the right of a citizen is subject to such reasonable restrictions as may be imposed by the State in the interest of the general public, yet, the right includes the right of a citizen to remain open or to offer himself for employment. It is open to the State to say that it shall not employ dishonest men and to say who and by what means the question of dishonesty should be decided. But such provision must be made

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by the Government consistently with the requirements of Article 14 and before a citizen is condemned or debarred from employment, he must be heard. AIR 1965 Ker 19 and AIR 1969 Ker 81 (FB), Distinguished; 1969 Delhi LT 568, Applied. (Para 38)

(D) Constitution of India, Article 16 — Equality of opportunity in matters of public employment — Citizen cannot be debarred from being considered for employment by an ex parte finding that he is dishonest. (Para 38)

Cases Referred: Chronological Paras

(1969) AIR 1969 NSC 108 (V 56) = 1969-2 SCC 262, A. K. Kraipak v. Union of India 25

(1969) AIR 1969 Ker 81 (V 56) = ILR (1968) 2 Ker 1 (FB), V. Punnan Thomas v. State of Kerala 40

(1969) 1969 Delhi LT 568 = 1969 Pun LR (D) 334, Mahavir Hat Manufacturing Co. v. Union of India 30

(1968) Civil Writ Petn. No. 477 of 1968, D/- 7-10-1968 (Delhi), K. G. Khosala and Co. v. Union of India 40

(1967) AIR 1967 SC 1269 (V 54) = 1967-2 SCR 625, State of Orissa v. Miss Binapani Dei 25

(1965) AIR 1965 Ker 19 (V 52), K. M. Sugatha Prasad v. State of Kerala 39

(1961) AIR 1961 SC 493 (V 48) = 1961-2 SCR 371, State of Punjab v. Sodhi Sukhder Singh 30

(1925) 1925-2 KB 391 = 134 LT 280, M. Issac and Sons v. Cook 30

C. K. Daphtary with R. K. P. Shankar Das and Mr. H. K. Puri, for Petitioner; Mr. C. B. Aggarwala with Mr. Aruna Madan and A. D. Chaudhury, for Respondents.

HARDY, J.: The petitioner Mr. M. K. Mathulla is a Chartered Accountant. Before he was selected by the Union Public Service Commission in 1951 for the post of Controller of Accounts, Fertilizers Project, Sindri, he had held office for 12 years as Assistant and Deputy Controller of Accounts and ultimately Controller of Accounts in Tata Iron and Steel Company Jamshedpur and from 1948 to 1951 as Chief Executive Officer in Air India. After working for about three years in Sindri Fertilizers and Chemicals Limited his services were taken on loan by Government of India in the then Ministry of Production where he was first appointed as Officer on special duty and later made ex-officio Joint Secretary.

2. From 1st March, 1956 he was appointed Managing Director of Hindustan Machine Tools Limited Bangalore where he claims to have made a tremendous success of his job by transferring an undertaking that had shown a loss of Rs. 60 lakhs into a flourishing concern which began to make profits rising to Rs. 3 crores per annum and paid a dividend of 16 per cent per annum for 5 years in succession. He also claims that by

imaginative planning, reorganisation and utilisation of full production capacity of the undertaking he succeeded in launching on a programme of expansion whereby four more machine tool factories, one in Bangalore, the other in Pinjore (Punjab), the third in Kalamassery (Kerala) and the fourth in Hyderabad were established, two of these factories are claimed to have been built from internal resources of the parent undertaking without any additional investment of capital by the Government or external resources.

3. The petitioner also alleges that his services in the development and profitable expansion of machine tools industry and precision instruments industry won him the appreciation of Shri Jawaharlal Nehru and the then Minister of Commerce and Industry late Shri Lal Bahadur Shastri and Shri Manubhai Shah. In recognition of his distinguished services to the country he was awarded Padma Shri in 1959 and the Hindustan Machine Tools (HMT) won the Presidential Award for the best managed public undertaking.

4. He states that as he would have ordinarily retired on completing the age of 55 in the year 1962, he requested the Government in 1961 to allow him to return to the private sector and start a small tool factory of his own with foreign collaboration. He therefore put up a scheme for collaboration with a 100% State-owned West German concern, Messrs Fritz Werner, for this purpose.

5. A letter dated 7-4-1961 addressed to the petitioner by the then Minister of Industries Shri Manubhai Shah shows that in view of the petitioner's direct connection with HMT and the likelihood of his continuing in that position for many more years, the Minister did not favour the petitioner's association with any such enterprise and therefore declined to accommodate him. It however appears that while disavowing the petitioner's direct association with such a venture, the Minister made what would appear to be a most impolitic suggestion that the petitioner might ask any of his friends or some other persons known to him to take up such a venture with Messrs. Fritz Werner of Germany.

6. An application was therefore made for grant of a licence to establish a new industrial undertaking under Section 11 of the Industries Act, 1951 for manufacturing machine tools by Fritz Werner in partnership with the petitioner's brother, Shri K. M. Thomas at Bangalore. A letter dated June 8, 1961, addressed by the petitioner to Shri D. Sandilya, Joint Secretary to the Government of India in the Ministry of Commerce and Industry shows that the application was pursued by the petitioner who made a special reference to the suggestion made by the Hon'ble Minister while at the same time disclosing that the Indian partner of the foreign collaborators was the petitioner's own brother.

own brother.

7. With effect from 10th June, 1961 the petitioner also became Chairman of the Board of Directors of HMT in addition to his duties as Managing Directors of the company. This appointment he continued to hold till 1st of March, 1964 when he was appointed a Director and non-executive Chairman to preside over the meetings of the Board of Directors of the company until further orders.

8. The private venture which was styled as Bharat Fritz Werner Private Limited had meanwhile been set up and commenced production sometime after the petitioner handed over charge as Managing Director of HMT to his successor. At the end of 1964, the petitioner severed his connection with HMT even as its non-executive Chairman.

9. The petitioner alleges that in 1954-55 during negotiations with the Russian delegation for establishment of a steel plant at Bhilai, he as a Joint Secretary in the Ministry of Production advocated that a capacity of one million tons was more viable. This ran counter to the views of Mr. T. T. Krishnamachari who was for restricting the capacity of the Bhilai plant to 1/2 million tons on the ground that there was no demand in the country for a million ton plant. Almost three weeks thereafter the Ministry of Commerce and Industry with the backing of its Minister Mr. T. T. Krishnamachari recommended to the Cabinet for acceptance a proposal from Tatas to expand their steel capacity from one million tons to two million tons. The petitioner prepared a note in which he argued that the country would benefit financially and would save foreign exchange if instead of enhancing the capacity of the private sector plant of Tatas the capacity of the proposed public sector undertaking was increased. This further antagonised Mr. T. T. Krishnamachari.

10. The petitioner further alleges that besides Mr. T. T. Krishnamachari certain other officers of the Indian Civil Service Cadre were also opposed to any outsider occupying a high post in the industrial sphere of the Government which they wanted to retain for men of their cadre.

11. The petitioner states that after his release from Government he assumed chairmanship of Bharat Fritz Werner which did extremely well and was able to organize itself as a very efficient engineering unit within a short time. But in 1965 reports reached him that some sort of investigation was being conducted by the Special Police Establishment, Company Law Department and the Ministry of Finance (Directorate of Foreign Exchange) regarding him. Mr. T. T. Krishnamachari was then Finance Minister, Government of India. In the circumstances, the petitioner and his family felt constrained to sell their interest to Birla Group in June, 1966.

12. In February, 1967, the petitioner came to know that in December, 1966 Shri

N. N. Wanchoo, Secretary to the Government of India, Ministry of Industrial Development and Company Affairs, who has been impleaded in the petition as respondent No. 1, had issued a confidential circular letter to all the Secretaries and Departmental heads of Central and State Governments in which it was alleged that the petitioner had shown special favour to Bharat Fritz Werner Private Limited as Chairman of HMT and although there was not enough evidence to take legal action against the petitioner his conduct was viewed as one not befitting his office and that it had been decided that he should not be nominated to any Board in which the Government had any interest.

13. In December, 1967, there were also questions in Parliament to the effect that investigations had revealed that the petitioner had shown some favours to Messrs Bharat Fritz Werner Private Limited Bangalore in reply to which Mr. Fakhruddin Ali Ahmed, Minister for Industrial Development and Company Affairs, stated that although the evidence was not sufficient to sustain any charge against the petitioner administrative action had nevertheless been taken.

14. The petitioner thereupon addressed a representation and also had an interview with the Minister concerned wherein he pleaded for withdrawal of the offending letter. During the course of the interview he was informed that action had been taken by the Central Vigilance Commission and that if the petitioner made any representation the same would be forwarded to the Commission and the latter would also be asked to give him a hearing. The Minister however expressed his inability to withdraw the circular letter.

15. On 22nd November, 1968 the petitioner moved this Court by filing a petition under Article 226 of the Constitution challenging the legality of the Government's action in issuing the circular letter of which a copy was annexed to the petition as Annexure D.

16. The main grounds on which Government's action has been assailed in the petition are that by issuing the impugned circular letter the Government has imposed a blanket ban on his nomination and appointment to any office of profit under the Central and State Government or in any of the public undertakings of these Governments, that this amounts to infringement of his fundamental rights under Articles 14, 16, 19 and 21 of the Constitution, that at no stage before action was taken against him was he given any opportunity of hearing to show cause against the proposed action and that the action is mala fide and is the outcome of malice and ill-will which Mr. T. T. Krishnamachari had against him and the hostility of some of the members of the Indian Civil Service, notably Mr. N. Subra-

maniam, I. C. S. Addl. Secretary in the then department of Heavy Engineering.

17. The petitioner has also averred that although the circular letter was marked "Confidential" its contents were made known far and wide and led to his giving up his claim for over Rupees six lakhs against Birlas, apart from seriously undermining his personal and professional reputation without any lawful excuse.

18. In the reply affidavit filed by Shri N. N. Wanchoo some of the tall claims made by the petitioner about his performance and activities have been characterised as highly exaggerated and there is an attempt to belittle his importance but it cannot be denied that even after making due allowance for exaggeration, by and large the petitioner's performance as Managing Director of HMT is deserving of praise. The allegations of malice and ill-will on the part of Mr. T. T. Krishnamachari and hostility on the part of I. C. S. officers of the Government have however been denied and it is asserted that action was taken against the petitioner as a result of inquiries made by the Central Bureau of Investigation in consultation with the Central Vigilance Commission in accordance with the procedure outlined in the relevant resolution of the Ministry of Home Affairs, Government of India, relating to the scheme of Central Vigilance Commission. The affidavit also mentions briefly certain instances of favours which the petitioner was alleged to have shown to the private company and had led to the administrative action to which exception has been taken by him. The petitioner's allegation that no opportunity of showing cause or of hearing was given to him before the impugned letter was issued, has not been controverted. On the other hand, a straight defence that no such notice or opportunity was necessary has been taken. It is pleaded that association of members with Boards of Government undertakings is a prerogative of the President and Government has a right to include or exclude any individual for this purpose. The petitioner has no such right, fundamental or legal, to be nominated to any such Board. It is further pleaded that the action taken by the Government being an administrative act is not subject to challenge in a petition under Article 226 of the Constitution and it is contended that this Court will not go into the correctness or incorrectness of facts leading to the issue of the impugned letter and reasons for issue of the same and therefore the petition challenging the decision of the Government to issue the circular letter is not maintainable. The correctness of the copy of the impugned circular letter has also been denied and it is stated that whosoever placed the said copy in the hands of the petitioner or by whatsoever means the petitioner had managed to procure the same its possession was surrepti-

tious and unauthorised. After the respondent's affidavit in reply to the petition was filed the petitioner filed a rejoinder-affidavit controverting the facts and contentions raised in the respondent's affidavit with special emphasis on the allegations of favouritism made against him. He also moved an application for summoning and inspection of the records containing material on which the allegations of favouritism and the inquiry made by the C. B. I. as made in the counter-affidavit filed by respondent No. 1 were based. The application was however opposed by the respondents in respect of the documents relating to the preliminary and final reports of the Central Bureau of Investigation on the ground that they related to the affairs of the State. A claim for privilege was also made in respect of those and certain other documents.

19. No separate orders were however passed by the Bench hearing that application and it was directed that the same should be listed for hearing along with the main petition. Meanwhile the petitioner also filed a rejoinder affidavit followed by an application for summoning Shri N. N. Wanchoo for cross-examination. No orders were passed on that application as well and it was directed that the same should also be considered at the hearing of the main petition. The Government also filed an additional affidavit controverting some of the facts in the petitioner's rejoinder affidavit and re-asserted or elaborated certain other averments.

20. When the petition finally came up for hearing before us no serious attempt was made by Mr. C. K. Daphtary, learned counsel for the petitioner, to challenge the Government's claim for privilege nor was the petitioner's application for summoning Shri N. N. Wanchoo for cross-examination pressed. Mr. Daphtary also submitted at the very commencement of his arguments that although he did not wish to give up the petitioner's attack on the ground of mala fide he did not propose to address us on that point unless he failed to carry the Court with him on the question of infringement of fundamental rights under Arts. 14, 16, 19 and 21 of the Constitution and violation of rules of natural justice.

21. Mr. Daphtary also did not rightly address any argument on the correctness or otherwise of the allegations of favouritism made against the petitioner as any such argument would have been completely out of place.

22. After hearing the learned counsel for the parties, we indicated that it was not necessary for Mr. Daphtary to go into the question of mala fides as we were inclined to agree with him that there had been gross violation of rules of natural justice inasmuch as the impugned letter had been issued by respondent No. 1 without the petitioner having been afforded any hearing either by the Minister concerned or the Central Vigilance

Commission in consultation with whom the said circular is claimed to have been issued.

23. As the copy of the impugned letter filed by the petitioner was found to be incorrect, Mr. C. B. Aggarwala, learned counsel for the respondents rightly accepted our suggestion to produce the certified copy of the original letter together with the list of officers and organisations to whom it had been sent.

24. All further argument therefore proceeded on the basis of the certified copy as produced by Mr. Aggarwala. The circular letter which is addressed to all Secretaries, Special Secretaries to the Government of India contains an endorsement at the foot to the effect that its copy is forwarded to the Chief Secretaries of the State Governments and Governments of Union Territories with the request that action similar to that in paragraphs 2 and 3 may be taken in relation to organisation and undertakings of the said Governments. The circular letter is dated the 22nd December, 1966, is marked "Confidential" and reads as under:—

"Dear Shri

During an investigation of certain allegations against M/s. Bharat Fritz Werner Ltd. Bangalore, a firm in the private sector engaged in the manufacture of machine tools it was found that Shri M. K. Mathullah, when he was Chairman and Managing Director, Hindustan Machine Tools Ltd., had shown some undue favours to the private firm in question. On relinquishing his Chairmanship of Hindustan Machine Tools, Bangalore, Shri Mathullah took up the Chairmanship of the Private firm, M/s Bharat Fritz Werner Ltd. On examination of the evidence available, it was found that while there was insufficient evidence to take more positive action against Shri Mathullah, his conduct in the affair did not conform to the standard of probity expected of an officer of his standing.

"2. In all the circumstances of the case, it has, therefore, been decided in consultation with the Central Vigilance Commission that it would be inappropriate for Shri M. K. Mathullah to be associated with any organisations (Committees, Boards etc.) of the Government of India or Public Undertakings controlled by the Government of India.

"3. I would accordingly request that the above may be borne in mind while constituting new Boards Committee etc. and also while reconstituting any of the Committees/Boards etc. on which Shri Mathullah may have been nominated in the past.

Yours sincerely,
Sd/- N. N. Wanchoo."

We will now deal with the arguments that have been addressed by the learned counsel for the parties and our reasons for the conclusion arrived at by us.

25. The first contention urged by Mr. Daphtary is that ex facie the impugned letter

not only brands the petitioner as a dishonest man but also prevents his being associated in future with any organisations of the Government of India or public undertakings controlled by the Government and requests the State Governments and the Governments of Union Territories to take similar action in relation to the organisations and undertakings of these Governments. It is not disputed by the respondents that the petitioner was not given any opportunity of being heard and meeting or explaining the allegations made against him either at the stage of inquiry by the Central Bureau of Investigation or the Central Vigilance Commission or by the Government before respondent No. 1 issued the impugned letter. It is true that the action taken by the respondent is administrative in character but he submits it is no longer in doubt that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice after informing the person concerned of the evidence in support thereof and after giving him an opportunity of being heard and meeting or explaining that evidence. Reliance for the argument is placed on two decisions of the Supreme Court in *State of Orissa v. Dr. (Miss) Binapani Dei*, (1967) 2 SCR 625 = (AIR 1967 SC 1269) and *A. K. Kraipak v. Union of India* (1969) 2 SCC 262 = (AIR 1969 NSC 108.)

26. There is a great deal of force in the submission made by the learned counsel. A bare reading of the impugned letter makes it plain that it imputes lack of honesty to the petitioner and accuses him of abuse of official position in showing undue favours to a private firm when he was holding the office of Managing Director and Chairman of a public undertaking, particularly to a firm of which he himself became chairman immediately after he relinquished his connection with the public undertaking. The petitioner is admittedly a chartered accountant of some standing in his profession. He has held positions of responsibility and trust not only in private sector undertakings but also in a public undertaking where but for the alleged lapse, his performance, even after making due allowance for exaggeration is not negligible. To say of such a man that his conduct as reflected by the undue favours shown by him to a private firm did not conform to the standard of probity expected of an officer of his standing is nothing short of declaring that he had abused the confidence and trust that had been reposed in him by the Government.

27. The impropriety of his conduct is made to stand in high relief by what is stated in the second paragraph that action has been taken against him in consultation with the Central Vigilance Commission whose principal function, it is well known is to undertake inquiries into complaints of corruption, misconduct, lack of integrity

and other kinds of malpractices or misdemeanours on the part of public servants including officers employed in connection with corporate central undertakings.

28. It will also be seen that although the words used in the second paragraph are that "it would be inappropriate for Shri M. K. Mathulla to be associated with any organisations (Committees, Boards etc.) of the Government of India republic undertakings controlled by the Government of India", the term "associated" is one of wide import. The use of the word "etc." after "Committees, Boards" also indicates that the petitioner's association is sought to be barred not merely in respect of his nomination to any committees or boards constituted by the Government of India but also in respect of all avenues of employment in any organisations of the Government of India or public undertakings controlled by the Government of India. The range of action is not merely within the confines of organisations and undertakings of the Government of India but it is extended to the organisations and undertakings of State Governments and Governments of Union Territories which too have been requested to take similar action in respect of the petitioner.

29. We fail to see what other object could the authors of the impugned letter have had in view if it was not to impose a blanket ban on the petitioner's employment to any office of profit under the State.

30. It is a matter of common knowledge that with the passing of every day the economy of the nation is likely to be geared to an increasing expansion of public sector. We already have scores of statutory and government controlled corporations. All these corporations have their Boards of Directors and Chairman who are to be appointed either by the Central Government or the State Government concerned. Then there are government companies as defined in Section 617 of the Companies Act, 1956. According to that section the expression "government company" means any company in which not less than 51% of the paid-up share capital is held by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a company as thus defined. Under Section 619 (2) the Auditor of a Government company can only be appointed or re-appointed by the Central Government on the advice of the Comptroller and Auditor General of India. Scores of such companies have been established all over the country. If effect is given to the impugned letter the petitioner's association with any such companies is completely barred. Even private companies which look to government for all kinds of facilities in these days of controls, licences and permits are

likely to fight shy of offering any position of responsibility to the petitioner.

31. It was argued on behalf of the respondents that the circular merely states that it was inappropriate that the petitioner should be associated with any committees or boards of such undertakings or companies. The restriction, if any, was in the matter of his nomination to such committees and boards etc., and there was no ban as such to his appointment as an Auditor or in any other capacity. The argument appears to us to be completely devoid of substance. We fail to see how any reasonable Minister of the Government or the Comptroller and Auditor General of India would ever accord approval to the appointment of the petitioner as an Auditor of any such company when his nomination as a member of the committee or board relating to such company has been declared by the Government to be inappropriate.

32. We are therefore convinced that the impugned letter involves adverse civil consequences for the petitioner and as such it could only be issued consistently with the rules of natural justice after the petitioner had been informed of the evidence against him and after giving him an opportunity of being heard and meeting or explaining such evidence. When we say this, we do not at all wish to be understood as laying down that there should have been a full-fledged inquiry of the type envisaged under Article 311 of the Constitution or under any other service rules relating to disciplinary action against public servants. What is required is that the authority competent to take such action should act fairly and with due regard to the minimum requirements of rules of natural justice in that the authority should give the person concerned a hearing after informing him about the nature of the evidence against him in order that he may be able to meet or explain such evidence.

33. Mr. Aggarwala, learned counsel for the respondents next argued that the petitioner had no right to be nominated to any committee or board of a government organisation nor had he any right to be appointed to any office under the government. The association of persons with boards or committees of government undertakings, it was urged, is a prerogative of the President and government has a right to include or exclude any individual for this purpose. The government as an employer has as much right to pick and choose persons for employment as any other employer and nobody can claim to have any right to be chosen or appointed. He also urged that the petitioner having accepted employment under the government gave it the right to evaluate and appraise his performance and if on making such appraisal the government after fully informing itself by means of an inquiry held by an agency like the Central Bureau of Investigation and consulting a high level commission, decided to issue a

confidential circular to Secretaries of its own ministries and the Chief Secretaries of the governments of States and Union Territories about its opinion its action can scarcely be regarded as arbitrary nor can it be subjected to judicial review.

34. Mr. Aggarwala further argued that in the circumstances, the object of the circular was merely to protect public interest in regard to public undertakings and not to punish the petitioner in any manner.

35. According to Mr. Aggarwala only two points arose for consideration, first whether the matter relates to an affair of State and secondly whether the action was inspired by malice. If the matter relates to an affair of State then the impugned letter being an official communication made by one officer of State to another in the course of official duty, is absolutely privileged and cannot be made the subject-matter of any action in Court and the Court is bound to refuse to allow any inquiry as to the malice of the Official to proceed. On the other hand if the matter does not relate to an affair of State then on grounds of public policy or the general welfare of society the law affords protection on certain occasions to persons who acting in good faith and without any indirect or improper motive, make statements about another which are in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. In that case it is for the defendant to prove the facts and circumstances which establish that the occasion was privileged. If he does so, the burden of showing actual or express malice rests on the plaintiff.

36. Relying upon a decision of Roche, J. in *M. Isaacs and Sons Ltd. v. Cook*, (1925) 2 KB 391, Mr. Aggarwala contended that the fact that the communication relates to commercial matters does not itself preclude it from being one relating to State matters, which, as was held by the Supreme Court in *the State of Punjab v. Sodhi Sukhdev Singh*, AIR 1961 SC 493 are identical with "affairs of State" mentioned in Section 123 of the Evidence Act.

37. There can be no doubt that so far as action for libel is concerned, respondent No. 1 can claim completely immunity against the same for the communication is undoubtedly an official communication relating to affair of State and is therefore absolutely privileged. The question in the present case is however entirely different. It is true that it is not for us to say as to how far the opinion formed by the Government is justified on the material in its possession. It is also true that if the petitioner has in fact acted in the manner alleged in the impugned letter he can hardly expect any sympathy from any quarter. But the question is whether he should have been heard before he was condemned. It is not of libel that he complains of. In a case of libel the remedy of the aggrieved person is generally

to bring an action for damages and in some cases to ask for interdict before the actual publication of the libel. In such a case, the defence of absolute or qualified privilege may be a complete answer to the plaintiff's case; But the petitioner's case is that the action taken against him has infringed his fundamental rights guaranteed under Articles 14, 16, 19 and 21 of the Constitution.

38. We agree with Mr. Aggarwala that the petitioner has neither a right to be nominated to any committee or board nor has he any right to appointment to any office of profit under the Government. It is true that every citizen has a right to carry on his avocation, but the right to work does not mean that a person has also a right to exact work or to force himself on another for employment. This applies as much to employment under the State as to employment under a private employer. What then is the extent of this right? In our view, the only right that the Constitution guarantees to a citizen under Article 19 (1) (g) is that he has a right to practise any profession or to carry on any avocation, trade or business subject to such reasonable restrictions on the exercise of that right as may be imposed by the State in the interest of the general public. This includes the right to remain open for employment or to be available to offer oneself for employment. The extent of the right lies in the right to offer oneself and the right to be considered for employment. It is open to the State to say it shall not employ dishonest men. It is also open to the State to say who and by what means the question as to whether a person is honest or dishonest should be decided, but when it makes such a provision it has to do consistently with the requirements of Article 14 of the Constitution and that necessitates that before a citizen is condemned and debarred from exercising that right to be considered for employment he must be heard. The question is not one of merely laying down qualifications for employment as Mr. Aggarwala tried to make out, for it is not disputed that the State can prescribe qualifications. But just as no citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State as laid down in Article 16 (2) of the Constitution in much the same way the right of equality of opportunity guaranteed under Article 16 (1) postulates that a citizen shall not be debarred from being considered for employment or appointment to an office under the State by an ex parte finding arrived at against him by a functionary of the State that he has been found dishonest and as such the door of such employment or appointment shall remain shut in his face. Before the door is slammed against him he has a right to be heard. That is about the only right

which the petitioner can legitimately claim and to that we see no valid defence.

39. In that view of the matter the reference made by Mr. Aggarwala to a decision of Vaidialingam, J. in K. M. Sugatha Prasad v. State of Kerala, AIR 1965 Ker 19 where it was held that the nature of the materials to be collected and the satisfaction to be arrived at about the character and antecedents of a person are entirely matters for the appointing authority, can be of no assistance to the argument of the learned counsel. That was a case relating to the termination of the petitioners' officiating services as teachers in the Education Department of the State and it was in that context that one of the questions raised before the learned Judges was whether the State Government was bound to disclose the grounds on the basis of which it had come to the conclusion that the character and antecedents of each of those petitioners were not such as to make them eligible for appointment to service under the State. Dealing with that contention it was held that there was no fundamental right to be continued in the employment of the State and that a party could not claim that the termination of his services by the State amounted to an infringement of any constitutional right when no question of violation of Article 311 was raised.

40. No help can also be derived by Mr. Aggarwala from the majority decision of Kerala High Court in V. Punnan Thomas v. State of Kerala, AIR 1969 Ker 81 (FB) which runs counter to a Division Bench judgment of this Court in K. G. Khosla and Co. v. Union of India, (Civil Writ Petn. No. 477 of 1968, D/- 7-10-1968 (Delhi)) to which one of us (T. V. R. Tatachari, J.) was a party. The decision in K. G. Khosla and Co. v. Union of India, 1969 Delhi L.T. 566 and is more in consonance with the minority view of Mathew, J. of Kerala High Court. All three were cases of black-listing and were no doubt decided on their own facts but the ratio of the decision in the case of K. G. Khosla and Co. is fully applicable to the present case and we agree with the same.

41. The result is that the petition is allowed and the respondents are directed to withdraw the impugned circular letter. This will however in no way prejudice the right of the Government to take whatever administrative action it lawfully takes against the petitioner after giving him a hearing and an opportunity to know and meet the evidence on which the proposed action may be taken. The petitioner will also have his costs which are assessed at Rs. 500.

Petition allowed.

AIR 1970 DELHI 202 (V 57 C 43)

(HIMACHAL BENCH)

H. R. KHANNA, C. J.

Duni Chand etc., Appellants v. Paras Ram etc., Respondents.

Regular Second Appeal No. 285 of 1967, D/- 12-5-1970.

Hindu Adoptions and Maintenance Act (78 of 1956), Sections 12, 14 — Effect of adoption — Son adopted by widow — He becomes absorbed in adoptive family to which the widow belonged and becomes son not only of widow but also of deceased husband — Hence he will be preferential heir of deceased husband qua other collaterals. AIR 1970 SC 343, Foll. (Paras 9, 10)

Cases Referred; Chronological Paras (1979) AIR 1970 SC 343 (V 57)=

1969-2 SCC 544, Smt. Sitabai v.

Ramchandra

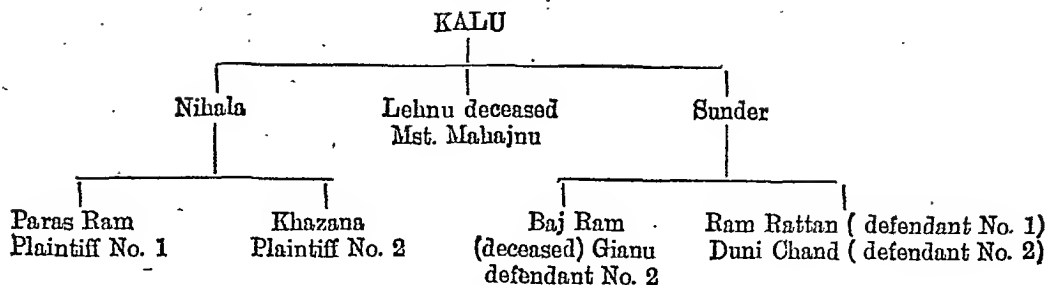
Chhabil Dass, for Appellants; Kailash Chand, for Respondents.

H. R. KHANNA, C. J.— This regular second appeal by Duni Chand and other defendants is directed against the judgment and decree of learned Senior Subordinate Judge, Kangra, affirming on appeal the decision of the trial Court whereby a decree for possession of one-half share in the land in dispute was awarded in favour of Paras Ram and Khazana plaintiff-respondents against the defendant-appellants.

2. In order to appreciate the facts of this case it would be useful to reproduce the pedigree table showing the relationship of the plaintiff-respondents with the defendant-appellants as under:—

(For pedigree table see next page.)

Lehnu deceased was the last male holder of land measuring 52 Kanals 16 Marlas situated in village Pahlu. Lehnu died issueless and on his death his widow Mahajnu succeeded to this estate. On September 18, 1914, Mahajnu made an oral gift of land measuring 52 Kanals 16 Marlas in favour of Ram Rattan defendant No. 3 and Baj Ram father of Gianu defendant No. 2. On November 20, 1914, Khazana and Paras Ram plaintiffs filed a suit for declaration to challenge the above gift on the ground that the plaintiffs were the collaterals of Lehnu and that parties were governed by Customary law. It was prayed by the plaintiffs that the gift made by Mahajnu in favour of Ram Rattan and Baj Ram should not affect their reversionary rights after the death of Mahajnu. In the aforesaid suit a decree by compromise was granted in favour of the plaintiffs against Mahajnu, Baj Ram and Ram Rattan on June 28, 1915. Exhibit P-3 is the copy of that compromise. Baj Ram, it appears, died some time thereafter. On November 27, 1957, Mahajnu filed suit No. 334 of 1957 for possession of the gifted land against Ram Rattan and Gianu by asking for the cancellation of



the gift made by her in favour of Ram Rattan and Baj Ram. A decree by compromise for possession of one-half of the land in suit in that suit was awarded in favour of Mahajnu against Ram Rattan. The suit with respect to the remaining one-half of the land against Gianu was dismissed. The date of that compromise decree is February 5, 1958. Exhibit P-5 is its certified copy. In the meantime on May 23, 1957, Mahajnu executed a deed of adoption showing the adoption of Duni Chand defendant No. 1 son of Ram Rattan defendant No. 3 by her (Mahajnu). Mahajnu died in September, 1960. The present suit for recovery of possession of land measuring 26 Kanals 8 Marlas was filed by Paras Ram and Khazana plaintiffs against Duni Chand and other defendants on June 1, 1961. According to the allegations of the plaintiffs, the compromise decree, which was granted in favour of Mahajnu on February 5, 1958, was a collusive and a sham transaction. It was stated that Duni Chand had not been adopted by Mahajnu and that even if the adoption be proved the same would have no effect on the plaintiffs' rights. The plaintiffs claimed decree for possession of the land in dispute in view of the earlier compromise decree which was awarded in their favour on June 28, 1945. Nakidhu defendant No. 4 was impleaded as a party because he was alleged to have obtained part of the land in dispute in exchange with other defendants.

3. The suit proceeded ex parte against defendant No. 4. It was contested by the remaining defendants. According to defendants 1 and 3, defendant No. 1 was the adopted son of Mahajnu and in his presence the plaintiffs had no locus standi to file the present suit. The adoption of defendant No. 1 by Mahajnu was stated to be valid. It was denied that the decree dated June 28, 1945, was a collusive or a sham transaction. Defendants 1 and 3 further denied that the parties were governed by Customary Law.

4. Following issues were framed in the case:—

1. Whether Smt. Mahajnu did not secure a decree for possession relating to the land in suit against defendant No. 2 also?

2. Whether the decree in suit No. 334 of 1957 was collusive, fictitious and sham and not binding on the plaintiffs?

3. Whether Smt. Mahajnu was in possession as owner of the property in suit after

the coming into force of Act 30 of 1956? If so, to what effect?

4. Whether defendant No. 1 is not the adopted son of Smt. Mahajnu?

5. If issue No. 3 is proved and issue No. 4 is not proved, whether the plaintiffs have a locus standi to sue?

6. Whether the parties are/were governed by custom? If so, what is/was that custom?

7. Whether the plaintiffs have no right to sue in the presence of defendant No. 1?

8. Relief?

5. The trial Court decided issue No. 1 in favour of the plaintiffs and issue No. 2 against the plaintiffs. On issue No. 3 the finding was that Mahajnu was in possession of one-half of the land measuring 52 Kanals 16 Marlas as owner after the coming into force of the Hindu Succession Act. Issue No. 4 was decided against the plaintiffs and in favour of defendant No. 1. On issue No. 5 the finding of the trial Court was that the decree awarded in suit No. 334 of 1957 affected one-half of the land. The plaintiffs were found to have a locus standi in respect of half of the land in dispute and not with respect to the other half covered by suit No. 334 of 1957. On issue No. 6 it was held that the parties were governed by Customary Law. Issue No. 7 was held not to arise. In the result the decree for possession of one-half of the land in dispute, i. e., for about 13 Kanals 4 Marlas, was awarded in favour of the plaintiffs against the defendants.

6. Appeal against the decree awarded by the trial Court was filed by defendants 1 to 3, while cross-objections were filed by the plaintiffs.

7. Learned Senior Subordinate Judge dismissed both the appeal and cross-objections. The only point which was raised in appeal was that Duni Chand became the validly adopted son of both Mahajnu as well as her husband and as such was entitled to the whole of the property of Mahajnu and Lehnu. This contention was repelled.

8. In second appeal Mr. Chhabil Das on behalf of the appellants has argued that when Duni Chand was adopted by Mahajnu he became the adopted son of not only Mahajnu but also of her deceased husband Lehnu. As such, Duni Chand is stated to be a preferential heir to the estate of Lehnu, as against the plaintiff-respondents. Duni Chand in the circumstances, according to the learned counsel, is entitled to the entire land in dis-

pute and the plaintiff-respondents cannot derive any benefit from the declaratory decree which was awarded in their favour on June 23, 1945. As against that, Mr. Kailash Chand on behalf of the plaintiff-respondents has contended that even though Duni Chand, as found by the Courts below, was adopted by Mahajnu on May 23, 1957, he cannot be deemed to be the adopted son of Lehn. Duni Chand, it is further urged, cannot be considered to be a preferential heir of Lehn qua the plaintiff-respondents.

9. I have given the matter my consideration and am of the view that the contention advanced on behalf of the appellants is well founded. The adoption of Duni Chand by Mahajnu took place, as mentioned earlier, on May 23, 1957, after the coming into force of the Hindu Adoptions and Maintenance Act, 1956 (Act No. 78 of 1956). According to Section 5 of that Act, no adoption shall be made after the commencement of the Act by or to a Hindu except in accordance with the provisions contained in Chapter II of that Act and any adoption made in contravention of the said provisions shall be void. Section 6 of the Act deals with the requisites of a valid adoption, while Section 7 relates to the capacity of a male Hindu to take in adoption. Section 8 makes provisions for an adoption by a female Hindu and reads as under :—

"6. Capacity of a female Hindu to take in adoption.

Any female Hindu:—

(a) who is of sound mind,

(b) who is not a minor, and

(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind,

has the capacity to take a son or daughter in adoption."

Section 9 deals with persons who are capable of giving in adoptions, while Section 10 specifies the persons who may be adopted. Section 11 prescribes the other conditions which must be complied with in order to make a valid adoption. Section 12 has a bearing and reads as under:—

"12. Effects of adoption.

An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family."

Provided that—

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall con-

tinue to vest in such person subject to the obligations if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

According to Section 13 an adoption, subject to any agreement to the contrary, does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will. Section 14 lays down the rule as to who should be determined to be the adoptive mother of the adopted child.

The various provisions, mentioned above, were referred to by their Lordships of the Supreme Court in the case of Smt. Sitabai v. Ramchandra, (1969) 2 SCC 544. In that case, one Bhagirath died in 1930. His widow, Sitabai, adopted Suresh Chandra in March, 1958. One of the questions, which arose for decision in that case, was whether Suresh Chandra could be treated to be the adopted son of Bhagirath and as such whether he became a coparcener in respect of the joint family properties which were at one time held by Bhagirath and his brother Dulichand. The High Court held that Suresh Chandra became the adopted son of Sitabai with effect from March 1953, and could not become the adopted son of Bhagirath. This finding of the High Court was assailed in the Supreme Court. Ramaswami, J., speaking for the Court, on conspectus of the different provisions of the Hindu Adoptions and Maintenance Act, came to the conclusion that the High Court was in error in holding that the adoptee would be the adopted son of the widow and not of her deceased husband. It was observed as under:

"5. It is clear on a reading of the main part of Section 12 and sub-section (vi) of Section 11 that the effect of adoption under the Act is that it brings about severance of all ties of the child given in adoption in the family of his or her birth. The child altogether ceases to have any ties with the family of his birth. Correspondingly, these very ties are automatically replaced by those created by the adoption in the adoptive family. The legal effect of giving the child in adoption must therefore be to transfer the child from the family of its birth to the family of its adoption. The result is, as mentioned in Section 14 (1) namely where a wife is living, adoption by the husband results in the adoption of the child by both these spouses; the child is not only the child of the adoptive father but also of the adoptive mother. In case of there being two wives the child becomes the adoptive child of the senior-most wife in marriage, the junior wife becoming the step-mother of the adopted child. Even when a widower or a bachelor adopts a child, and he gets married subsequent to the adoption, his wife becomes the

step-mother of the adopted child. When a widow or an unmarried woman adopts a child, any husband she marries subsequent to adoption becomes the step-father of the adopted child. The scheme of Sections 11 and 12, therefore, is that in the case of adoption by a widow the adopted child becomes absorbed in the adoptive family to which the widow belonged. In other words the child adopted is tied with the relationship of sonship with the deceased husband of the widow. The other collateral relations of the husband would be connected with the child through that deceased husband of the widow. For instance, the husband's brother would necessarily be the uncle of the adopted child. The daughter of the adoptive mother (and father) would necessarily be the sister of the adopted son, and in this way, the adopted son would become as member of the widow's family, with the ties of relationship with the deceased husband of the widow as his adoptive father. It is true that Section 14 of the Act does not expressly state that the child adopted by the widow becomes the adopted son of the husband of the widow. But it is a necessary implication of Sections 12 and 14 of the Act that a son adopted by the widow becomes a son not only of the widow but also of the deceased husband. It is for this reason that we find in sub-section (4) of Section 14 a provision that where a widow adopts a child and subsequently marries a husband, the husband becomes the 'step-father' of the adopted child. The true effect and interpretation of Sections 11 and 12 of Act No. 78 of 1956 therefore is that when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family. In other words the result of adoption by either spouse is that the adoptive child becomes the child of both the spouses."

In the face of the above pronouncement, Duni Chand in the present case should be held to be the adopted son not only of Mahajnu but of Lehnua.

10. The Courts below took the view that on account of the provisions of clause (c) of the proviso to Section 12 of the Act, Duni Chand could not divest the plaintiffs of the land which had vested in them. This approach of the Courts below was manifestly erroneous because there arose no question of divesting the plaintiffs of any land which had vested in them. All that was decided in the suit in which a compromise decree was awarded in favour of the plaintiffs on June 26, 1945, was that the gift made by Mahajnu in favour of Ram Rattan and Baj Ram would not affect the reversionary rights of the plaintiffs. The aforesaid decree did not have the effect of vesting the land in suit in the plaintiffs, the result of that decree was that whosoever was the preferential heir of Lehnua after the death of Mahajnu, he would become entitled to file a suit for

possession against the transferees. As Duni Chand is a preferential heir of Lehnua qua the plaintiff-respondents and is in possession of the land in suit, it is manifest that the plaintiffs cannot succeed in the present suit for possession of the estate of Lehnua against Duni Chand. The suit of the plaintiffs against Duni Chand would consequently have to be dismissed.

11. Cross-objections filed by the plaintiff-respondents, in view of the conclusion at which I have arrived earlier, must necessarily fail.

12. I would, therefore, accept the appeal, set aside the judgments and decrees of the Courts below and dismiss the suit of the plaintiff-respondents. The cross-objections filed by the plaintiff-respondents are dismissed. Looking to all the facts, I leave the parties to bear their own costs throughout. Appeal allowed.

AIR 1970 DELHI 205 (V 57 C 44)

S. N. ANDLEY AND P. S. SAFEER, JJ.

Jamil Ahmed Taban and others, Petitioners v. Must. Khair-UI-Nisa and others, Respondents.

Second Appeal from Order No. 16-D of 1966, D/- 16-3-1970 against order of Rent Control Tribunal, Delhi, D/- 21-8-1965.

(A) Civil P. C. (1908), Order 26, Rules 18 and 10 (2) — Parties to appear before Commissioner — Notice to appear not given by Court or even by the Commissioner — Report resulting from inspection cannot be received as evidence under Rule 10 (2).

(B) Civil P. C. (1908), Order 39, Rule 8 — Notice to be given before application under Rule 6 or Rule 7 — Provision is directory — Does not preclude Court from passing ex parte order including order for inspection of property in terms of Clause (a) of Rule 7 (1). AIR 1943 Bom 143, Rel. on.

(C) Houses and Rents — Delhi Rent Control Act (1958), Section 37 (1) — Procedure to be followed by Controller — Duty to give notice — Provisions do not apply to interlocutory orders, like ex parte appointment of local Commissioner to report as to who is in occupation, which do not affect rights of parties.

(D) Houses and Rents — Delhi Rent Control Act (1958), Section 37 (2) — Controller to follow practice and procedure of Small Cause Court — Appointment of Commissioner to inspect premises and report — Limited power given to Controller under Section 36 (3) (a) to inspect premises himself does not under Rule 23 of the Delhi Rent Control Rules (1959) exclude power to him to appoint Commissioner under Orders 26, and 39, Civil P. C. AIR 1965 SC 1144, Distinguished. (Paras 10 and 11)

EN/FN/C440/70/MKS/T

(E) Evidence Act (1872), Section 157 — Use of former testimony for corroborating later testimony — Report by Commissioner appointed to inspect — Proof of its execution by Commissioner proves its contents under Section 61 — Commissioner, not examined under Order 26, Rule 10 (2), Civil P. C., but as ordinary witness, proving the report — Report can be relied on as corroborating evidence of inspection by Commissioner notwithstanding non-compliance with Order 26, Rule 18 — (Civil P. C. (1908), O. 26, R. 18). (Paras 13 and 14)

(F) Civil P. C. (1908), Order 26, Rule 10 — Report as evidence in suit — Commissioner appointed to ascertain person in possession of suit premises — Statements in report as to sub-letting and time of sub-letting are beyond scope of order of appointment and cannot be relied upon. (Para 15)

Cases Referred to: Chronological Paras
(1969) 1969 Ren CR 690 = 1967 Cur LJ 916 (Punj), Kheru Ram v. Hans Raj 14
(1968) AIR 1968 Ker 28 (V 55) = ILR (1967) 1 Ker 454, Maroli Achuthan v. Kunhi Pathumma 14
(1966) 1966 Delhi LT 262, Central Bank of India v. Gokalachand 9, 10
(1965) AIR 1965 SC 1144 (V 52) = 1965-2 SCR 186, Ramkaran Das v. Bhagwan Das 11
(1963) 1963-65 Pun LR 1056 = ILR (1964) 1 Punj 323, Pokar Mal v. Prem Nath 9
(1962) AIR 1962 Andh Pra 84 (V 49) = 1961-1 Andh WR 533, Seetharamappa v. Appaiah 6
(1962) AIR 1962 Pat 211 (V 49) = 1961 BLJR 830, Smt. Mandera v. Sachindra Chandra 6
(1957) AIR 1957 SC 444 (V 44) = 1957 SCR 370, Harish Chandra v. Triloki Singh 16
(1955) AIR 1955 NUC 1187 (Tra-Co) (V 42), V. P. V. Pillai v. A. P. B. Pillai 6
(1943) AIR 1943 Bom 143 (V 30) = ILR (1943) Bom 138, Tota Ram v. Dattu 7
(1936) AIR 1936 PC 253 (2) (V 23) = 63 Ind App 372, Nazir Ahmad v. Emperor 7
(1934) AIR 1934 Mad 548 (V 21) = 40 Mad LNW 353, Latchan v. Ram Krishna 6

D. D. Chawla, for Appellants; Yogeshwar Dayal, for Respondents.

P. S. SAFEER, J.: This judgment will dispose of S. A. O. Nos. 16-D and 17-D of 1966 in which common questions have been raised. The appellants are tenants against whom two separate proceedings were instituted for their ejectment on the ground of sub-letting or parting with possession of the premises without the written consent of the landlord.

2. An application dated 5-6-1961 was made to the Rent Controller, Delhi, under Order 26, Rule 9 and Order 39, Rule 7 read with Section 151 of the Code of Civil Procedure praying that a local commissioner be appointed to go to the spot and report as to who was in occupation of the premises. The order dated 12-6-1961 by which Mr. P. Bose, Advocate, was appointed as local commissioner, was passed ex parte and is in the following terms:

"I appoint Shri P. Bose, Advocate, as a local commissioner to go to the spot and report as to who is in occupation of the premises in question. His fee is fixed at Rs. 30."

3. The eviction petitions in both the cases were dismissed by the Additional Rent Controller by his orders dated 23-1-1965 but the appeals filed against his orders were accepted by the Rent Control Tribunal and the reversal was based upon the reports (Exhibits A1 and A2) which the local commissioner had submitted after visiting the premises and which were proved by him during the course of his examination as AW1.

4. The appellants raise two contentions. The first is that the provisions contained in the Delhi Rent Control Act, 1958 (hereinafter referred to as "the Act") do not confer any authority on the Rent Controller to appoint any local commissioner under the provisions of the Code. The second is that even if the provisions of the Code were available to the Rent Controller to appoint a local commissioner then while making such an appointment in terms of Rule 9 of Order 26 he was bound by the provisions contained in Rule 18 of the same Order. It is argued that the provisions of Rule 18 are mandatory and unless they are complied with the report of the local commissioner cannot be evidence in the case.

As a part of the same argument it is urged that even if the order appointing the local commissioner was valid, he could not have acted beyond the scope of the express directions contained in the order and could not have stated anything in his report apart from indicating the person or persons who were in occupation of the premises. It is emphasised that all the matters contained in Exhibits A1 and A2 are not admissible in evidence and cannot be relied upon as such.

5. Rule 9 of Order 26 of the Code says:

"9. In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to

whom such commission shall be issued, the Court shall be bound by such rules." If the local commissioner is competently appointed under Rule 9 then in terms of R. 10 his report and the evidence taken by him (but not the evidence without the report) shall be evidence in the case. The Court can examine the local commissioner and, with the permission of the Court, the parties can also examine him in respect of any matter stated in the report.

Then Rule 18 provides:—

"18 (1) Where a commission is issued under this Order the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders."

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence."

This provision requires the Court to direct the parties to appear before the local commissioner so that they may participate in the proceedings before him. The local Commissioner can proceed ex parte in case the parties or any one of them does not appear before him after the service of the notice given under sub-rule (1).

6. The appellants have relied upon *Lathan v. Ram Krishna*, AIR 1934 Mad 548, *Smt. Mandera v. Schindra Chandra*, AIR 1962 Pat 211, *Vanamoorthi Pillai Veerabhadran Pillai v. Ayyamperumal Pillai Bhagavathy Pillai*, AIR 1955 NUC 1187 (Tra-Co) and *Sectharamappa v. Appaiah*, AIR 1962 Andh Pra 84 in support of the contention that in case of non-compliance with the mandatory provisions of Rule 18 the appointment of the local commissioner is without jurisdiction and the report resulting from his inspection cannot be read as evidence. We hold the same view. In the cases before us no notice was given by the Court as required by rule 18 (1) nor even by the local commissioner appointed. In the circumstances, the reports Exhibits A1 and A2 cannot, without anything more, be evidence in the case by the force of Rule 10 (2).

7. To meet this argument, the respondent relies upon the provisions of Rule 7 of Order 39 of the Code which was also invoked in the said applications. The appellant's reply is that Rule 8 of Order 39 also requires a notice before the making of an application either under Rule 6 or R. 7 and, therefore, unless such notice is given no order can be made under any of these rules. Unlike Rule 18 of Order 26, R. 8 of Order 39 does not cast any obligation upon the Court to give any notice of an order under Rule 6 or 7 of Order 39. Rule 8 of Order 39 merely directs the party making the application to give a notice to the opponent before making it. It is directory in its language. There is nothing in this rule to persuade us to hold that the Court is precluded from making an ex parte order

under Rule 6 or Rule 7 of Order 39 including an order for inspection of the property which may be the subject matter of a suit in terms of Clause (a) of Rule 7 (1). This view finds support from a Division Bench decision of the Bombay High Court in *Totaram v. Dattu*, AIR 1943 Bom 143 where the ex parte appointment of a commissioner was upheld.

Then, the learned counsel for the appellants contended that the Act is a special statute which enumerates the powers of the Controller and the procedure to be adopted by him while exercising those powers and wherever any provision is made therein the action to be performed must be in strict compliance with its terms. It was urged that the Privy Council had laid down in *Nazir Ahmad's case*, AIR 1936 PC 253 (2) that where power is given to do a thing in a certain way then it must be done in that way or not at all. Reliance is placed on Section 36 which enumerates the powers of the Controller and on Section 37 which prescribes the procedure to be followed by him. Reference was also made to Rule 23 of the Delhi Rent Control Rules, 1959 framed in exercise of powers conferred by section 56 of the Act.

These provisions are in these terms:

S. 36 "Power of Controller. (1) The Controller may—

(a) transfer any proceeding pending before him for disposal to any additional Controller, or

(b) withdraw any proceeding pending before any Additional Controller and dispose of it himself or transfer the proceeding for disposal to any other Additional Controller.

(2) The Controller shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents.

(c) issuing commission for the examination of witnesses.

(d) any other matter which may be prescribed;

and any proceeding before the Controller shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code (45 of 1860), and the Controller shall be deemed to be a Civil Court within the meaning of Section 480 and Section 482 of the Code of Criminal Procedure, 1898 (5 of 1898).

(3) For the purposes of holding any inquiry or discharging any duty under this Act, the Controller may—

(a) after giving not less than twenty-four hours' notice in writing, enter and inspect or authorise any officer subordinate to him

to enter and inspect any premises at any time between sunrise and sunset; or

(b) by written order, require any person to produce for his inspection all such accounts, books or other documents relevant to the inquiry at such time and such place as may be specified in the order.

(4) The Controller may, if he thinks fit, appoint one or more persons having special knowledge of the matter under consideration as an assessor or assessors to advise him in the proceeding before him."

S. 37 "Procedure to be followed by Controller. — (1) No order which prejudicially affects any person shall be made by the Controller under this Act without giving him a reasonable opportunity of showing cause against the order proposed to be made until his objections, if any, and any evidence he may produce in support of the same have been considered by the Controller.

(2) Subject to any rules that may be made under this Act, the Controller shall while holding an enquiry in any proceeding before him, follow as far as may be the practice and procedure of a court of small causes, including the recording of evidence.

(3) In all proceedings before him, the Controller shall consider the question of costs and award such costs to or against any party as the Controller considers reasonable.

Rule 23. "Code of Civil Procedure to be generally followed. In deciding any question relating to the procedure not specially provided by the Act and these rules, the Controller and the Rent Control Tribunal shall, as far as possible, be guided by the provisions contained in the Code of Civil Procedure, 1908."

The contention is that Section 36 (2) (c) and Section 36 (3) (a) of the Act which provide for the issue of commissions and inspection of property respectively by the Controller exclude the applicability of the provisions of the Code. It is urged that the Legislature has conferred certain powers on the Controller and no more and that the Controller having been authorised to exercise the powers of a Civil Court under the Code of Civil Procedure only in respect of the matters enumerated in these sections and such other matters as may be prescribed by virtue of Clause (d) of section 36 (2) of the Act, no other power can be exercised by the Controller under the Code.

As to the provisions of sub-section (3) of Section 36, it is contended that while Cl. (c) of sub-section (2) limited the powers of the Controller as exercisable by a Civil Court under the Code to the issuing of commissions for the examination of witnesses, the power of inspection as provided for in R. 9 of Order 26 and Rule 7 of Order 39 was eliminated by restricting the manner and method of inspection to the terms of Cl. (a) of sub-section (3) of Section 36 of the Act. It is further argued that sub-section (1) of Section 37 of the Act excludes *ex parte*

orders as it emphasises that no order which may prejudicially affect any person can be made by the Controller under the Act without giving a reasonable opportunity of showing cause against the proposed order and until the objections, if any, and any evidence which may be produced in support had been considered.

Therefore, it is submitted that the order appointing the local commissioner whose reports are the subject of controversy could not have been made without giving a reasonable opportunity to the appellants to raise their objections and adduce evidence. We are unable to agree with these contentions.

8. Section 37 (1) will be attracted only in case of orders which may prejudicially affect any person. The *ex parte* appointment of a local commissioner for ascertaining as to who is in occupation of the premises cannot by any stretch of imagination be said to be an order prejudicially affecting any of the parties. Such an order is passed for discovering the truth which may or may not be in favour of either of the parties. Sub-section (1) of Section 37 of the Act contemplates an order which may affect substantial rights of the parties and for that purpose provides for an opportunity for raising objections and producing evidence. It cannot be said that an order appointing a local commissioner for inspecting the premises in order to report as to who is in occupation would require as a condition precedent that parties be allowed to produce evidence in respect of any objections that may be made. Interlocutory orders which do not by themselves affect the rights of the parties are not contemplated by sub-section (1) of Section 37.

9. Turning to sub-section (2) of Sec. 37 the learned counsel for the appellants correctly submitted that while holding an inquiry in any proceeding the Controller could avail of the provisions which were applicable to the practice and procedure before a Court of Small Causes. This submission is supported by the cases reported as 1983-85 Pun LR 1056 and 1968 Delhi LT 262, *Central Bank of India v. Gokal Chand*. In the latter case, the Court was dealing with the scope of Section 38 of the Act when in the course of its judgment it said:—

"If full effect is given to the provisions of Section 37 (3), it must be taken as if the procedural provisions of the Code of Civil Procedure as applicable to a Court of Small Causes are written with pen and ink in the Delhi Rent Control Act, 1958." The counsel, however, contended that the foregoing observations must be read in the light of the further observation that:—

"It must, therefore, be held that subject to any rules that may be made under the Delhi Rent Control Act 1958, such provisions of the Code of Civil Procedure, as relate to the practice and procedure of a Court of Small Causes stand incorporated

that order of sentence and wherein possibly, he will be again entitled to challenge the order of conviction. In my opinion, this argument cannot be accepted as a correct argument. The reason is that Section 7(2) of the Act clearly indicates that the appellate Court or the High Court in the exercise of its powers of revision is entitled to set aside an order under Section 4 or 5 and in lieu thereof pass sentence on such offender according to law. The legislature has clothed this Court with such powers. The only restriction placed upon the powers of this Court is that it shall not inflict a great punishment than might have been inflicted by the Court by which the offender was convicted. It is, therefore, not necessary to remand the case to the trial Court for awarding sentence.

28. It has been lastly submitted by Mr. Shelat that this Court could only award the sentence which would be a non-appealable sentence. This argument is without any basis. The provisions of sub-section (2) of Section 7 of the Act clearly indicate that this Court has been empowered to pass sentence according to law. The only restriction is that this Court cannot pass a sentence higher than the sentence that might have been awarded by the trying Magistrate. It is significant to note that the offender has been given a right to appeal against the order of conviction even though sentence awarded was not passed, and he was released on probation of good conduct. It is, therefore, evident that he has not been prejudiced in any manner in regard to his right of appeal, as no sentence was awarded by the trying Magistrate and was released on probation of good conduct.

29. All the submissions made by Mr. Shelat fail. The last question that survives for consideration is what is the proper and adequate sentence that should be awarded to opponent No. 2 who has been convicted of an offence punishable under Section 326 of the Code. The nature of injury, the weapon used and the part selected for causing injury, are important factors to be taken into consideration.

30. Dr. Raval, Ex. 19, had examined injured Bhagwanji soon after the incident at about 9-30 p.m. on 7th October, 1968. The incident had taken place at about 8-30 p.m. He found the following injury:

"(1) Oblique incised wound 3" x 1/2" x bone deep on the middle of the head, fracture suspected."

The injury could be caused by a sharp cutting instrument. He is corroborated by the certificate, Ex. 20, given by him.

31. Dr. Mankad, Ex. 21, attached to Junagadh Civil Hospital, had examined

injured Bhagwanji on that very night at about 11-00 p.m. According to him, the patient was serious. He was admitted in the hospital. Arrangement was made also for recording the dying declaration.

32. Dr. Sitapara, Ex. 24, in charge of Male Surgical Ward, Junagadh Civil Hospital, states that injured Bhagwanji was admitted in his ward and the patient was referred to the Surgeon, and as per the advice, X-Ray was taken on 8th October, 1968. It was taken by Dr. R. C. Popat. There was fracture of skull of the right parietal frontal region. That X-Ray plate has been produced at Ex. 26. The injured was treated by this doctor from 7th October, 1968 to 4th November, 1968.

33. Dr. Popat has been examined at Ex. 30. He has stated that he found fracture of the skull of the right parietal frontal bone on taking X-Ray. It was not a minor one. He is corroborated by the documents, Exs. 25 and 26.

34. Dr. Sitapara, Ex. 24, has also deposed that the injury was deep to the brain and hence the injured had an attack of paralysis. The other cause might be of cerebral tension. The injury was caused to Bhagwanji when Bhagwanji asked the accused not to beat one Ambalal with an axe. Taking into consideration these circumstances, it is a case which would undoubtedly require awarding of substantive sentence of imprisonment.

35. The learned trying Magistrate has observed in his judgment that the accused is a young man. His age appeared to be 25 years. According to him, the accused had no bad antecedents and he did this act in anger. Taking into consideration those circumstances in favour of the accused and other circumstances referred to above, I think that sentence of one year's rigorous imprisonment and a fine of Rs. 125/- for the offence punishable under Sec. 326 of the Indian Penal Code, would meet the ends of justice. Mr. Mehta fairly stated that this sentence would meet the ends of justice, especially in view of the fact that the learned trying Magistrate had given a benefit of releasing opponent No. 2 on probation of good conduct. The revision petition, therefore, succeeds.

36. The order regarding payment of fine is made, keeping in mind that compensation of Rs. 125/- was awarded to injured Bhagwanji. That amount was to be paid by opponent No. 2 to that injured person by way of compensation. That order has been probably passed by the learned trying Magistrate, keeping in mind the provisions of Section 6 of the Act, as the order regarding releasing opponent No. 2 on probation of good conduct is set aside, it will not be proper to maintain that order of compensation. It is true that notice had not been given to

the injured person regarding this revision petition. If out of the fine that be recovered, Rs. 125/- are ordered to be paid to injured Bhagwanji, injured Bhagwanji will not be prejudiced in any manner. Furthermore, taking into consideration the seriousness of the offence committed by opponent No. 2, sentence of one year's rigorous imprisonment and sentence of fine of Rs. 125/- and in default of payment of fine, to undergo two months' further rigorous imprisonment, would meet the ends of justice.

37. The revision petition is allowed. The order passed by the learned trying Magistrate releasing opponent No. 2 on probation of good conduct and the order awarding compensation of Rs. 125/- to injured Bhagwanji, are set aside and in lieu thereof, opponent No. 2 (original accused No. 2) is sentenced to suffer one year's rigorous imprisonment and to pay a fine of Rs. 125/- and in default of payment of fine, to undergo two months' further rigorous imprisonment, for the offence punishable under Section 326 of the Indian Penal Code.

38. Out of the fine, if recovered, Rs. 125/- are ordered to be paid to the injured (Bhagwanji). Rule is made absolute.

Revision allowed.

fit to be resolved by Supreme Court.

(Para 14)

Cases - Referred: Chronological Paras
(1969) AIR 1969 SC 1225 (V 56) =
(1969) 1 SSC 781, Jindal Oil Mills
v. Godhra Electricity Co. Ltd. 11
(1962) AIR 1962 SC 1543 (V 49) =
(1962) Supp 3 SCR 973, Madanlal
v. Shree Changdeo Sugar Mills
Ltd. 8

I. M. Nanavati, for Appellant; Shantilal
M. Shah with M. C. Shah, for Respon-

MEHTA, J.:— This appeal raises a short question as to whether under Section 22-A(3) of the Indian Electricity Act, 1910, hereinafter referred to as 'the Act', a local authority is entitled to continuance of supply of electrical energy on the same terms and conditions even when its agreement expires. After the earlier agreement, dated April 3, 1937, was declared by the Civil Court as per the decree, dated November 17, 1939, to be null and void in a suit filed by the ratepayer, the present agreement between the licensee company and the plaintiff municipality, the local authority, was entered into on August 14, 1940 for a period of 20 years for supply of electrical energy to this local authority on the terms specified therein. The said agreement was to expire on August 13, 1960. The licensee company by the letter, dated May 10, 1960, intimated the local authority that on the expiry of the said agreement the company would have no obligation to supply electrical energy on the same terms, but that they would charge increased rates. The Municipal Board passed a resolution on August 6, 1960, to file a suit as they were of the view that they were entitled to renewal of the agreement, or in any event, to have the supply continued to them on the same terms by the licensee company. The plaintiff Municipality, therefore, filed the present suit. Both the trial Court as well as the first appellate Court dismissed the plaintiff's suit on the ground that there was no covenant providing for any implied renewal of the agreement in question, and that Section 22-A(3) could not help the plaintiff in the present case. When the matter came up before our learned brother Bhagwati, J. (as he then was) in Second Appeal, our learned brother also took the same view that the relevant Cls. 14 and 15 could not be pressed in aid to spell out any implied renewal of the agreement in question. As regards the applicability of Section 22-A(3), however, our learned brother reversed the decision of the two lower Courts as he came to the conclusion that Section 22-A (3) created an obligation on the licensee to continue the supply of electrical energy on the same terms even after the expiry of the said agreement. On that footing our learned brother

AIR 1970 GUJARAT 194 (V 57 C 33)

J. B. MEHTA AND S. N. PATEL, JJ.

Nadiad Electric Co. Ltd., Nadiad, Appellant v. The Nadiad Borough Municipality, Nadiad, Respondent.

Letters Patent Appeal No. 11 of 1963, D/- 14-10-1969, from judgment of Bhagwati J. reported in AIR 1964 Guj 30.

(A) Interpretation of Statutes — Marginal note — Not to be invoked so as to limit plain words of statute. (Para 8)

(B) Electricity Act (1910), S. 22-A (3) — Scope — Obligation to continue supply on same terms after expiry of agreement. Section 22-A (3) creates an obligation on the licensee to continue the supply of electrical energy on the same terms even after the expiry of the previous agreement between it and the local authority. This benefit however would be available only to those establishments which are used or intended to be used for maintaining supplies and services essential to the community. S. 22-A (3) has nothing to do with any preferential supply mentioned in S. 22-A (1) but operates in a totally different field. (Paras 7, 12)

(C) Constitution of India, Art. 133(1) (c) — Certificate of fitness — Interpretation of S. 22-A (3) of Electricity Act — Question is one of wide public importance

FN/GN/C804/70/DHZ/R

allowed the appeal and granted a declaration to the plaintiff-Municipality that the defendant company was bound under Section 22-A (3) to continue to supply electrical energy to the plaintiff on the same rates and on the same terms and conditions as specified in the agreement, dated August 14, 1940, so long as the plaintiff continued their establishment used or intended to be used for maintaining supplies and services essential to the community until the defendant received a notice in writing from the plaintiff requiring them to discontinue the supply. Our learned brother made it clear that this obligation was subject to the other provisions of the Act and also the Electricity (Supply) Act, 1948, including Sections 57, 57-A and VI and VII, Schedules of that Act. No injunction was granted by him as the defendant company raised only the contention that the agreement was not automatically renewed and they were not bound to continue the supply on the same terms and conditions as envisaged under Sec. 22-A (3) of the Act and they had not refused to supply electrical energy to the plaintiff on any other grounds. The question regarding the automatic renewal is not raised in this appeal. This appeal is only confined to the question as regards the true interpretation of Section 22-A (3) of the Act. The licensee company has come in this appeal on the certificate being issued by our learned brother.

2. For a proper interpretation of Section 22-A (3), it would be proper to consider its entire setting and background especially as both Section 22-A and Section 22-B were introduced in that Act by the Amending Act 32 of 1959 which came into force on September 5, 1959. Section 22 of the Act provides that where energy is supplied by a licensee, every person within the area of supply shall, except in so far as is otherwise provided by the terms and conditions of the license, be entitled on application, to a supply on the same terms as those on which any other person in the same area is entitled in similar circumstances to a corresponding supply. The proviso is not material for our purpose. Section 23(1) provides that a licensee shall not, in making any agreement for the supply of energy, show undue preference to any person. Thus before the amended Section 22-A and Section 22-B were inserted, the scheme of Sections 22 and 23 made it clear that every consumer was entitled to a supply without any discrimination with any other person similarly situated on the same terms and without any discrimination and the licensee company on the making any agreement for the supply of electric energy could not show any undue preference to any person. It is, therefore, by way of an exception to the scheme of Sections 22 and 23 that preferential sup-

ply could be permitted and that is why Section 22-A (1) has been now introduced. The two newly inserted provisions Sections 22-A and 22-B are as under:—

"22-A (1) The State Government may, if in its opinion it is necessary in the public interest so to do, direct any licensee to supply, in preference to any other consumer, energy required by any establishment which being in the opinion of the State Government an establishment used or intended to be used for maintaining supplies and services essential to the community, is notified by that Government in the Official Gazette in this behalf.

(2) Where any direction is issued under sub-section (1) requiring a licensee to supply energy to any establishment and any difference or dispute arises as to the price or other terms and conditions relating to the supply of energy, the licensee shall not by reason only of such difference or dispute be entitled to refuse to supply energy but such difference or dispute shall be determined by arbitration.

(3) Where any agreement by a licensee, whether made before or after the commencement of the Indian Electricity (Amendment) Act, 1959, for the supply of energy with any establishment referred to in sub-section (1) expires, the licensee shall continue to supply energy to such establishment on the same terms and conditions as are specified in the agreement until he receives a notice in writing from the establishment requiring him to discontinue the supply.

(4) Notwithstanding anything contained in this Act, or in the Electricity (Supply) Act 1948, or in his license or in any agreement entered into by him for the supply of energy, a licensee shall be bound to comply with any direction given to him under sub-section (1) and any action taken by him in pursuance of any such direction shall not be deemed to be a contravention of Section 23.

22-B (1) If the State Government is of opinion that it is necessary or expedient so to do, for maintaining the supply and securing the equitable distribution of energy it may by order provide for regulating the supply, distribution, consumption or use thereof.

(2) Without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may direct the licensee not to comply, except with the permission of the State Government, with—

(i) the provisions of any contract, agreement, or requisition whether made before or after the commencement of the Indian Electricity (Amendment) Act, 1959, for the supply (other than the resumption of a supply) or an increase in the supply of energy to any person, or

(ii) any requisition for the resumption of supply of energy to a consumer after a period of six months from the date of its discontinuance, or

(iii) any requisition for the resumption of supply of energy made within six months of this discontinuance, where the requisitioning consumer was not himself the consumer of the supply at the time of its discontinuance."

3. On a perusal of these two newly introduced Sections 22-A and 22-B, it is obvious that there are three different concepts introduced in these two relevant provisions. Section 22-A (1) deals with preferential supply in case of a certain class of consumers who could be preferred to any other consumer in the supply by the licensee. Section 22-A (3), however, had nothing to do with any preferential supply. It only provides for continuance of supply on the same terms and conditions when the previous agreement expires. The last Section 22-B, however, enables the State to pass orders in general for maintaining supply and securing equitable distribution of energy, and in particular, the said order could direct any licensee, even not to comply except with the permission of the State Government, with its existing contracts and agreements for supply to another consumer. Thus, the scheme of the newly introduced Sections 22-A and 22-B is an integrated scheme even though its different provisions operate in three different fields. The preferential treatment which could be given under direction under Section 22-A (1), as well as the continuance of supply on the same terms even after the expiry of the contractual agreement by reason of the statutory obligation enacted under Section 22-A (3) have reference to establishments used or intended to be used for maintaining supplies and services essential to the community. As regards Section 22-B, however, it deals with a different problem of controlled distribution and consumption of electrical energy being to secure an equitable distribution and maintain the supply when it becomes necessary or expedient. Therefore, all these three provisions show an important nexus or interdependence as they are all intended to achieve the contemplated end in their wider public interest. Of course, all the three operate in the different perspective or the fields. But they all form part of an integrated scheme as aforesaid. In this context, Mr. Shah rightly pointed out that the legislature must be conscious of the fact that especially in case of a local authority which formed a large bulk of such establishments used or intended to be used for maintaining supplies and services essential to the community, the Legislature knew that their agreements were not on the usual pattern, which were applicable to

other consumers, where the agreement for supply of energy would not get terminated on the expiry of the period specified. In this connection, Mr. Shah drew our attention to Section 3(2) (f) which provides that the provisions contained in the Schedule to the Act shall be deemed to be incorporated with, and to form part of, every license granted under this Part. In the Schedule to the Act, Part V (1) provides that where.....a requisition is made by two or more owners or occupiers of premises in or upon any street within the area of supply or by the State Government or a local authority, charged with the public lighting thereof, requiring the licensee to provide distributing mains throughout such street or part thereof, the licensee shall comply within six months with the requisition unless:—

(a) where it is made by such owners or occupiers as aforesaid, the owners or occupiers making it do not, within fourteen clear days after the service on them by the licensee of a notice in writing in this behalf, tender to the licensee a written contract in a form approved by the State Government duly executed and with sufficient security binding themselves to take, or guaranteeing that there shall be taken, a supply of energy for not less than two years to such amount as will in the aggregate assure to the licensee at the current rates charged by him, an annual revenue not exceeding fifteen per centum of the cost of the distributing mains (not including transformers and other sub-station equipment) required to comply with the requisition; or

(b) where it is made by the State Government or a local authority, the State Government or local authority, as the case may be, does not, within the like period, tender a like contract binding itself to take a supply of energy for not less than seven years for the public lamps in such street or part thereof."

Similarly Part VI deals with requisition for supply to owners or occupiers in vicinity and in that case also Cl. (a) to the first proviso makes it clear that the owners or occupiers must on receiving a notice of the licensee execute a written contract in a form approved by the State Government. The provision of Cl. (a) of the first proviso is not applicable in the case of the State Government or local authority as can be seen from Part VIII (2). Mr. Shah in this connection pointed out that the terms of the relevant licence of the licensee company Ex. 48 in which Cl. 7 provides that no supply of energy shall be commenced to be given by the licensee to any owner or occupier or private premises until the State has approved the form of requisition as well as the form of the written contract or agreement for the licensee for supply of electrical energy. Under Cl. 7(2) Paras V, VI, VII

and VIII of the Schedule to the Act are to be necessarily read as expressly added to or varied to the extent set out in the proviso in sub-clause (1). Mr. Shah also pointed out the relevant approved form. There are conditions for the supply of electrical energy laid down by the State as per the letter, dated February 1, 1948 as Ex. 49. In the approved form at Annexure B regarding the written contract, the Cl. 8 provides that the agreement shall be in force for a period of not less than 2 years in the first instance from the date of the commencement of the supply in Cl. (1) and thereafter shall continue from year to year until the agreement is determined as hereinafter provided. Clause 9 provides that the consumer shall not be at liberty save with the consent of the licensee to determine this agreement before the expiration of two years from the date of commencement of the supply of energy hereunder. The consumer may determine this agreement at any time after the said period on giving to the licensee not less than one calendar month previous notice in writing in that behalf and upon the expiration of the period of such notice this agreement shall cease Therefore, the ordinary consumer would have even after the two years period their supply continued until they terminate the agreement by the requisite notice. As these relevant clauses of approved form of contract were not applicable to agreements with the local authority, the plaintiff's agreement, Ex. 47, dated August 14, 1940, only provided the period of 20 years, and on the expiry of that period, Cl. 15 in terms stipulates that if the agreement was not renewed, the licensee would be entitled to remove the street light installation. The effect of this Cl. 15 would be disastrous if the licensee removed the street lighting installation on the expiry of the term of the agreement, if it was not renewed. Being conscious of all these considerations, the legislature when it sought to amend the Act by introducing the Sections 22-A and 22-B also introduced Section 22-A (3), which would provide for continuance of supply on the same terms and conditions in case of such establishment used or intended to be used for maintaining supplies and services essential to the community on the same terms and conditions even if the stipulated period of agreement expires. Mr. Nanavati no doubt vehemently argued that the local authority was not the only class which would contemplate to get the benefit of Section 22-A (3). But he even not only disputed the fact that the local authorities would form a very substantial class of these consumers which maintains and supplies services essential to the community and he conceded that *ex facie* those would be the class of establishments used or who intended to be used for main-

taining supplies and services essential to the community. Even if a private consumer may have some special agreement as contended by Mr. Nanavati, from the language of Section 23(1), other than the usual agreements contemplated to be entered into in the approved form, it could be well considered that the legislature had in mind those contingencies that in cases of such consumers which maintain supplies and services essential to the community, they should no longer be left at the mercy of the licensee. Therefore, irrespective of the fact that the period under the agreement and the contractual obligation came to an end, and that there was not automatic renewal clause which would ensure continuance of the supply, the legislature intervened by creating this statutory obligation as envisaged under Section 22-A (3). Even in the case of preference clause under Section 22-A (1), such preference is permitted, by way of an exception to the general scheme which was in existence prior to the new amendment under which there could be no preferential supply whatever, and all the consumers had to be given equal treatment by reason of the guarantee enshrined in Sections 22(1), 22-A (3) and 23(1) of the Act. Looking to the nature of the essential establishments and the public interest which would be served, the legislature intervened by providing for a preferential supply over other consumers by enacting Section 22-A (1). Even under Section 22-B for the purpose of securing equitable distribution of energy, the provision was made even of such drastic orders which would interfere with other private contracts so that the licensee would be required not to comply with those contracts for achieving this end. Therefore, all these three provisions do interfere with the rights of other consumers or secure preferential rights to the establishments in question by giving them undue preference and even in the case of expired contracts, the obligation to supply energy on the same terms and conditions is sought to be continued. All this has its justification in the wider public interest. It is in the light of this background that we must now resolve this vexed question of interpretation.

4. As regards Section 22-A (1), Mr. Shah rightly urged that the section has both an operative part as well as a descriptive part. If the State Government forms its opinion that it is necessary in the public interest to direct any licensee to give preferential supply, over any other consumer, in respect of the energy required by any establishment described therein, the State Government is conferred power to issue such a direction. The nature of the establishment in respect of which such a direction can be issued is described in the latter part of S. 22-A (1). The latter part in terms states that the

establishment must be one (1) which being in the opinion of the State Government, (2) an establishment used or intended to be used for maintaining supplies and services essential to the community, (3) is notified by the Government in the Official Gazette in this behalf. What is the establishment in its essential being is in terms mentioned by specifying the character of this establishment. The criterion, the characteristic or the test by which such an establishment can be picked out from the other establishments has been referred to in Section 22-A (1) in the following words: "an establishment used or intended to be used for maintaining supplies and services essential to the community." The existence or being of the establishment as such an establishment possessing these characteristics or criterion is not envisaged to be proved as an objective fact. The existence must only be proved for the purposes of Section 22-A (1) only by way of subjective existence or as a mental fact in the mind of the State Government. The process for determining this characteristic or the criterion of the establishment is thus only a subjective process and the opinion of the State Government that such criterion is satisfied is made conclusive and it is not necessary for the purposes of Section 22-A (1) that such existence or being must be shown to be an objective fact. The bona fide opinion of the State Government would be conclusive but that is only as regards the process by which the criterion test or the relevant (sic) is to be applied by the State Government or for determining the application of Section 22-A (1). Similarly, the other step of notification of the establishment is also a mechanical part of the process so that the opinion formed by the State Government would become known. The establishment which is subjectively found to possess the requisite characteristic is notified by the Government in the Gazette for the purpose of exercising the powers under Section 22-A (1) of issuing necessary directions in respect of such establishment. The expression "in this behalf" at the end of Section 22-A (1) would show that the final process of notification which is contemplated is for the purpose of issuing the direction for preferential supply under Section 22-A (1). Therefore, shorn of all the verbiage the characteristic which determines the establishment in Section 22-A (1) or by the help of which such establishment can be picked out by making a particular reference is in its character that it is an establishment used or intended to be used for maintaining supplies and services essential to the community irrespective of the fact that for the purposes of Section 22-A (1) the determination process envisaged is one by way of a subjective opinion, and that the establishment in question has to

be notified in that behalf in the Official Gazette. It should also be kept in mind that wide powers are conferred on the State Government to issue directions under Section 22-A (1), once the necessary opinion is formed of the necessity to issue such direction in the public interest, for the supply can be directed to be given in preference to any other consumers. The legislature has not fettered the discretion of the State Government as to the nature of the preference but has conferred the widest discretion to give preference. Such preference may be in the quantity or a kind of the electric energy to be supplied or even as regards the prices to be charged. But in any event, the nature of preference which can be so directed over other consumers is not sought to be limited by any kind of limitations. The power being of such a wide amplitude and as it seeks to give such a preference over other consumers by means of a statutory direction, the legislature has provided various safeguards.

5. Under Section 22-A (2) when any direction is issued under Section 22-A (1) for the preferential supply to any such establishment, if any dispute or difference arises as to the price or other terms and conditions relating to the supply of electrical energy, such dispute or difference shall be determined by arbitration. The legislature has, however, made it clear that by reason only of the difference or dispute, the licensee shall not be entitled to refuse to supply electrical energy. Therefore, a special machinery of arbitration is created which would impartially resolve any such difference or dispute regarding the terms and conditions relating to the supply which is directed under Section 22-A (1) including the price of the energy to be so supplied. In this context, it should be kept in mind that at the time of the same amendment the legislature had amended Sixth Schedule in the Electricity (Supply) Act, 1948, which lays down the financial principles and their application in the context of Sections 57, 57-A of the Supply Act. Section 57 provides that the provisions of the Sixth Schedule and the Seventh Schedule shall be deemed to be incorporated in the licence of every licensee, not being a local authority—

(a) in the case of a licence granted before the commencement of this Act from the date of the commencement of the licensee's next succeeding year or account, and as from the said date the licensee shall comply with the provisions of the said Schedule accordingly and any provisions of the Indian Electricity Act, 1910, and the licence granted to him thereunder and of any other law, agreement or instru-

ment applicable to the licensee shall, in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of Section 57-A and the said Schedules. Section 57-A provides that— (1) where the provisions of the Sixth Schedule and the Seventh Schedule are under Section 57 deemed to be incorporated in the licence of any licensee, the following provisions shall have effect in relation to the said licensee, namely—

(a) the Board or where no Board is constituted under this Act, the State Government—

(i) may, if satisfied that the licensee has failed to comply with any of the provisions of the Sixth Schedule; and

(ii) shall, when so requested by the licensee in writing,

constitute a rating committee to examine the licensee's charges for the supply of electricity and to make recommendations in that behalf to the State Government:

The first part of the Sixth Schedule as now amended at the same time in 1959 runs as under:—

"1. Notwithstanding anything contained in the Indian Electricity Act, 1910, except sub-section (2) of Section 22-A, and the provisions in the licence of a licensee, the licensee shall so adjust his rates for the sale of electricity whether by enhancing or reducing them that his clear profit in any year of account shall not, as far as possible, exceed the amount of reasonable return."

The provisos lay down the conditions and procedure for enhancement of the rates and the third proviso in terms provides that the licensee shall not enhance rates until after expiry of a notice in writing of not less than sixty clear days of his intention to so enhance the rates, given by him to the State Government and to the Board. The fourth proviso states that if the rates of supply fixed in pursuance of the recommendations of a rating committee constituted under Section 57-A are lower than those notified by the licensee under and in accordance with the preceding proviso, the licensee shall refund to the consumers the excess amount recovered by him from them. Therefore, in view of the amendment in Para I, it is obvious that Section 22-A (2) is in terms excepted so that the licensee could get relief in case of such preferential direction issued under Section 22-A (1) by resorting to the special arbitration remedy under Section 22-A (2) of the Act. Further protection is also given to the licensee in Section 22-A (4) which provides that—

"(4) Notwithstanding anything contained in this Act or in the Electricity (Supply) Act, 1948, or in his licence or in any agreement entered into by him for the supply of energy, a licensee shall be bound to comply with any direction given

to him under sub-section (1) and any action taken by him in pursuance of any such direction shall not be deemed to be a contravention of Section 23."

Therefore, even though by reason of the direction under Section 22-A (1) the licensee gives undue preference even in the rates, his action is not to be deemed to be a contravention of Section 23. In addition to these provisions which protect the licensee by enabling him to avail of this special arbitration and by giving the licensee an immunity from claims of other consumers by reason of contravention of Section 23, the legislature has also provided adequate penalties to see that the licensee carries out these obligations. Section 22-A (4) in terms provides that the licensee shall be bound to carry out the directions under Section 22-A (1). Section 4(1) provides that the State Government may, if in its opinion the public interest so requires, and after consulting the State Electricity Board, revoke a licence in any of the following cases;

"(e) where a licensee, in the opinion of the State Government has made default in complying with any direction issued under Section 22-A."

Similarly, Section 42(d) provides for the penalty if default is made in complying with the direction issued under S. 22-A. Therefore, the Section 22-A (1) in the light of these provisions in sub-cl. (2) and (4) of Section 22-A when read with these other two provisions completes the entire scheme relating to these preferential directions.

6. Similarly, the power given to the State under Section 22-B for maintaining supplies and securing equitable distribution of energy enables the State when it is necessary or expedient, to issue the orders for regulating supplies or distribution or use of the electrical energy. Section 22-B (1) is a general provision and without prejudice to the generality of those powers, under Section 22-B (2) orders can be issued directing the licensee not to comply except with the permission of the State Government with:—

(i) the provisions of any contract, agreement or requisition whether made before or after the commencement of the Indian Electricity (Amendment) Act, 1959; for the supply other than the resumption or a supply or an increase in the supply of energy to any person, or

(ii) any requisition for the resumption of supply of energy to a consumer after a period of six months, from the date of its discontinuance, or

(iii) any requisition for the resumption of supply of energy made within six months of its discontinuance, where the requisitioning consumer was not himself the consumer of the supply, at the time of its discontinuance.

Even for the non-compliance with this section, the penalty of revocation of the licence would follow from Section 4(1) (a) which provides for the case where the licensee in the opinion of the State makes wilful and unreasonable prolonged default in doing anything required of him by or under the Act. Section 42(e) also provides the specific penalty for the default in complying with the order issued under Section 22-B. For the purposes of the present dispute Section 22-B is not material except in so far as it discloses the entire, integrated scheme in that it also confers by the same amendment powers on the State to issue orders for maintaining supplies and equitable distribution of the energy and while issuing such orders the licensee can be directed not to comply with his contract or agreement with the other consumers as provided therein.

7. Turning now to the material provision before us viz. Section 22-A (3) it runs as under:—

"(3) Where any agreement by a licensee, whether made before or after the commencement of the Indian Electricity (Amendment) Act, 1959, for the supply of energy with any establishment referred to in sub-section (1) expires, the licensee shall continue to supply energy to such establishment on the same terms and conditions as are specified in the agreement until he receives a notice in writing from the establishment requiring to discontinue the supply."

On a bare perusal, it is obvious that it operates in a totally different field than the one in which Section 22-A (1) operates. As we have already mentioned Section 22-A (1) envisages a preferential supply over other consumers. There is no question of any preferential supply whatever in Section 22-A (3). It merely provides of a statutory obligation to continue supply for an electrical energy to the establishments mentioned therein on the same terms and conditions notwithstanding that the agreement with such establishment, whether made before or after the Amendment Act, 1959, expires. Such obligation continues until the licensee receives notice from the establishment requiring him to discontinue the supply. Looking to the aforesaid background in which these sub-sections came to be enacted, it is obvious that the legislature intended that such essential establishments which are covered under Section 22-A (3) must have their supply continued notwithstanding the expiry of their agreement with the licensee on the same terms and conditions as before. The nature of establishment which is entitled to this benefit is specified by the words "any establishment referred to in sub-section (1)." We will, presently consider the various interpretations which are canvassed as to the term "referred to" in sub-section (1). The term must have

a descriptive reference by which such an establishment which is envisaged as being eligible for this statutory benefit could be picked out from the other establishments. Therefore, the reference must be by some criterion or characteristic as it must satisfy that descriptive test. When we turn to Section 22-A (1), the reference, as we have already pointed out, is to an establishment used or intended to be used for maintaining supplies and services essential to the community. That is the only definition characteristic or criterion by which such an establishment could be picked out from others irrespective of the fact as to what is the process to be applied whether the subjective process by way of the opinion of the State Government or the objective process which the Court would apply, and whether it is notified for the purpose of issuance of direction under Section 22-A (1) or not. Therefore, on a plain literal construction, the benefit of Section 22-A (1) (sic (3)?) of continuance of supply on the same terms and conditions even after the expiry of the previous agreement would be available only to establishments which satisfy this criterion viz. that they are establishments which are used or intended to be used for maintaining supplies and services essential to the community.

8. Mr. Nanavati, however, vehemently argued that it is a settled principle of construction as laid down in *Madanlal v. S. Changdeo Sugar Mills Ltd.*, AIR 1962 SC 1541 at p. 1551, that the two sub-sections must be constructed as a whole "each portion throwing light, if need be, on the rest." The two sub-sections must be read as parts of an integral whole one as being interdependent and an attempt should be made in construing them to reconcile them if it is reasonably possible to do so and to avoid repugnancy. If repugnancy cannot possibly be avoided, then a question may arise as to which of the two should prevail. But that question can arise only if repugnancy cannot be avoided. Mr. Nanavati, therefore, argued that when the three clauses of Section 22-A viz. 22-A (1), 22-A (2) and 22-A (4) all relating (sic) to the question of preferential supply under a direction of the State Government in case of an establishment specified in Section 22-A (1), sub-clause (3) of Sec. 22-A must also be deemed to be forming part of the same whole scheme of Sec. 22-A of issuing direction for supply. In that context Mr. Nanavati argued that Sec. 22-A (3) should not be interpreted as having its own different perspective or operating in a different field as if it was a separate section which deals with a different situation. Mr. Nanavati also vehemently relied upon the marginal note to Section 22-A which labels it as "powers of State Government to give directions to a licensee in

regard to the supply of energy to certain class of consumers." Now, it is well settled that the marginal note could never be invoked so as to limit the plain words of the statute. Mr. Nanavati is right in his argument that the various sub-sections must be read as interdependent so as to bring out the whole scheme. The material question which arises as to what is the scheme and whether there could be any clue to the scheme merely from the marginal note. The label may be a wrong label and we are concerned only with what is actually enacted by the legislature. If the language were to be any guide, it is obvious that in all the other three sub-sections 22-A (1), 22-A (2) and 22-A (4), the legislature in terms has used appropriate language to show that it was dealing with those cases where the direction for preferential supply of energy was issued under Section 22-A (1). That is why in Section 22-A (2), the opening words in terms state:—"Where any direction is issued under sub-section (1)." Similarly, in Section 22-A (4) it is said that the licensee shall be bound to comply with any direction given under sub-section (1). The legislature, however, departed from that phraseology when it enacted Section 22-A (3) by providing that when there is an agreement by a licensee with any establishment referred to in sub-section (1), whether before or after the amendment of 1959. Therefore, the legislature has used a different phraseology to disclose its intention that it is not dealing with the same subject-matter. Even the context of Section 22-A (3) makes it abundantly clear that the subject-matter of that sub-section is totally different from the subject-matter of Section 22-A (1). Section 22-A (3) envisages an agreement even before the commencement of the Amendment Act, 1959. As we have already discussed under the scheme of the Act prior to this amendment, there was an absolute ban of any preferential supply and, therefore, there could be no agreement by a licensee for supply of energy with any establishment which gave any preferential supply. Without a direction under Section 22-A (1) there can be no question of any preferential supply whether before or after the amendment Act, 1959. Therefore, the problem posed and dealt with by Section 22-A (3) is a totally different problem, not of any preferential supply but of discontinuance of existing supply, and the contractual obligation had to be turned into a statutory obligation only for the simple reason that on the expiry of the agreement the contractual obligation came to an end. The legislature wanted to confer a benefit to such an establishment which had that character imprinted on them of being used or intended to be used for maintaining supplies and services to the community.

Their maintenance of essential supplies and services should be continued notwithstanding the fact that their contract had come to an end. It is only to help them out of this predicament to which they came to by reason of the contract that the legislature intervened to create this statutory obligation. Of course, it is in the public interest that that is done and that is why the benefit is not given to all and sundry but only to those establishments which satisfy the definitive test which is referred to in Section 22-A (1), by their being used or intended to be used for maintaining supplies or services essential to the community. Therefore, this argument of Mr. Nanavati is wholly misconceived that Section 22-A (3) has introduced a totally extraneous concept. The whole contention was based on the basis of the marginal note which could never be a guide, and such an assumption of Mr. Nanavati that the entire Section 22-A is only by way of giving preferential direction is found to be baseless in view of the plain terms of this provision of Section 22-A (3) which deals with no question of preference. This contention of Mr. Nanavati must therefore, fail.

9. Mr. Nanavati next argued that the expression, "any establishment referred to in sub-section (1)" in Section 22-A (3) must be interpreted to mean an establishment which is wholly covered by Section 22-A (1) and in respect of which direction for preferential supply is issued. This construction, as we have already shown, would amount to rewriting Section 22-A (3). It is well settled that the Court cannot change the texture of a statutory enactment even though it may iron out the creases. The whole context of Section 22-A (3) is only of continuance of existing supply, where there is no question of any preference over other consumers and, therefore, the construction advanced by Mr. Nanavati would not only be rewriting the section but would be repugnant in the whole context of Section 22-A (3). As we have already pointed out, there can be no agreement prior to 1959 Amendment Act for supply of energy by giving any preference over other consumers and even after the Amendment Act without a direction in sub-section 22-A (1), no such preferential supply could be given. Therefore, there can be no such agreement as envisaged by Section 22-A (3) in cases of preferential supply. Besides, the only reference in sub-section 22-A (3) is to an establishment referred to in sub-section (1) which is clearly a reference to the descriptive portion in Section 22-A (1). Such a reference to the descriptive portion could never relate to the operative portion of Section 22-A (1).

10. Besides the contention of Mr. Nanavati would make the entire Sec-

tion 22-A (3) redundant. Section 22-A (4) in terms provides that a licensee shall be bound to comply with any direction given to him under sub-section (1), notwithstanding anything contained in this Act or in the Electricity (Supply) Act, 1948, or in his licence or in any agreement entered into by him for the supply of energy. Therefore, notwithstanding the fact that the agreement has expired, when a direction is issued the licensee would be bound to comply with the direction under Section 22-A (1). In that view of the matter, the whole provision enacted in Section 22-A (3) would be nugatory or redundant as it would be a mere surplusage. Mr. Nanavati in this connection vehemently argued that even in spite of Section 22-A (4) there was a necessity to enact Section 22-A (3), because the direction under Section 22(1) could not contain the terms for supply. In order to make that aspect clear that legislature enacted Section 22-A (3) by laying down the statutory obligation that notwithstanding the expiry of the contract, the licensee shall continue to supply energy on the same terms and conditions as they were specified in the agreement. This argument of Mr. Nanavati proceeds on an assumption that Section 22-A contains any limitation on the power of the State Government to direct preferential supply. As we have already shown, the power of the State Government to direct such preferential supply is not sought to be limited by any better whatever and any preference could be given whether as to quantity, quality or price of the energy to be supplied. That is why we had pointed out that the legislature sought to give immunity under Section 22-A (4) by providing that the licensee who acts in pursuance of such direction under Section 22-A (1), shall not be deemed to contravene Section 22-A (3) which deals with undue preference to any one consumer by different charges in the same circumstances. Mr. Nanavati, however, argued that the power to issue direction under Section 22-A (1) was by way of an exception to Section 22 and not to Section 23. This argument ignores the fact that Section 22-A uses the expression, "preference" in its widest context without any limitation and in its turn provides for the immunity in Section 22-A (4) for the contravention of Section 23. Mr. Nanavati suggested another reason that when the prices were fixed in arbitration on a dispute arising between the licensee and the consumer in question under Section 22-A (2), immunity would have to be provided in Section 22-A (4). This argument cannot be accepted because the immunity irrespective of the fact, whether in pursuance to the direction in any arbitration proceeding had taken place or not. Mr. Nanavati further argued that under Section 22-A (2) a situation might

arise when the licensee may offer prices less than those charged from the other consumers to this particular consumer and there might be an agreement, and in such a case immunity could be obtained only under Section 22-A (4). We cannot agree with Mr. Nanavati that Section 22-A (4) was enacted to cover such a far-fetched case which in a practical world we can hardly envisage.

11. Mr. Nanavati next argued that in any event this construction would lead to an invidious discrimination and the legislature would never have intended such a hardship to be imposed on the licensee, and to avoid such anomalous consequences, the construction canvassed by him should be preferred. Mr. Nanavati pointed out in this context that Section 22-A (3) provides a statutory obligation to continue supply of energy on the same terms and conditions as per previous agreement until the licensee receives a notice in writing requiring him to discontinue the supply. Therefore, in perpetuity the licensee would be tied down with those obligations with no way for him to get out of this predicament, the other essential and service consumers to whom direction was issued under Section 22-A (1) can at least avail of the statutory remedy under Section 22-A (2) to raise a dispute to be resolved by arbitration if they feel themselves aggrieved by the price or other terms and conditions. While these establishments which if held to be different establishments than those in whose case the direction is issued under Section 22-A (1) would not have the benefit of this statutory arbitration. There would be no reason, Mr. Nanavati argued out for this invidious distinction between these two classes, when especially they came out of the same genus viz. establishments used or intended to be used for supplies and services essential to the community. Mr. Nanavati in this context vehemently relied upon the fact that in the Supply Act Part I of Schedule VI was amended only to except Section 22-A (2). In fact that very exception offers a solution to the problem posed by Mr. Nanavati. The direction under S. 22-A (1) is special direction of a preferential supply in which case the legislature gives this special protection of the special statutory arbitration under Section 22-A (2), and that is why the exception is made only for this provision in Part (1) of the Sixth Schedule. When the case is not one of any preferential direction under Section 22-A (1) but is only of continuance of supply for on the same terms and conditions as previously agreed and which is dealt with under Section 22-A (3), the legislature had no necessity to enact any such special protection and that is why it left the parties to their general remedy and by re-

sorting to Sections 57 and 57-A and Para I of the Sixth Schedule. Mr. Nanavati rightly pointed out that after the decision of the Supreme Court in *Jindal Oil Mills v. Godhra Electricity Co. Ltd.*, 1969 (1) SCC 781, it is well settled that the licensee has unilateral right to enhance the charges in accordance with the conditions prescribed in the Sixth Schedule by following that procedure. This was the procedure applicable even when the previous agreement was in force and it could make no difference merely because instead of the contractual obligation, statutory obligation was substituted because the contract came to an end. There would be no question of any invidious discrimination when the two situations are totally different. In one case there is the question of a preferential direction and, therefore, a special protection under Section 22-A (2) exists while in the other case there is only continuance of supply on the terms as originally agreed and, therefore, the parties would be left to the same original remedy. That is why the legislature was particular to exclude only Section 22-A(2) by amending Part I of the Sixth Schedule of the Supply Act. Besides, our learned brother rightly pointed out that merely because hardship results it would be no ground to depart from the accepted principles of statutory construction as that would be a matter for the legislature to consider. In fact, the construction suggested by Mr. Nanavati not only compels us to rewrite the language but results in the vices which would of redundancy and repugnancy and it would plainly defeat the object of the legislature in enacting this statutory measure for the benefit of such hardship establishments which are used and intended to be used for maintaining supplies and services essential to the community. Even if two interpretations were possible, we would be bound to give that interpretation which would advance this object rather than would defeat it and which would not lead to any such anomalies.

12. Mr. Nanavati argued his case in the alternative for another construction by interpreting the expression "establishment referred to in sub-section (1)" as an establishment which falls within the descriptive part of Sec. 22-A(1) by satisfying all the three relevant conditions, or in any event, at least the first relevant condition that it is an establishment which in the opinion of the State Government is used or intended to be used for maintaining supplies and services essential to the community. Mr. Nanavati argues that this construction would avoid conflict of decisions as to the "establishment referred to in sub-section (1)." On the interpretation propounded by Mr.

Shah, argued Mr. Nanavati, there would be two conflicting decisions, in one case as per the opinion of the State Government on the application of the subjective test, and in the other case, as per the decision of the Court on the application of the objective test. There is no substance even in this last contention of Mr. Nanavati different consequences ensue not because of our different interpretation of the same words but because in the two sub-sections the legislature has made different provisions. In Section 22-A(1) the legislature has in terms provided that the criterion which is to be applied for finding out whether the establishment fulfils the necessary test of its being used or intended to be used for maintaining supplies and services essential to the community, is one by way of a subjective process viz., by the opinion of the State Government which is made conclusive. In Section 22-A(3) on the other hand, the legislature has not used the same expression that such an establishment must satisfy only the subjective test. The legislature contented itself by using the words "establishment referred to in sub-section (1)". The reference could only be a descriptive reference and such description must be, no doubt, by way of a definition by laying down the criterion and that criterion could only be found from the words "establishment used or intended to be used for maintaining supplies and services essential to the community." Section 22-A (1) in terms speaks of that as the being of that establishment or its essence. For the purpose of Sec. 22-A(1) when the State Government acts. For exercising power in that behalf it is provided that this criterion may be applied subjectively but that does not change the nature of the criterion. The criterion would always be a norm or an objective criterion unless the legislature in terms states that the criterion must be applied subjectively, so that the being need not actually exist or must be objectively shown to exist and it would be sufficient to say that it exists subjectively or only as mental fact. Unless the Legislature uses such words, the reference must always be by objective description. Mr. Nanavati next argued that the expression used in Section 22-A(3) is "any establishment," and, therefore, it must have reference to any particular establishment which wholly falls under Section 22-A (1) at least satisfies the three criteria referred to in the later part of S. 22-A(1): (1) of a subjective opinion of the State, (2) the descriptive nature of the establishment, and (3) the notification by the State. Now the use of the word "any" is often in the sense of 'all' as in the familiar expression "any one can do it", we mean that all can do it. Therefore, 'any establishment' would mean in S. 22-A(3)

'all' such establishments which satisfy the objective norms or criteria to which we find reference in Section 22-A(1) and that is why the legislature used only the compendious expression "establishment referred to in Section 22-A(2)", instead of repeating the words "establishment used or intended to be used for maintaining supplies and services to the community. Besides, it must be kept in mind that Section 22-A(3) contemplates an agreement between a licensee and the establishment referred to in sub-section (1). Therefore, such an establishment cannot exist as a mental fact but must be one which must satisfy the objective norms. Mr. Nanavati made it clear that the establishment even in his argument is not one which exists only as a mental fact. Establishment is actual but its character is determined by a subjective process by its existence in the mind of the State. We are not concerned for determining the eligibility for the benefit of S. 22-A (3), with the establishment in general but only with the establishment referred to in sub-section (1). Once we accept Mr. Nanavati's argument that the reference brings in a subjective existence in the mind of the State, it would mean that what is contemplated in Section 22-A(3) in establishment which had only a mental existence. When the agreement is contemplated between the licensee and such referred establishment, it would be obvious that both licensee and the referred establishment must exist objectively. Therefore, looking to the entire context, setting and all these considerations which we have made, neither of the alternative constructions urged by Mr. Nanavati can be accepted in plain departure from the statutory language of this salutary enactment embodied in Section 22-A(3) and in violation of all the settled principles of construction of statute. We, therefore, completely agree with the decision of our learned brother that Section 22-A(3) operates in a totally different field as it does not deal with any question of preference but it provides for continuance of the obligation to supply energy to an establishment used or intended to be used for maintaining supplies and services to the community irrespective of the fact that an agreement whether entered into proof or after 1959 Amendment has expired until the licensee received a notice in writing from the establishment requiring him to discontinue the supply. In that view of the matter this appeal must fail.

13. In the result, this appeal is dismissed with costs.

14. At the end Mr. Nanavati made a request for the issue of a certificate under Article 133(1)(c) of the Constitution. We consider this question of interpretation of Section 22-A(3) as one of wide public

Importance which should be resolved by the Supreme Court. We, therefore, order that a certificate may be issued in this case under Article 133(1)(c) in view of the wide importance of this question.

15. We also direct that the entire order made by this Court on June 19, 1963 shall continue for a period of 30 days from the date the certified copy of this order with the certificate is supplied to the licensee company provided an application for the same is made within a week. We further direct that the plaintiff shall not withdraw the security deposited by them under the order of this Court, dated November 23, 1962, for the aforesaid period of 30 days when the certified copy of the judgment is supplied to the licensee company.

Appeal dismissed.

'AIR 1970 GUJARAT 204 (V 57 C 34)'

P. N. BHAGWATI, C. J. AND
A. R. BAKSHI, J.

Shashikant Mohanlal Desai and others,
Petitioners v. State of Gujarat and others,
Respondents.

Spl. Civil Appns. Nos. 372 and 1280 of
1967, 1394 of 1965 and 294 of 1968, D/-
7-1-1969.

Tenancy Laws — Bombay Tenancy and
'Agricultural Lands Act (67 of 1948), Sec-
tions 43 and 32 — Intention of Legislature
in making tenant a deemed purchaser —
Purchaser transferring land — Sanction
granted on payment to State Government
— Sanction is valid — Necessity of con-
ditions laid down in Section 43, explained.

Under Bombay Act 67 of 1948, the tenant is made the deemed purchaser of the land in order to effectuate the policy of agrarian reform to eliminate the intermediary landlord and to establish direct relationship between the State and the tiller of the soil. The Legislature therefore, insisted that the tenant must personally cultivate the land of which he is made the deemed purchaser. If the tenant failed to cultivate the land personally either by keeping it fallow or by putting it to non-agricultural use, he would lose the land. For the same reason, the Legislature under Section 43 placed an embargo on the tenant transferring the land.

(Paras 7, 8)

Transfer may be made by the tenant to another after sanction by the Collector and on payment of such amount as the State Government may by general or special order determine. If either of these two conditions is not fulfilled, the transfer would be invalid. The first is to en-

*Only portions approved for reporting
by High Court are reported here.)

IM/LM/E142/69/HGP/B

sure that the general rule inhibiting transfer is not departed from except under justifying circumstances. The second is quite independent of the first and is of a mandatory character. The payment contemplated by S. 43 is payment to the State Government and not to the landlord. (Paras 8, 9)

As soon as the tenant becomes the deemed purchaser of the land, the landlord ceases to have any interest in the land. What the tenant does with the land thereafter is a matter between the tenant and the State Government. The State is theoretically the owner of all lands: all occupants hold under the State. If an occupant is not entitled to transfer his land without the permission of the State, the State can very well say that the permission to transfer the land would be granted only if he pays a premium to the State as the sovereign owner of the land. That is the charge which the State makes for permitting transfer where the occupancy is not transferable as of right. (Paras 10, 11)

Where the State Government made under Section 43 the Resolution on 17-1-1961 determining different amounts to be paid to the State Government according as the land was sought to be transferred by sale, gift, etc. and the amount on transfer by sale was fifty per cent of the net profit resulting to the tenant from the sale. When this amount was paid by the tenant before effecting the sale the second condition of Section 43 must be held to have been fulfilled and the sanction granted for sale was valid. (Para 11)

Spl. C. A. 372/67:—

C. T. Daru and P. D. Desai, for Applicant; J. M. Thakore, Advocate General with J. R. Nanavati, Asstt. Govt. Pleader and M. G. Doshit, Addl. Govt. Pleader, for Respondents Nos. 1 and 2; A. H. Mehta with S. T. Mehta, for Respondents Nos. 3 and 4. The Advocate General served. Spl. C. A. 1394/65:—

M. C. Shah, for K. M. Shah, for Petitioners; J. M. Thakore, Advocate General with M. G. Doshit Addl. Govt. Pleader, for Respondents Nos. 3 and 4; B. R. Shah, for Respondent No. 2; The Advocate General and Respondent No. 1 served.

Spl. C. A. 1280/67:—

M. I. Patel, for Petitioner; J. M. Thakore, Advocate General with M. G. Doshit, Addl. Govt. Pleader, for Respondents Nos. 1 and 2; G. C. Patel, for Respondent No. 3.

Spl. C. A. No. 294/68:—

J. M. Patel, for M. M. Patel, for Petitioner; J. M. Thakore, Advocate General with M. G. Doshit, Addl. Govt. Pleader, for Respondents Nos. 1 and 2; A. G. Momin, for G. R. Shaikh, for Respondent No. 4.

BHAGWATI, C. J.:— These petitions raise a short but interesting question of construction of Section 43 of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the Act). Though the question of law which arises in these petitions is common, the facts are not identical and it is therefore, necessary, to state the facts of each petition separately.

2. Petition No. 372 of 1967:— Prior to 1st April 1957, the petitioner's predecessor in-title was the landlord and the predecessor-in-title of the third respondent was the tenant of survey No. 228 situate in village Rander, Taluka Chorashi, District Surat. By reason of Section 32 of the Act, the predecessor-in-title of the third respondent became the deemed purchaser of the said survey number on 1st April 1957 and in an inquiry held under Section 320, the Agricultural Lands Tribunal fixed the purchase price of the said survey number at Rs. 12,000/- by an order made on 31st October 1963. The purchase price was payable in twelve equal annual instalments of Rs. 1000/- each together with interest at four and one half per cent per annum but it appears that the entire purchase price together with accrued interest was deposited by the third respondent with the Agricultural Lands Tribunal by 26th April 1965 and a certificate of purchase was accordingly issued by the Agricultural Lands Tribunal in favour of the third respondent on 28th April 1965. The petitioner in the meantime came to learn that the third respondent was negotiating for sale of the said survey number to the fourth respondent for a price of over Rs. 1,30,000/- and the petitioner therefore, addressed letters to the Chief Minister, the Revenue Minister and the Collector protesting against the intended transfer of the said survey number by the third respondent at such a large profit. The record does not show whether any reply was received by the petitioner from the Chief Minister, the Revenue Minister or the Collector but it is clear that an agreement dated 29th July 1965 was entered into by the third respondent with the fourth respondent for sale of the said survey number at the price of Rs. 1,32,391/-. Pursuant to a public notice issued by the fourth respondent inviting objections against the proposed purchase of the said survey number, the petitioner communicated his objections to the fourth respondent by a letter dated 21st May 1966 and the petitioner also on the same day wrote to the Assistant Collector inquiring whether any application for sanction was received by him. The Assistant Collector replied by his letter dated 4th June 1966 stating that no application for sanction had been received till then from the third respondent. The petitioner thereafter had an interview with the Revenue Minister and according

to him, he was assured by the Revenue Minister that no sanction would be granted for sale of the said survey number by the third respondent to the fourth respondent. The Assistant Collector however, by an order dated 23rd December 1966 granted sanction to the third respondent to sell the said survey number to the fourth respondent for the price of Rs. 1,32,391.30 on condition that the third respondent paid to the State Government fifty per cent of the profit resulting to him from the sale, namely, Rs. 60,195.65np. Pursuant to the sanction granted by the Assistant Collector, the third respondent sold the said survey number to the fourth respondent for the price of Rs. 1,32,391.30 on 30th December 1966 and paid a sum of Rupees 60,195.65 representing fifty per cent of the excess of Rs. 1,32,391.30 over Rs. 12,000/- to the State Government. This led to the filing of Petition No. 372 of 1967.

3-5. x x x x x x

6. Each of these petitions impugned the validity of the order of the Collector granting sanction for sale of the respective lands as also of the sale effected by the tenant pursuant to the sanction so granted. There were in the main two contentions on which the challenge was based. The first contention was that on a true construction of Section 43, the Collector could grant sanction to the tenant for sale only on condition that the tenant agreed to make payment of the amount determined by the Government to the landlord and since the order granting sanction did not contain any such condition, it was illegal and void. It was also urged on behalf of the petitioner in each petition — and that was the second contention — that on a proper interpretation of Section 43, payment to the landlord of an amount to be determined by the State Government was a condition of the sale and since this condition was not satisfied, the sale effected by the tenant in each of the four petitions was invalid. The respondents disputed the validity of both these contentions and they urged that there was nothing in Section 43 which required the Collector to make it a condition of the grant of sanction for sale that the tenant should make payment of the amount determined by the State Government to the landlord and though it was no doubt true that under Section 43 the sale could not be effected by the tenant except on payment of the amount determined by the State Government, this condition was satisfied for the payment contemplated was payment to the State Government and not to the landlord and fifty per cent of the net profit so determined by the State Government in the Government Resolution dated 17th January 1961 was paid by the tenant in each case to the State Government. These rival contentions raised

an interesting question of construction which we shall now proceed to consider.

7. The Act as originally enacted in 1918 was intended to regulate the relationship of landlord and tenant with a view to giving protection to the tenant against exploitation by the landlord but in 1956 a major amendment was made in the Act introducing a radical measure of agrarian reform. The Legislature decided that the tiller of the soil should be brought into direct contact with the State and the intermediary landlord should be eliminated and with that end in view, the Legislature introduced a fasciculus of sections from Section 32 to S. 32-R and S. 43. These sections came into force on 13th December 1956 and they provided for the tenant becoming deemed purchaser of the land held by him as tenant. Section 32 said that on 1st April 1957 every tenant shall, subject to certain exceptions which are not material for the purpose of the present petitions, be deemed to have purchased from his landlord, free from all encumbrances subsisting thereon on the said day, land held by him as tenant provided he was cultivating the same personally. If the landlord bona fide required the land either for cultivating personally or for any non-agricultural purpose, he could after giving notice and making an application for possession as provided in Section 31, sub-section (2), terminate the tenancy of the tenant subject to the conditions set out in Sections 31-A to 31-D but if he did not take steps for terminating the tenancy of the tenant within the time prescribed in Section 31, the tenant became the deemed purchaser of the land on 1st April 1957. If the landlord gave notice and made an application for possession within the time prescribed in Section 31, the tenant would not become the deemed purchaser of the land on 1st April 1957 but he would have to await the decision of the application for possession and if the application for possession was finally rejected, he would be the deemed purchaser of the land on the date on which the final order of rejection was passed. Now if the tenant becomes deemed purchaser of the land, there would be no difficulty, for the intermediary landlord would then be eliminated and direct relationship would be established between the State and the tiller of the soil. But what is to happen if the tenant expresses his unwillingness to become deemed purchaser of the land? The Legislature said that in such a case the tenant cannot be permitted to continue as a tenant: he would have to go out of the land. If the tenant is permitted to continue as a tenant, the object and purpose of the enactment of the legislation, namely, to eliminate the middleman, would be defeated. The Legislature therefore, provided in Section 32-P that if the tenant expresses

his unwillingness to become deemed purchaser of the land and the purchase consequently becomes ineffective, the Collector shall give a direction providing that the tenancy in respect of the land shall be terminated and the tenant summarily evicted. The land would then be surrendered to the landlord subject to the provisions of Section 15 and if the entire land or any portion thereof cannot be surrendered in accordance with the provisions of Section 15, the entire land or such portion thereof, as the case may be, shall be disposed of by sale according to the priority list. The priority list consists of persons who would personally cultivate the land and the sale of the land to them would ensure that the tiller of the soil becomes the owner of it and there is no intermediary or middleman to share the profits of his cultivation. Since the tenant is made the deemed purchaser of the land in order to effectuate the policy of agrarian reform to eliminate the intermediary landlord and to establish direct relationship between the State and the tiller of the soil so that the soils of his cultivation are not shared by an intermediary or middleman who does not put in any labour, the Legislature insisted that the tenant must personally cultivate the land of which he is made the deemed purchaser. The tenant, said the Legislature, would continue to remain owner of the land only so long as he personally cultivated it: he must make use of the land for the purpose for which it was given to him as owner. If the tenant failed to cultivate the land personally either by keeping it fallow or by putting it to non-agricultural use, he would lose the land under Section 32-B and the land would be given away to others for personal cultivation in accordance with the provisions of Section 84-C.

8. So also and for the same reasons, the Legislature by enacting Section 43 placed an embargo on the tenant transferring the land deemed to be purchased by him. If the tenant were free to transfer the land to anyone he liked, the object and purpose of making him the deemed purchaser of the land would be frustrated. Section 43 therefore, provided that no land purchased by a tenant under Section 32 shall be transferred by sale, gift, exchange, mortgage, lease or assignment or partitioned without the previous sanction of the Collector and except on payment of such amount as the State Government may by general or special order determine. The general rule enacted in Section 43 was that the tenant shall not transfer the land by sale, gift, exchange, mortgage, lease or assignment or partition if, for it is given to him as owner for personal cultivation. But the Legislature recognised that there may be cases where it may be necessary or expedient to transfer the land to some other person and the

Legislature therefore, provided that the transfer may be made by the tenant after obtaining the previous sanction of the Collector and on payment of such amount as the State Government may by general or special order determine. These two conditions are clearly and indubitably conditions of a valid transfer of the land by the tenant and if either of those two conditions is not fulfilled, the transfer would be invalid.

The first condition requires that there must be previous sanction of the Collector before land can be transferred by the tenant. This requirement is introduced in order to ensure that the general rule inhibiting transfer is not departed from except under justifying circumstances. When an application is made to the Collector for sanction, the Collector will examine the facts and circumstances of the case and decide whether, consistently with the policy of the Act and the exigencies of the situation, the tenant should be permitted to transfer the land. If the land is sought to be transferred by the tenant for a non-agricultural purpose the Collector will have to consider whether the necessity or expediency of transfer is so great that, despite the policy of the statute that the land must be personally cultivated by the tenant, it should be allowed to be transferred by the tenant to another for a non-agricultural purpose. It is not a power to be exercised lightly: it is a power which must be exercised with great care and circumspection having regard to the policy of the statute and also bearing in mind the fact that the landlord has been deprived of his ownership of the land for the purpose of making the tiller of the soil the owner of it. The Collector will therefore, take into account various circumstances relating to the proposed transfer and decide whether he should grant permission or not but there is nothing in Section 43 which requires that he should make it a condition of sanction that the tenant shall pay the amount determined by the State Government. The requirement that the tenant shall pay "such amount as the State Government may by general or special order determine" is introduced by the second condition and that is quite independent of the first: there is no reason on principle why it should be incorporated in the sanction to be granted by the Collector. The sanction granted by the Collector in each of the petition cannot therefore be assailed as invalid on the ground that it did not make payment of the amount determined by the State Government a condition of the sanction.

9. Turning to the second condition, there can be no doubt that it is of a mandatory character. The negative language of the section: "No land shall be transferred ex-

cept on payment of such amount” clearly indicates that payment is obligatory in order that the transfer should be valid: only the amount is left to be determined by the State Government by general or special order. The question then arises, to whom is the payment required to be made: is it to the landlord as contended by the petitioner in each petition or is to the State Government as claimed by the respondent? The section does not in so many terms mention to whom the payment is to be made, and hence the debate or controversy between the parties. We are of the view that the construction contended for on behalf of the respondents is correct and the payment contemplated by the section is payment to the State Government and not to the landlord and our reasons for saying so are as follows:

10. In the first place, it must be realised that as soon as the tenant becomes the deemed purchaser of the land, whether under Section 32 or under any of the other sections referred to in Section 43, the landlord ceases to have any interest in the land and goes out of the picture altogether. He ceases to have any concern with the land and what the tenant does with the land thereafter is a matter between the tenant and the State Government, with which he is not concerned. The tenant becomes the deemed purchaser of the land and if there are any conditions or restrictions affecting his occupancy of the land under the Act, it is for the State and not for the landlord to see that those conditions and restrictions are observed. The landlord fades out of the picture once the deemed purchase is effected and it is difficult to see why the Legislature should have provided that when the tenant transfers the land, such amount as may be determined by the Government shall be paid to the landlord. The transfer may be effected by the tenant at any point of time in the future: it may be after ten years or fifteen years or twenty years: the association of the landlord with the land would by that time be merely a historical association. If that be so, it is difficult to imagine any reason which should have induced the legislature to introduce a provision that when the landlord, who has been an occupant of the land for a number of years, transfers it, some amount should be required to be paid to the landlord. Moreover, different kinds of transfer contemplated by the section include gift and mortgage. Now what object or purpose could possibly be intended to be served by requiring payment of some amount to the landlord when the tenant gifts the land or mortgages it for raising a loan? There would be no element of profit motive in the transaction and no profit could possibly arise to the tenant as a result of the transaction: why then should the tenant

be compelled to pay any amount to the landlord? The section also refers to partition of the land. If the tenant has become the deemed purchaser of the land as manager and Karta of his joint family and he partitions the land, there is no reason why, as a condition of partition, some benefit should be provided to the landlord. The only argument on which the petitioner sought to justify provision for payment to the landlord was that it was introduced as a part of the scheme of social justice envisaged by the Act. The petitioner contended that the tenant was made the deemed purchaser of the land at a ridiculously low price because he was personally cultivating it and it was intended that he should continue to personally cultivate it. But if he wanted to act as the ordinary owner and take full advantage of the rights which ownership gave him, then the law required that he should make some extra payment to the landlord so that justice might also be done to the landlord. This was, according to the petitioner, a counter-balancing provision which was intended to effectuate justice to the landlord in those cases where the reason for giving the land to the tenant at a ridiculously low price ceased to exist. But this contention is without force. Where the tenant partitions the land amongst the members of the joint family and the land goes to the share of another member for personal cultivation, where does the necessity of compensating the landlord arise? So also, where the tenant mortgages the land for the purpose of raising a loan or where he exchanges the land for another land which he thinks he will be able to cultivate more efficiently there can be no necessity or justification for compensating the landlord. Moreover, if payment was intended to be made to the landlord in order to effectuate social justice, it would not have been left to the State Govt. to determine the amount in its absolute discretion. It may also be noticed that there is no reference to the landlord anywhere in the section and it therefore, stands to reason that if the Legislature intended that the payment should be made to the landlord, the Legislature would have said so in so many terms.

11. As the section stands there can be no doubt that it is implicit in the language used in the section that the payment contemplated is payment to the State Government. It must be remembered that the State is theoretically the owner of all land; all occupants hold under the State. If an occupant is not entitled to transfer his land without the permission of the State, the State can very well say that the permission to transfer the land would be granted only if he pays a premium to the State as the sovereign owner of the land. As a matter of fact, such a provision is to

be found in Section 73-B of the Bombay Land Revenue Code, 1879. That section which was introduced in the Code with retrospective effect by Gujarat Act 35 of 1965 provides that where any occupancy, by virtue of any conditions annexed to the tenure by or under the Code is not transferable or partible without the previous sanction of the State Government, the Collector or any other officer authorised by the State Government, such sanction shall not be given except on payment to the State Government of such sum as the State Government may, by general or special order determine. The Legislature has also similarly provided in Section 43 that if the tenant who is otherwise under an inhibition to transfer, wants to transfer the land, he shall do so only on payment of such amount as the State Government may by general or special order determine. That is the charge which the State makes for permitting transfer where the occupancy is not transferable as of right. It is no doubt true that the words "to the State Government" are not to be found after the word "payment" in Section 43 but that does not make any difference. These words were perhaps not explicitly used by the Legislature as the Legislature might have felt that even without these words the meaning of the section was reasonably clear. Once the landlord goes out of the picture altogether and direct relationship exists only between the State and the tenant, any requirement for payment as a condition of the privilege to transfer must be construed as referable to payment to the State Government. It was in exercise of the power conferred by this section that the State Government made the Resolution dated 17th January 1961 determining different amounts to be paid to the State Government according as the land was sought to be transferred by sale, gift, exchange, mortgage, lease or assignment or partition. The amount that was determined to be payable to the State Government on transfer by sale was fifty per cent of the net profit resulting to the tenant from the sale and this amount was paid by the tenant in each petition before effecting the sale impugned in each petition. The second condition requiring payment of such amount as the State Government may by general or special order determine was also therefore, fulfilled in each of these four cases.

12. These were the only contentions urged in Petitions Nos. 372 of 1967, 1394 of 1965 and 294 of 1968 and since there is no substance in them, these petitions fail and the rule issued in each of these petitions stands discharged with costs.

Rules discharged.

AIR 1970 GUJARAT 209 (V. 57 C 35)

M. U. SHAH, J.

Teja Mohan, Appellant v. Mangubhai Mehta and another, Respondents.

Criminal Appeal No. 841 of 1966, D/-12-8-1969, against order of City Magistrate, 6th Court, Ahmedabad in Criminal Appeal No. 90 of 1966.

(A) Prevention of Food Adulteration Act (1954), Ss. 16(1) (b), 10(1) (a) and (7) and 11(1) (a) — Prosecution under Section 16(1) (b) — Power of Food Inspector.

Where the accused throws away milk and thereby renders it impossible for the Food Inspector to take sample, it cannot be said that the Food Inspector lacks in power to prosecute the accused under Section 16(1) (b) as he will not be able to comply with Sections 10(7) and 11(1) (a). Section 10(7) and S. 11(1) (a) can have no play when the Food Inspector is prevented from taking a sample as authorised by the Act, and the question of taking the sample of food and further of taking it in the manner required by law, viz. under Sections 10(1) (a) and 11(1) (a) does not arise.

(Para 8)

(B) Prevention of Food Adulteration Act (1954), S. 16(1) (b) — Prosecution under — Knowledge on part of accused that Food Inspector is taking sample of food — Proof.

The prosecution must first establish knowledge on the part of the accused that the Food Inspector is to take the sample of food from him in his capacity as a Food Inspector and in discharge of his duty as such.

(Para 9)

(C) Prevention of Food Adulteration Act (1954), Ss. 16(1) (b), 19(1) — Offence of preventing Food Inspector from taking sample — Mens rea — Essential.

Accidental or unintentional act of an accused resulting in such prevention cannot create a criminal liability. Section 19(1) which rules out mens rea is limited in its operation to CL (a) of Section 16(1) and does not cover CL (b). (1946) 110 JP 317 & AIR 1951 SC 204, Followed.

(Para 10)

(D) Prevention of Food Adulteration Act (1954), S. 16(1) (b) — Word "prevent" — Meaning of.

In order to constitute the act of prevention within meaning of S. 16(1) (b) it is sufficient if in a given case, an accused person with the intent to prevent a Food Inspector from taking the sample does an act which renders it impossible for the Food Inspector to take a sample as authorised by the Act. A positive action in the form of a physical obstruction, threat or assault is not necessary to constitute the act of prevention. Such a narrow and restricted meaning cannot be given to the word "prevent" when considered in the

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proper context in which it is used in Section 16(1) (b) and having regard to the nature, design and object of the Act and the dictionary meaning of the word 'prevent,' Case law discussed. (Para 32)

Cases Referred:	Chronological	Paras
(1967) AIR 1967 Guj 61 (V 54) — 1966-7 Guj LR 120. State of Gujarat v. Laljibhai Chaturbhai		11
(1961) AIR 1961 Ali 103 (V 48) — 1961 (1) Cri LJ 204, Municipal Board, Sambhal v. Jhamman Lal		22
(1955) AIR 1955 Bom 390 (V 42) — 1955 Cri LJ 1333, State v. Kanu Dharma Patil		22
(1954) AIR 1954 Mad 199 (V 41) — 1954 Cri LJ 197, Public Prosecutor v. Murugesan		22
(1951) AIR 1951 SC 204 (V 38) — 52 Cri LJ 768, Ravula Hari-prasad Rao v. State		10
(1946) 110 JP 317 — 175 LT 306, Brend v. Wood		10
(1851) 20 LJQB 460 — 85 RR 369. Cort and Gee v. Ambergate Nottingham and Boston and Eastern Junction Rly. Co.		11

P. D. Desai, for Appellant; R. K. Abichandani for S. B. Vakil, for Respondent No 1; G. M. Vidyarthi, Asstt. Govt. Pleader, for Respondent No 2.

JUDGMENT:— Appellant Rabari Teja Mohan has been convicted by the learned City Magistrate, 6th Court, Ahmedabad, in Criminal Case No. 90 of 1966 for the offence punishable under Section 16(1) (b) of the Prevention of Food Adulteration Act, 1954 (37 of 1954) which will hereafter be referred to as "the Act". He has been sentenced on this count to suffer rigorous imprisonment for six months and to a fine of Rs. 1,000/- in default rigorous imprisonment for three months.

2. The appellant-accused was charged with having on or about the 5th day of August 1965 at 5-30 A.M. near Block No. 327 in Bapunagar, Rakhial at Ahmedabad, prevented Food Inspector Shri Mangulal C. Mehta from taking sample of milk from the appellant by throwing away the milk on the ground and thereby having committed an offence punishable under Section 16(1) (b) of the Act. The accused was tried on this charge which the learned City Magistrate has found to have been proved against him beyond reasonable doubt. It appears to be the prosecution case that on the morning of August 5, 1965, at about 5-20 A.M., Food Inspector Mehta accompanied by his peon P.W. 4 Mahmadmiya had gone to Bapunagar in Rakhial within the city of Ahmedabad. The accused was seen carrying two cans containing the milk with him on his cycle. He had measures with him. He was selling milk. The Food Inspector called two panchas P.Ws. Vadilal and Ramkishore. The accused was then called, but he did

not come. The Food Inspector then went to him. He asked him about the quality and the rate of the milk that he was selling. In reply, the accused stated that it was cow's milk. However, he did not express his willingness to sell the milk. The Food Inspector then told him that he was the Food Inspector, but the accused said that he won't sell the milk. The Food Inspector requested him to give the milk on payment of the price. However, instead of giving the milk, the accused threw away the milk. The Food Inspector then asked the name and the address of the accused. A panchnama was then drawn up which was read over to the panchas and was signed by the panchas. The Food Inspector who recorded the Panchnama also signed it. The Food Inspector then drafted the complaint and obtained the necessary sanction to prosecute the accused. After obtaining the sanction, he instituted the complaint against the accused. This, in brief, is the prosecution case as is revealed from the evidence of the Food Inspector P.W. No 1 Mangulal Mehta, Ex. 2 In support of his evidence, panchnama Ex. 8 which was signed by the panchas in the presence of the Food Inspector was relied upon. The prosecution had also examined the two panch witnesses P.W. 2 Ramkisan Mulchand Ex. 8 and P.W. 3 Vadilal Mohanlal Ex. 9. Although the panchas admitted their presence and the factum of the panchnama having been signed by them, they did not support the prosecution case in all aspects, and it appears that they were treated as hostile witnesses. The prosecution also relied upon the evidence of the peon P.W. 4 Mahmadmiya Mohmad Afzal Ex. 10, who supported the evidence of the Food Inspector. On this evidence, the learned City Magistrate has accepted the prosecution case as against the accused and convicted and sentenced him as aforesaid.

3. In the case which was tried as a warrant case and where there was a de novo trial because of the another Magistrate having taken office during the pendency of the case, the accused had pleaded not guilty to the charge. In his statement recorded under Section 342 of the Code of Criminal Procedure, in answer to the Court's question:

"You heard the entire evidence of the prosecution. Do you wish to, say anything?"

the accused replied:

"I am not selling milk at all. I maintain only cows and buffaloes. I do not know anything in the matter"

In answer to the second question, viz.

"The panch witness Ramkisan states that he had seen you on 5-8-65 at about 5-30 A.M. near Block No. 327 at Bapunagar. Do you wish to say anything to that?"

The answer was:

"No Sir."

In answer to the third question, viz.

"Witness Vadilal states that he had also seen you on that date and at that time. Do you wish to say anything to that?"

the appellant replied:

"I do not wish to say anything to that."

In answer to a question:

"Do you wish to say anything else?"

the appellant replied:

"No Sir."

Thus, the answers of the accused to questions Nos. 1 and 2 and the last question were mere denials, but the answer to question No. 3 was not a mere denial, but that the accused did not want to say anything to that.

4. Mr. P. D. Desai, learned Advocate appearing on behalf of the appellant-accused, has contended before me that, on a true and proper interpretation of Section 16(1) (b) of the Act, the said section requires the proof of four ingredients. In other words, the prosecution must prove beyond reasonable doubt the existence of four circumstances to bring home the guilt to the accused, viz.

I. (a) existence of power in the Food Inspector to take the sample of an article of food, and

(b) action on his part to exercise that power in the manner required by law;

II. knowledge on the part of the accused that the Food Inspector is proceeding to take a sample of an article of food;

III. intention on the part of the accused to effectively hinder or stop the Food Inspector from taking the sample and

IV. successful implementation of that intention by some physical obstruction, threat or assault on the Food Inspector.

I will proceed to examine the four circumstances urged by Mr. Desai in order.

5. Section 16 of the Act is the punishing section which provides penalties against an offender. Clause (b) of sub-section (1) of Section 16 of the Act provides the penalty for a person preventing a Food Inspector from taking a sample as authorised by this Act and reads:

"16. (1) If any person—

(a) x x x x

(b) prevents a Food Inspector from taking a sample as authorised by this Act; or

(c) x x x x

(d) x x x x

(e) x x x x

(f) x x x x

he shall, in addition to the penalty to which he may be liable under the provisions of Section 6 be punishable with imprisonment for a term which shall not

be less than six months but which may extend to six years and with fine which shall not be less than one thousand rupees: .

x x x x x".

The first ingredient, according to Mr. Desai, which must be present in order to invoke the penalty under Section 16(1) (b) of the Act is, as aforesaid, (a) existence of a power in the Food Inspector to take a sample of an article of food, and (b) action on the part of the Food Inspector to exercise that power in the manner required by law. Thus, the first circumstance falls into two parts (a) and (b). Now, in the instant case it is not the contention of Mr. Desai that the Food Inspector had not the power to take a sample of an article of food. Mr. Desai does not dispute the validity of the appointment of the complainant as the Food Inspector. But, contends Mr. Desai that the Food Inspector lacked the power because the condition precedent to the assumption of the power, namely, the conditions mentioned in Section 10(1) (a) are not fulfilled. Mr. Desai contends that the Food Inspector must exercise the power in the manner required by law, which, according to Mr. Desai, has relation to the taking of sample of an article of food by the Food Inspector under Section 10 of the Act. Now, Section 10 (1) of the Act deals with the powers of Food Inspectors. Sub-section (1) of Section 10 of the Act, which is material for the purpose and which has been relied upon by Mr. Desai, provides that:

"10(1). A Food Inspector shall have power—

(a) to take samples of any article of food from

(i) any person selling such article;

(ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee;

(iii) a consignee after delivery of any such article to him; and

(b) x x x x x".

In this case, I will not be concerned with the power of the Food Inspector to send such sample for analysis to the public analyst as mentioned in clause (b) of sub-section (1) of Section 10 of the Act, because, according to the prosecution case, the accused had emptied the milk cans and thrown away the milk and had thus made it impossible for the Food Inspector to take the sample and send it for analysis, to the Public Analyst.

6. Sub-s. (1) provides for taking of sample of any article of food from a person selling such article, from a person in course of conveying, delivering or preparing to deliver such article, and from a consignee after delivery of such article to

him. The Food Inspector has power to take samples of an article of food from a person filling in one of these three characters. The powers to take the sample are not confined only qua a person selling such article. If the prosecution succeeds in establishing the fact that the sample is taken from a person filling in one or the other of these three characters, the taking of the sample of an article of food from that person would be in accordance with the provisions of law, viz., Section 10(1) of the Act and the conditions for the assumption of the power will be deemed to have been fulfilled.

7. Mr. Desai has leaned heavily upon the provision in Section 10(1) (a) (i) of the Act. In Mr. Desai's submission, having regard to the charge, the complaint and the tenor of examination of the accused under Section 342 of the Code of Criminal Procedure, the question of taking a sample of an article of food from persons filling in the characters (ii) and (iii) of clause (a) of sub-section (1) of Section 10 of the Act does not arise in the case. Mr. Desai's submission was that the charge did not specifically relate to the Food Inspector taking the sample while the accused was selling the milk. There is no merit in this submission. The charge which I have set out earlier is broad-based and is not confined to the taking of the sample of milk from a person filling in any particular character. The charge, it may be remembered, was that the accused prevented the Food Inspector from taking sample of the milk from him by throwing away the milk on the ground and thereby committed an offence punishable under Section 16(1) (b) of the Act. It is true that the evidence of the Food Inspector was that he had seen the accused selling the milk and he does not in terms, refer to conveying it. But the evidence further is that, at the material time, the accused had two cans containing milk on his cycle and was carrying measures with him. It was at about 5-30 A.M. of the day that the accused was thus seen with two milk cans on his cycle and selling milk. It was at this time that he was called by the Food Inspector, who disclosed to him his identity and asked him to give a sample of milk for a price to be paid. This evidence indicates with reasonable certainty that the accused was in the course of conveying, delivering or preparing to deliver milk to his customers-purchasers and negatives Mr. Desai's contention that the prosecution case rested entirely on the basis that the accused was selling milk and the power of the Food Inspector thus can arise only on proof of the fact that the accused was selling the milk. The examination of the accused by the Court also does not indicate that the prosecution case was confined only to the fact that the

accused was, at the material time, selling milk. No prejudice is shown to have been caused to the accused. Again, the question, in my opinion, is merely of an academic interest, having regard to the evidence on record which I shall discuss a little later, and which, in my opinion, discloses that the case of the Food Inspector was of attempting to take the sample of milk from the accused who was seen in Bapumagar with two cans of milk and measures with him on his cycle and was selling the milk and was thus in possession of milk intended for sale and which milk was to be delivered or conveyed to the regular purchaser or clients in the ordinary course of his business or work. It is, therefore, not necessary to go into the questions as to what constitutes a 'sale' and what is a 'sample' and the impact of the definitions of the two terms on the prosecution case. However, as Mr. Desai has addressed me at length on the second part of his first contention aforesaid by relying on the definition of the two terms and urged that there must be an article for sale and an action on the part of the Food Inspector to exercise his power of taking the sample in the manner required by law, in order that the Food Inspector has the power to take the sample the prevention of which act is made an offence under Section 18 (1) (b) of the Act, it is but proper that I should discuss the questions.

8. "Sale" is defined in clause (xiii) of Section 2 of the Act as under :

"'Sale' with its grammatical variations and cognate expressions, means the sale of any article of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use, or for analysis, and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article, and includes also an attempt to sell any such article."

Thus Section 2(xiii) gives a special definition of 'sale' which specifically includes within its ambit a sale for analysis. The definition of sale is an inclusive definition and it covers within its fold an agreement for sale, an offer for sale, the exposition of an article for sale or the possession of an article for sale, as also an attempt to sell any such article. If it is shown that the accused was, at the material time, in possession of an article of food and the possession at the relevant time was for the purpose of sale, may be for cash or on credit or by way of exchange or may be a sale of sample for analysis, it would be a sale within the meaning of the term as defined in Section 2(xiii) of the Act. It is true as contended by Mr. Desai that mere possession of an adulterated article

of food is not a sale but if, in a given case, it is shown that the possession of an adulterated article of food was for sale, that would be a sale within the meaning of the term. Coming back to the question of the powers of the Food Inspector of taking the sample, I must say that Mr. Desai had relied upon the definition of the term "sample" as defined in Section 2 (xiv) of the Act which defined "sample" as meaning "a sample of any article of food taken under the provisions of this Act or of any rules made thereunder." Relying upon this definition, Mr. Desai urged that the taking of the sample from a person filling in one of the three characters aforesaid must be in the manner prescribed. According to Mr. Desai, the power of taking a sample is a conditional power which must be exercised in the manner required by law. Contentends Mr. Desai that sub-section (7) of Section 10 and clause (a) of sub-section (1) of Section 11 of the Act lay down the manner in which the power is to be exercised. Now sub-section (7) of Section 10 provides that: "Where the Food Inspector takes any action under clause (a) of sub-section (1), sub-section (2), sub-section (4) or sub-section (6), he shall call one or more persons to be present at the time when such action is taken and take his or their signatures." Clause (a) of sub-section (1) of Section 11 provides the procedure to be followed by the Inspector taking a sample of food for analysis. Clause (a) provides that he shall give notice in writing then and there of his intention to have it so analysed to the person from whom he has taken the sample so analysed. The notice or the intimation is to be given to the person from whom the sample is taken and that is in the prescribed Form VI under Rule 12 of the Rules. Rule 12 of the Prevention of Food Adulteration Rules, 1955, which will hereafter be referred to as "the Rules" provides for the form of intimation of the purpose of taking sample. Thus, Sections 10(7) and 11(1) (a) (i) of the Act, which respectively make it necessary that one or more persons must be kept present at the time and that a notice in writing of the Food Inspector's intention to have the sample analysed, must be given has relation to the particular act or action of the Food Inspector, viz., the taking of a sample of any article of food from a person filling in one or the other of the three characters laid down in clause (a) of sub-section (1) of Section 10 of the Act. The legislative intent will be clearer from the specimen form No. VI under Rule 12 which is a statutory rule. The relevant form is to state:

"To

I have this day taken from the premises of situated at samples of the food specified below to

have the same analysed by the Public Analyst, for
Details of food.

Food Inspector.

Area

Place.....

Date.....

Thus, it is clear that the manner referred to by Mr. Desai is the one to be observed in taking the sample of an article of food for analysis. If, in a given case, as in the case before me, the accused throws away the milk and thus renders it impossible for the Food Inspector to take the sample and to have the sample analysed, the question of taking the sample of food and further of taking it in the manner required by law, viz., under Section 10(1) (a) and Section 11(1) (a) of the Act does not arise. In this view of the matter, I cannot accept Mr. Desai's contention that there is no power in the Food Inspector, unless the article is for sale, and there is no exercise of the power till the formalities of the power under Section 10(7) and Section 11(1) (a) of the Act are complied with. The scheme of the Act and the Rules and especially of Sections 10 and 11 of the Act and Rule 12 of the Rules indicate that Section 10(7) and Section 11(1) (a) can have no play in a case where the accused throws away the milk and prevents a Food Inspector from taking a sample as authorised by the Act. In the instant case, however, the evidence of the Food Inspector which has been found by the learned Magistrate to be reliable and which is acceptable to me shows that the two panchas were kept present at the relevant time.

9. This takes me to the consideration of the second, third and fourth circumstances, which, according to Mr. Desai, must necessarily be proved to bring home the offence under Section 16(1) (b) of the Act to the accused. It may be remembered that these circumstances or ingredients as I would like to call them, are (i) the knowledge on the part of the accused that the Food Inspector is to proceed to take an article of food, (ii) intention on the part of the accused to effectively hinder or stop the Food Inspector from taking sample, and (iii) successful implementation of that intention by some physical obstruction, threat or assault on the Food Inspector. Mr. Desai has contended that the accused must be shown to have knowledge at the relevant time that Food Inspector is to take a sample of the article of food. His submission further was that the accused must be shown to have the knowledge that the Food Inspector was acting in discharge of his duty as a Food Inspector. On the question of intention and successful implementation of the intention, Mr. Desai has contended that the prosecution must

prove the intention of the accused to effectively hinder or stop the Food Inspector from taking the sample. Thus, in Mr. Desai's submission, in order to succeed in the case, the prosecution must first establish knowledge on the part of the accused that the Food Inspector is to take the sample of food from him in his capacity as a Food Inspector and in discharge of his duty as such. So far, I am in agreement with Mr. Desai. The knowledge to be proved is that the complainant is a Food Inspector who is authorised to take the sample and that he proposes to take the sample of the article of food from him for analysis.

10. As regards the intention of the accused, Mr. Desai's contention is not a simple proposition that the intention must be to prevent the Food Inspector from taking a sample as authorised by the Act, but Mr. Desai says such intention must be to effectively hinder or stop the Food Inspector from taking the sample. I am not inclined to accept such a qualified or restricted proposition of law, although in my opinion, it must be shown that the intention of the accused was to prevent the Food Inspector from taking a sample of food in such a case. Mr. G. M. Vidyarthi, learned Assistant Government Pleader, on the contrary, contends, relying on Section 19(1) of the Act that 'mens rea' need not be established. Now, Section 19(1) of the Act on which reliance is placed by Mr. Vidyarthi deals with defences which may or may not be allowed in prosecution under the Act. Its operation is limited to offence under Section 16(1) (a) pertaining to the sale of any adulterated or misbranded article of food. What is not available to the defence under the section is to allege merely that the vendor was ignorant of the nature, substance or quality of the food sold by him or that the purchaser who purchased the said article from him was not prejudiced by the sale and this places upon the defence the burden of showing that the accused had no mens rea to commit an offence under Section 16(1) (a) of the Act. But, Section 16(1) (b) of the Act provides penalty for an act amounting to 'preventing' a Food Inspector from taking a sample as authorised by the Act. The act of an accused resulting in preventing a Food Inspector from taking a sample must be a deliberate act of the accused. Accidental or unintentional act of an accused resulting in such prevention cannot create a criminal liability. The language of Section 16(1) (b) does not lend support to the contention that even an innocent vendor will be criminally liable. As observed by the Lord Chief-Justice of England: "It is in my opinion of utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that,

unless the statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind. *Brand v. Wood*, (1946) 110 JP 317 at p. 318, approvingly referred to by the Supreme Court in the case of *Ravula Hariprasad Rao v. State*, AIR 1951 SC 204". In my opinion, there is nothing in Section 16(1) (b) to show that either by clear intendment or by necessary implication mens rea as a constituent part of the crime is ruled out for the offence punishable under clause (b).

11. As regards the fourth ingredient, Mr. Desai's submission, it may be remembered, was that assuming that there was an intention on the part of the accused person, to prevent the Food Inspector from taking the sample, such intention must be accompanied by (i) some physical obstruction, (ii) threat, or (iii) assault on the Food Inspector. In Mr. Desai's submission, unless one of the three accompaniments to the intention is proved, there is no offence, I understand Mr. Desai to say that there must be an overt act of one of the three types evincing such intention. In support of his contention, Mr. Desai has strongly relied upon a decision of this High Court in the case of *State of Gujarat v. Laljibhai Chaturbhai*, (1966) 7 Guj LR 120-(AIR 1967 Guj 61) delivered by Mr. Justice Raju. In that case, the State had filed an appeal against an order of acquittal under the Prevention of Food Adulteration Act, 1954. The prosecution case was that the accused, who was sitting in his shop when the Food Inspector, visited it and asked for a sample of milk, refused to give a sample and left the shop and thus prevented the Food Inspector from taking the sample. The evidence disclosed that the respondent had raised his hand at the time. But there was no evidence to show whether the raising of the hand amounted to a threat or an assault and the learned Judge, therefore, left the circumstance out of account. It was observed that the Food Inspector has got powers under Section 10 of the Act to take a sample and, therefore, mere refusal would not amount to preventing the Food Inspector from taking a sample. In the opinion of the learned Judge, there was also no evidence of any threat as was in the case of *Cort and Gee v. Amburgeat, Nottingham and Boston and Eastern Junction Rly. Co.*, (1851) 20 LJ QB 460 at p. 465. It was observed: "Whether the Food Inspector was prevented or not would depend on the case in order to constitute the offence. There must be a physical obstruction or a threat or an assault. Mere refusal to give a sample would not amount to such prevention. Nor would merely leaving a shop, wa

do not know for what purpose, amount to prevention. The acquittal appeal is, therefore, dismissed." It appears from the observations of Raju, J. that a mere refusal to give a sample or merely leaving a shop would not amount to preventing a Food Inspector from taking a sample. As observed by the learned Judge in the case, whether the Food Inspector was prevented or not would depend on the facts of the case. It is not, therefore, correct to say that the decision lays down a rule of law which concludes the point before me. The case in (1851) 20 LJQB 460 referred to by Raju, J. is the one reported in (1851) 85 RR 361 at p. 369 was in relation to an action for damages brought by the vendor against the purchaser for breach of an executory contract to manufacture and supply the goods, namely, railway chairs, from time to time, to be paid for after delivery and where the purchaser, having accepted and paid for a portion of the goods, gave notice to the vendor not to manufacture any more as the purchaser had no occasion for them and will not accept or pay for them and the vendor having been desirous and able to complete the supply. It was contended by the plaintiffs that the defendants did prevent and discharge the plaintiffs from supplying the residue of the chairs and from the further execution and performance of the said contract. The defendants disputed that the plaintiffs were ready and willing to perform their contract and contended that the delays and final cessations took place with their concurrence. It was contended that the only modes in which the plaintiffs could exonerate themselves from the conditions precedent were either a competent dispensation or an actual prevention by the covenantor. It was contended that they did not prevent or discharge the plaintiffs from supplying the residue of the chairs. It was contended that "prevent" must mean an obstruction by physical force; and in answer to a question from the Court, the reply was that it would not be a preventing of the delivery of goods if the purchaser were to write in a letter to the person who ought to supply them, "Should you come to my house to deliver them, I will blow your brains out." It was contended that there could be no readiness and willingness to perform the contract unless all the chairs were finished and tendered: that to prevent must be by positive physical obstruction, and that there can be no discharging unless by an instrument under seal. On a consideration of the various contentions raised, Lord Campbell, Ch. J. held that the defendants had refused to accept the residue of the goods and that they had prevented and discharged the plaintiff from manufacturing and delivering them and therefore, the vendor

was entitled to maintain an action against the purchasers for breach of the contract. It is difficult to see how the decision can assist Mr. Desai's contention.

12. Mr. Vidyarthi had, in this connection, rightly relied upon a decision of the Division Bench of the Bombay High Court consisting of Gajendragadkar and Vyas, JJ., in *State v. Kanu Dharma Patil*, AIR 1955 Bom 390, an appeal against an order of acquittal wherein the Division Bench had an occasion to consider the import of the term 'prevent' used in Section 4 of Bombay Harijan Temple Entry Act (35 of 1947), which provides, *inter alia*, that, whoever (i) prevents a 'Harijan' from exercising any right conferred by this Act, or (ii) molests or obstructs or causes or attempts to cause obstruction to a Harijan in the exercise of any such rights shall, on conviction, be punished as laid down in that section. The Division Bench took the view that Section 4 of the Act does not necessarily denote the use of physical force or a threat of physical force. It was observed that "what constitutes the contravention of the provisions of Section 4 would naturally be a question of fact in each case. But, it would be going too far, we think, if we were to accept Mr. V. S. Desai's argument that unless the person charged under Section 4 is shown to have used physical force or threatened to use physical force, he cannot be held to be guilty under Section 4(1)." The Division Bench then referred to the object and the purpose of the Act and then to the dictionary meaning of the word "prevent" in Stroud's Judicial Dictionary and observed:

"x x x x x As a matter of legal construction, it is not possible to hold that the word "prevent" means only an obstruction by physical force. Stroud's Judicial Dictionary makes this position clear. To prevent says the author, does not mean only an obstruction by physical force, e.g., in the phrase that one party to a bargain "prevented or discharged the other from fulfilling his part thereof", it is not intended to suggest that the prevention is a result of physical obstruction.

In some cases, prevention may take the form of physical obstruction. The gates of the temple may be closed or the entry of a Harijan in the temple may be barred by putting a physical obstruction in his way. But, it is equally possible that in some cases, where Harijans who are not fully conscious of their rights and not aware of the strength of their cause seek to enter the temple in a timid and diffident way, they might be prevented from making an entry merely by the use of words strong and loud."

The Division Bench then dealt with the contention which was raised in the case, viz., that the provisions of the Act which is a penal statute, must be strictly enforced and observed:

"It is a matter of utmost importance that the provisions of this Act must be strictly enforced. Undoubtedly Section 4 is a part of a penal statute and it must be construed in favour of the accused. But, even while construing the statute in favour of the accused, we cannot give to the material words used in Section 4 the very narrow and the very unreasonable construction for which Mr. Desai contends."

The Division Bench was in the case concerned with a case wherein the acquitted respondent had prevented a Harijan boy from entering a temple. The prevention was not a physical one, but was by use of strong and loud words resulting in the Harijan boy getting out of the temple without obtaining the Darshan of the deity. This decision of the Division Bench shows what exactly is the connotation of the word "prevent". It makes no difference that the word is to be found in the Bombay Harijan Temple Entry Act. Mr. P. D. Desai has, however, tried to distinguish this decision by saying (i) that it takes into account the purpose and object of the Act; (ii) that it deals with Harijans who are as a class timid; and (iii) that the context therein was different, whereas the Gujarat decision of Raju, J., directly covered the case. In my opinion, the Bombay decision applies with equal force in this case. Having regard to the nature and design of the Prevention of Food Adulteration Act, the object of the Act and the dictionary meaning of the word 'prevent' which does not mean only an obstruction by physical force, the word 'prevent' when considered in the proper context in which it is used in Section 16(1) (b) of the Act cannot be given the narrow or restricted meaning canvassed by Mr. Desai. To do so would be giving to the material words used in Section 4 a very narrow and very unreasonable construction. As aforesaid, the decision of Raju, J. is not applicable here. In my opinion, it is sufficient if in a given case, an accused person with the intent to prevent a Food Inspector from taking the sample does an act which renders it impossible for the Food Inspector to take a sample as authorised by the Act. A positive action in the form of a physical obstruction, threat or assault is not necessary to constitute the act of prevention so as to constitute an offence within the meaning of Section 16(1) (b) of the Act. There needs be no overt act. I am further fortified in this view by the observations of a Division Bench of the Allahabad High Court in the case of

Municipal Board, Sambhal v. Jhamman Lal, AIR 1961 All 103, laying down that in cases of prevention an overt act is not necessary. The relevant discussion to be found at p. 104 reads:

"It was contended by learned counsel for the respondent that before there could be prevention, there should be some kind of overt act. If a person disappears from the shop, in our opinion, he has done an overt act by means of which he has made it impossible for the Food Inspector to obtain a sample from him. Apart from this fact, we do not think that in cases of prevention, an overt act is necessary."

A similar view has been taken by the Madras High Court in Public Prosecutor v. Murugesan, AIR 1954 Mad 199. It was a case where a person by his action effectively prevented the officer from taking the sample. It was held: "No overt act was necessary to make out 'preventing' under Section 14(3) of the Act." I am in respectful agreement with the Bombay, Allahabad and Madras view. As aforesaid, in my opinion, no overt act is necessary to constitute the act of preventing within the meaning of Section 16(1) (b) of the Act. To accept Mr. Desai's contention that the intention of the accused to prevent the Food Inspector from taking the sample must necessarily be accompanied by some physical obstruction, threat or assault on the Food Inspector would amount to saying that there must necessarily be an overt act, a proposition which is unacceptable to me.

13. I would now proceed to consider Mr. Desai's submissions on merits of the case.

14. On merits Mr. Desai's submission was that he wished only to say (i) that the prosecution has not been able to prove, beyond reasonable doubt, that the accused was, either selling, offering for sale, exposing for sale or having possession of the article for sale; (ii) that there was no reliable evidence that the power was exercised in the manner required; and (iii) that it was not proved that the throwing away of the milk cans was a physical obstruction. There is no merit in any of these submissions. As regards the last two facts of Mr. Desai's argument, I need merely recall my observations made earlier, viz., (i) that in such cases, it is not necessary to show that there was a physical obstruction, and (ii) that in a case where an accused renders it impossible for a Food Inspector to take a sample of food, there is no question of exercising the power in the manner laid down in Section 10(7) and Section 11(1) (a) of the Act. Even then, as I shall presently see, the evidence of the Food Inspector clearly brings out the fact that the panchas were kept present at all material times. The evidence on the point has been found to be trust-

worthy by the learned Magistrate and is acceptable to me. Therefore, the second and third parts of Mr. Desai's contention on merits do not survive. The evidence, as I shall presently see, also leads to a reasonably certain legal inference that the accused was in possession of milk for sale at the time and as such, the first part of the contention will also not survive.

15. Now, the evidence examined in the trial Court consists, as aforesaid, of the deposition of the Food Inspector, supported as it is by the evidence of the peon of the Food Inspector who was all along with him and is further corroborated by the evidence in the shape of the panchnama, which is proved to have been signed by the panchas who acknowledge their signatures to the panchnama. I have set out earlier, while making out a statement of the prosecution case, the evidence in chief of the Food Inspector and I need not repeat it. I may only say that the evidence discloses that the Food Inspector had seen the accused with two milk cans and measures on his cycle at 5-30 A.M. of the relevant day, that he had seen him selling milk, that he had called the two panchas, that he had asked the accused about the quality and the rate of the milk, that the accused had refused to sell the milk and thereupon he had revealed to the accused his identity as a Food Inspector and requested him to give milk on payment of the price, but the accused did not sell the milk, meaning that he did not enable the Food Inspector to take the sample of the milk and instead threw away the milk. No material infirmity is brought out in the cross-examination of the Food Inspector. On the contrary, he has stated that he took down the name of the accused as was given by him and this was after due verification, he has repelled the defence suggestion that the man obstructing the Food Inspector from taking the sample was not the accused. He has also repelled the suggestion that the panchnama was made afterwards. Except for throwing some challenge as regards the identity of the accused in the cross-examination, the other material facts stated by the Food Inspector in his evidence in chief have gone unchallenged. The identity of the accused is established beyond reasonable doubt and this is not a case of mistaken identity. Panchas Ramkishan and Vadilal admit their signatures to the panchnama Ex. 3 of the factum of milk having been spilled on the ground, although they prevaricate on some other part of their evidence. So far they support the evidence of the Food Inspector. The evidence of the peon supports the version of the Food Inspector in all material particulars. It was, however, con-

tended by Mr. Desai that the version of the two differed in so far as the Food Inspector stated that he had seen the accused selling the milk and the peon stated that he had seen the accused going on his cycle. But, reading the evidence of the peon as a whole, I do not find any material variation so as to introduce any infirmity in the evidence of the peon. In any case, the two versions are not inconsistent. The evidence of the Food Inspector appears to me to be trustworthy. His is a natural version of the events that had happened on that early morning. It is not shown that the Food Inspector had any bias against the accused, nor is any such case made out against the peon. Even apart from the evidence of the two panch witnesses who have been declared hostile, the evidence of the Food Inspector receives corroboration from the material circumstances that the milk was found spilled on the ground at the time when the panchnama, Ex. 3 was drawn up. Again, the early hour of the day and the manner in which the accused was seen at the time with two milk cans and measures on his cycle and going in the blocks in Bapunagar are further circumstances which lend further corroboration to the Food Inspector's version. The evidence leaves no manner of doubt that the accused was in possession of milk for sale and that he had thrown away the remaining part of the milk of the two cans on the ground and this was with the deliberate intention to thereby prevent the Food Inspector from taking the sample of milk for analysis, which would have exposed him to a criminal charge of sale of adulterated milk. The accused had thus made it impossible for the Food Inspector to exercise his powers under Sections 10(1) (b) (a), 10(7) and 11(1) of the Act. As aforesaid, an overt act is not necessary for the purpose. However, in this case, the very act of the accused in throwing away the milk when the Food Inspector proposed to take the sample of the milk amounted to an overt act. In any view of the matter, therefore, the learned trying Magistrate was right in convicting the accused of the offence punishable under Section 16(1) (b) of the Act. I must accordingly maintain the order of conviction and sentence now under appeal before me.

16. Appeal is dismissed. The appellant to surrender to his bail.

Appeal dismissed.

AIR 1970 GUJARAT 218 (V 57 C 36)

SHELAT, J.

Kantilal Damodardas, Appellant v. State of Gujarat, Respondent.

Criminal Appeal No. 198 of 1967, D/- 2-7-1969, against order of City Magistrate, 5th Court, Ahmedabad in Criminal Case No. 1327 of 1966.

(A) Criminal P. C. (1898), S. 156 — Information of cognizable offence — State law in action — Entitles Police Officer to investigate.

It makes no difference whether that information was reduced to writing or not at that particular stage. That may be an irregularity committed but the fact remains that the authority and power to inquire or to investigate begins. (Para 7)

(B) Criminal P. C. (1898), S. 157 — Investigation — What amounts to.

Section empowers the Police Officer in charge of a police Station to investigate any information received, from which he has reason to suspect the commission of an offence which he is empowered to investigate. (Para 7)

Where in an application it is alleged that a public servant acted unlawfully in carrying out a search of premises by colluding with the owner of the house searched, that would certainly give reason to suspect that there was a commission of an offence either by the public servant or by the person whose house was searched or by both. Any further step taken by a Police Officer in that connection would amount to investigation. (Para 7)

(C) Penal Code (1860), S. 182 — Information — Must be one falling under S. 154 — Subsequent statement during inquiry or investigation cannot be basis of offence under S. 182.

Giving of any information for any such purpose mentioned in Section 182 can only be one falling under Section 154, Criminal P. C. Any subsequent statement in the further enquiry or investigation of any such information already received cannot be the basis for any offence falling under Section 182. (Para 8)

Such statements being under Sec. 162, Criminal P. C. cannot be used for any other purpose but those mentioned in Section 162. AIR 1947 Pat 64, Rel. on.

(Para 8)

(D) Bombay Police Act, 1951 (22 of 1951), S. 64 — Duties of Police Officers — No authority to obtain or to record statements — "Information" meaning of.

Under Section 64 the duty of a Police Officer is to obtain intelligence concerning the commission of cognizable offence, and to lay information before superior officers. He has no authority to obtain or record statements of persons in respect of any such cognizable offence. (Para 9)

The 'information' contemplated in this section is the 'first information' which leads the police to take action.

(Para 9)

Cases Referred: Chronological Paras (1947) AIR 1947 Pat 64 (V 34) —

48 Cri LJ 264, Sudarshan Barhambhat v. Emperor

B. H. Desai, for Appellant; K. M. Chhaya, Asstt. Govt. Pleader, for Respondent.

JUDGMENT:— A short, yet an interesting question that arises for consideration in this appeal is as to whether the statement Ex. 13 of the accused which came to be recorded by Mr. Erulkar, the Police Officer, giving out information therein about his having given illegal gratification to the extent of Rs. 200/- to Mr. Desai, Superintendent of Excise, was a statement falling within the ambit of Section 162 of the Criminal P. C. and if so, whether the same can be made the basis of a complaint against him for an offence under Section 182 of the Indian Penal Code.

2. The facts giving rise to this prosecution are quite simple. The accused happened to be the proprietor of Rajkamal Stores situated in Bhadra in the City of Ahmedabad. The premises of the Stores were raided on 13-10-1962 by Mr. Ishverlal Chotubhai Desai, the Superintendent, Prohibition and Excise, with the assistance of other officers and on a search carried out, various articles were seized. Some of those articles were in the nature of bottles containing Eau-de-cologne, tincture Hemidesm., Kawoth etc. Though they were attached, samples therefrom were not given to the accused. Some time after one Chaturbhuj B. Acharya of Ahmedabad sent an application to Shri Medh. Deputy Superintendent of Police, Anti-Corruption Bureau, Ahmedabad inter alia stating that Mr. Desai had colluded with the accused and had deliberately not given samples to the accused in contravention of the circular issued by the Director of Prohibition and Excise so as to enable the accused to escape from the consequences of his being in unlawful possession of alcoholic preparations. That application was received on 13-12-1962 by Mr. Medh. Mr. Medh thereupon directed Mr. Erulkar, the P. S. I. to make an inquiry. While making inquiry Mr. Erulkar recorded the statement of the accused on 3-1-1963. That statement is Ex. 13 and it contained some allegations against Mr. Desai. The material allegation in respect of which this action is taken against him is that on 13-10-1962 when his Rajkamal Stores was raided and various articles seized therefrom by Mr. Desai and others, Mr. Desai had put him in fear and demanded some bribe from him. On his giving assurance that in future he will not be harassed, he gave a sum of Rs. 200/- by way of illegal gratification to Mr. Desai.

That statement bore the signature of the accused. Finding the allegations of a very serious character against a high official such as Superintendent of Prohibition and Excise, Mr. Erulkar told Mr. Medh that he cannot make further inquiry. Consequently Mr. Medh directed one Mr. Rana to make further inquiry in respect thereof. That inquiry was carried out and a report was submitted by Mr. Rana. In his view, the allegations made against Mr. Desai by this accused were false and that he should be prosecuted for an offence under Section 182 of the Indian Penal Code. On the basis of that report, it appears that the complaint against Shri Chaturbhuj as also against this accused was filed. Since there arose some technical defect, the case against this accused was separated and after the trial was over, the accused in that case, namely, Chaturbhuj B. Acharya was acquitted. The judgment thereof is produced in the case. It is dated 20-10-1966.

3. Thereafter Mr. Medh filed a complaint against this accused in the Court of the City Magistrate, 5th Court, Ahmedabad, for the same offence under Sec. 182 of the Indian Penal Code in respect of the same allegations made by him in his statement of 3-1-1963 before the P. S. I. Erulkar of the Anti-Corruption Bureau, against Mr. Desai since they were found to be false. To that charge levelled against him, the accused denied to have committed any offence. He, however, admitted about his having given a statement on 3-1-1963 before P. S. I. Erulkar wherein those allegations against Mr. Desai were made. But, according to him, the statement was not read over to him and that he had recorded in any manner as he chose. He has led no evidence in defence. The learned Magistrate after considering the effect of the evidence adduced in the case found that the allegations made by the accused were false and that he must be presumed to have had knowledge that the officers of the Anti-Corruption Bureau would be induced to make inquiries into the matter and that it would land Mr. Desai in serious trouble. He, therefore, found the accused guilty for an offence under Section 182 of the Indian Penal Code and sentenced him to suffer simple imprisonment for a period of three months and to pay a fine of Rs. 500/-, or, in default, to suffer simple imprisonment of 1½ months. Feeling dissatisfied with that order passed on 28-2-1967 by Mr. N. R. Tatia, City Magistrate, 5th Court, Ahmedabad, the accused has come in appeal.

4. The fact about Mr. Erulkar having recorded a statement of the accused on 3-1-1963 as also about the same containing serious allegations against Mr. Desai about his having been paid Rs. 200/- by way of illegal gratification is not in dis-

pute. The falsity thereof or the purpose with which the same is said to have been made is also not challenged before this Court. The contention, however, raised by Mr. Batubhai Desai, the learned advocate for the appellant-accused, is that this statement falls within the ambit of the provisions contained in Section 162 of the Criminal P. C. and when that is so, it cannot be used for any purpose other than contemplated therein so as to make the same as a basis for the prosecution of the accused under Section 182 of the Indian Penal Code. According to him, the statement could have been either recorded while making an inquiry or investigation in respect of any complaint relating to either a cognizable offence or a non-cognizable offence. Since the offence in respect of which the inquiry was put in action was in the nature of a cognizable offence, namely, the offence falling under Section 161 of the Indian Penal Code or so, the statement of the accused recorded during the course of that inquiry falls within Section 162 of the Criminal P. C. If it related to any non-cognizable offence, the permission of the Magistrate was essential to be obtained before investigating into the same and since no such permission was obtained, the P. S. I. had no authority to record any statement of the accused under Section 155(2) of the Code. In any view of the case therefore, it was contended, that this was not a complaint or information as such under Section 154 of the Criminal P. C. so as to be the basis of an action under Section 182 of the Indian Penal Code if it is found to be false. But if it was in pursuance of any further inquiry or investigation in relation thereto, the recording of the statement of such person would be under Sections 160 and 161 of the Criminal P. C. and that would fall under Section 162(1) of the Criminal P. C. On the other hand, it was urged by Mr. Chhaya that it was in the nature of a preliminary inquiry that Mr. Erulkar was directed to make on receipt of some application from one Shri Chaturbhuj and that a direction given to him was to make a preliminary inquiry before registering an offence and if any statement was recorded in relation to any such inquiry it would not fall under Section 154 of the Criminal P. C. According to him, it will be falling under Sec. 64(b) of the Bombay Police Act, 1951, as applied to the State of Gujarat.

5. From the evidence of Mr. Erulkar it appears that Shri Medh had forwarded an application which he had received from one Chaturbhuj Acharya by his letter No. 4065 of 27-12-1962 for making an inquiry. That application is not proved by examining him, and consequently is not exhibited in the case. It cannot, therefore, be taken as a part of record in the case. Now Mr. Erulkar has averred that in that applica-

tion which was sent to him for inquiry, the main allegation against Mr. Desai, the Superintendent of Excise was that the accused Kantilal, the proprietor of Rajkamal Provision Stores had given a sum of Rs. 200/- by way of bribe to Mr. Desai and that he had accepted the same at the time when his Stores were raided by Mr. Desai on 13-10-1962. Thus, he was required to make an inquiry with regard to the accusation of this character against Mr. Desai made by a third party in his application dated 11-12-1962. These allegations obviously relate to an offence falling under Section 161 of the Indian Penal Code and such an offence is a cognizable one. It was pointed out by Mr. Chhaya, the learned Assistant Government Pleader for the respondent-State, that the application does not clearly state about the accused having paid Rs. 200/- by way of bribe to Mr. Desai and all that it refers to is that while carrying out the raid of the Rajkamal Provision Stores belonging to the accused, he had colluded with him and while seizing those goods, he had not given the samples thereof and thereby keeping deliberately a loophole the advantage whereof can be obtained by the accused in the event of any prosecution that may be launched against him in respect thereof. In other words, it refers to Mr. Desai having not acted according to law in the search carried out by him in that he had acted in collusion with the accused in respect thereof. In face of the evidence of Mr. Erulkar, it is not proper to look at any such complaint which has not been proved and consequently not exhibited in the case. At any rate, on 27-12-1962 when he was asked to make an inquiry he had in his possession the information about Mr. Desai, the Superintendent of Excise, having committed an offence under Sec. 161 of the Indian Penal Code and that it was in that connection that the inquiry was directed to be made. It was that way that he went to the place of the accused and recorded his statement marked Ex. 13 on 3-1-1963 wherein those allegations have been made by him against Mr. Desai. This statement covers about 5 or 6 pages and it bears the signature of the accused. The further inquiry in this regard was carried out by Mr. Rao who had also recorded statements of various persons and ultimately in his view the allegations made by the accused in the statement of 3-1-1963 were found to be false and that the action against him under Section 182 of the Indian Penal Code was recommended.

6. The question, therefore, is as to under what provision of law Mr. Erulkar, the P. S. I. had recorded the statement of the accused in this case. Mr. Erulkar was asked as to under what provision of law he had made the inquiry in which he recorded the statement of this accused, and to that his reply is that he cannot say.

The inquiry in respect of any offence can be made by a police officer in case it relates to either a cognisable or a non-cognizable offence as contemplated in Chapter XIV of the Criminal P. C. Now Mr. Erulkar has, however, admitted that no order of the Magistrate was taken before initiating this inquiry. If the inquiry was in respect of any non-cognizable offence, the permission of the Magistrate was necessary to be obtained by him under Section 155(2) of the Criminal P. C. As provided therein, no police-officer can investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate. No such permission was at all obtained.

7. The police officer Mr. Erulkar, therefore, could only have the authority to inquire or investigate into the commission of a cognizable offence under the provisions contained in Chapter XIV of the Criminal P. C. Section 154 of the Code provides that every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Any information given, therefore, which relates to the commission of a cognisable offence puts the law in motion, and that entitles the police officer to exercise his authority and powers if he proceeds to inquire or investigate into the same. It makes no difference whether that information was reduced to writing or not at that particular stage. That may be an irregularity committed, but the fact remains that the authority and power to inquire or investigate into any such allegations amounting to a cognizable offence, begins. His action in so doing commences the inquiry or investigation as the case may be. Then comes Section 155 and sub-section (1) thereof relates to information into non-cognizable cases and the investigation in respect thereof. In that event, the police officer may have to enter the information in a book kept for the said purpose and refer the informant to the Magistrate. Sub-section (2) is already referred to and need not be repeated. Sub-section (3) thereof then says that any police-officer receiving such order from a Magistrate may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police-station may exercise in a cognizable case. Section 156 relates to investigation into

cognizable cases and as provided in sub-section (1) thereof, any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognisable cases which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial, and sub-section (2) thereof says that no proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one in which such officer was not empowered under this section to investigate. Then Section 157 of the Criminal Procedure Code provides for procedure where cognizable offence is suspected. If, from information received or otherwise, an officer in charge of a police-station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police-report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary to take measures for the discovery and arrest of the offender. Then there is a proviso thereto with which we are not much concerned. In other words, this section also empowers the police officer in charge of a police station to investigate any information received from which he has reason to suspect the commission of an offence which he is empowered to investigate. It may be stated here that if the application of Mr. Chaturbhuj Acharya did not actually disclose the material allegation about Mr. Desai having received illegal gratification of Rs. 200/- from the complainant for a particular purpose, the allegation did amount to his having acted unlawfully in carrying out the search of his premises by colluding with the accused. That would certainly give reason to suspect that there has been a commission of an offence of that character either by the accused or by Mr. Desai or by both of them and that, therefore, they had the authority to investigate into the same. Thereafter leaving Sections 158 and 159 which have reference more or less to the proviso to Section 157 and sub-section (2) thereof, we go to Section 160 whereby the police officer making an investigation under this Chapter has been given a power to require attendance of witnesses. As provided therein, he can require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted

with the circumstances of the case and such person shall attend as so required. Then after securing the presence, a police officer making an investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, as provided in sub-section (1) of S. 161. Sub-section (2) thereof then says that such person is bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty, or forfeiture. Sub-section (3) then says that the police officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so he shall make a separate record of the statement of each such person whose statement he records. It would appear therefrom that he can examine orally any person supposed to be acquainted with the facts and the circumstances of the case and any such person will be bound to answer the same, but the police officer may at the same time reduce into writing any statement made to him in the course of an examination under this section. Then comes the material Section 162 which runs thus—

"162. (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it: nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872, and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of Section 32, Cl. (1) of the Indian Evidence Act, 1872, or to affect the provisions of Section 27 of the Act."

It would appear therefrom that such a statement if reduced to writing shall not be signed by the person making it and then it says that any such statement or

any part of such statement shall not be used for any purpose save as hereinafter provided at any inquiry or trial in respect of any offence under investigation at the time when such statement was made, and the proviso thereto says that such a statement may be used by the accused with the permission of the Court under Section 145 of the Indian Evidence Act. It makes abundantly clear that such a statement if reduced to writing or any part thereof recorded by a police officer in the course of an investigation under this Chapter shall not be used for any purpose other than for contradicting the witness as contemplated in the proviso thereto. It follows therefrom that if the statement in question before the Court is found to be one recorded under Sec. 162 of the Criminal P. C., it cannot be used for any purpose other than the one contemplated under Section 162 and that being so, it cannot be made the basis of the complaint under Section 182 of the Indian Penal Code.

8. Now Section 182 of the Indian Penal Code refers to giving of false information with intention to cause public servant to use his lawful power to the injury of another person. It provides as under:—

"182. Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant—

(a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(b) to use the lawful power of such public servant to the injury or annoyance of any person,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

Thus, giving of any information for any such purpose mentioned in Section 182 can only be one falling under Section 154, for, it is that information which leads the police to make an inquiry or investigation in relation to the allegations made therein and that can be done by the police station officer under the provisions contained in Chapter XIV of the Code having regard to the fact that it relates to a cognizable offence or a non-cognizable offence or some offence that he has reason to suspect as contemplated under Section 157 of the Code. Any subsequent statement in the further inquiry or investigation of any such information already received, in my view, cannot be the basis of any offence falling under Section 182 of the Indian Penal Code. In this regard, I was referred to a decision

in the case of Sudarsan Barhambhat v. Emperor, reported in (1947) 48 CrLJ 264 = (AIR-1947 Pat 64). The relevant observations in respect of which the reliance was placed run thus:—

"Under Section 182, the information which is penalised is an information which is intended to cause or known to be likely to cause the public servant concerned to take action in one of the ways specified in the section. Here, information within this meaning had already been given and the law had already been set in motion. Further statements made in the course of the investigation would not, to my mind, be further information in this sense."

In other words, any further information in any of such statements recorded after the information was received which set the criminal law in motion cannot be said to be such information which is sought to be penalised under Section 182 of the Indian Penal Code. The machinery was already set in motion and inquiry was set against him. It made no difference whether the offence was registered or not for the simple reason that even such inquiry or investigation may not make much of a difference. The term 'inquiry' has been defined in Section 4(h) of the Criminal P. C. as including every enquiry other than a trial conducted under this Code by a Magistrate or Court and the term 'investigation' has been defined in S. 4(i) as including all the proceedings for the collection of evidence conducted by a police-officer or by any person other than a Magistrate who is authorised by a Magistrate in this behalf. In any view of the matter, where in the nature of an inquiry or an investigation in pursuance of an application received by Mr. Medh, recording of any statement by Mr. Erulkar of the accused was one under the powers derived by him under Chapter XIV of the Criminal P. C. and the statement recorded would, thus, in my view, fall within the ambit of Section 162 of the Criminal P. C.

9. Mr. Chhaya, the Learned Assistant Government Pleader, invited a reference to Section 64 of the Bombay Police Act, 1951 and sought support for such a statement falling within the ambit of CL (b) thereof. Section 64 provides as under:

"64. It shall be the duty of every police officer:—

(a) x x x x
(b) to the best of his ability to obtain intelligence concerning the commission of cognisable offences or designs to commit such offences, and to lay such information and to take such other steps, consistent with law and with the orders of his superiors as shall be best calculated to bring offenders to justice or to prevent the commission of cognisable and within his view of non-cognizable offences;

x x x x

This provision sets out the duties of a police officer. Now his duty is to obtain intelligence concerning the commission of cognizable offences or designs to commit such offences and to lay such information before the superior officers for preventing any commission of such offences. This section does not refer to any authority or power given to a police officer to obtain or record statements of person in respect of any such cognisable offences. There is hardly any doubt in the present case that Mr. Erulkar was exercising his power and authority under the provisions of Chapter XIV of the Code. It was for the purpose of making an inquiry or investigation as it were, in respect of information already received from Mr. Chaturbhuj Acharya against Mr. Desai in respect of a cognizable offence that he had recorded the statement of the accused. The recording of such a statement of the accused on 3-1-1963 cannot, therefore, be made the subject-matter of a charge against the maker thereof under Section 182 of the Indian Penal Code. The term 'information' contemplated therein is the first information which leads the police to take action against any such person and the subsequent recording or collecting of evidence or any such statement cannot come within the ambit of Section 182 of the Indian Penal Code for in that event the purpose or intention behind the giving of such information cannot be attributed to him.

10. In the result, therefore, the order of conviction and sentence passed against the accused-appellant is set aside and the accused is acquitted. The fine, if paid, is directed to be refunded to him.

Accused acquitted.

AIR 1970 GUJARAT 223 (V 57 C 37)*

J. M. SHETH, J.

Superintendent Customs and Central Excise Vapi, Appellant v. Raichand Lakhmash Shah, Respondent.

Criminal Reference No. 36 of 1969, D/- 28-8-1969.

Customs Act (1962), S. 110 — Vehicle carrying smuggled goods seized by police and conveyed to Customs House — Customs Officer seizing same under Section 110 — Seizure by police not under S. 550, Criminal P. C. — Magistrate cannot order Customs Officer to release vehicle to the owner.

When a police officer had seized a vehicle and the goods carried on it and conveyed the same to Customs House and subsequently the same are seized by Customs Officer in exercise of his power

*Only portions approved for reporting by High Court are reported here.

under Section 110 of the Customs Act, on ground that the goods which were carried in the vehicle were smuggled goods, the Magistrate cannot order the Superintendent, Customs and Central Excise to return the vehicle to the person who claims to be owner of it on condition of his giving security and undertaking to produce the vehicle in Court whenever so ordered, when there was nothing to show that the seizure by police was under Section 550, Criminal P. C. AIR 1967 Bom 138, Rel. on; AIR 1962 SC 496 & AIR 1963 Manipur 35 & AIR 1967 Guj 126 & AIR 1964 Cal 490, Distinguished; AIR 1962 SC 759, Ref. (Para 27)

Cases Referred: Chronological Paras

- | | |
|---|--------|
| (1967) AIR 1967 Bom 138 (V 54) — | |
| 1967 Cri LJ 715, Vasantlal v. Union of India | 25 |
| (1967) AIR 1967 Guj 126 (V 54) — | |
| (1966) 7 Guj LR 974 — 1967 Cri LJ 767, Suraj Mohan v. State of Gujarat | 8 |
| (1964) AIR 1964 Cal 490 (V 51) — | |
| 1964 (2) Cri LJ 536, Thandulal Dhanuka v. State | 16 |
| (1963) AIR 1963 Manipur 35 (V 50) — | |
| 1963 (2) Cri LJ 288, Namichand v. Supdt. of Central Excise | 14 |
| (1962) AIR 1962 SC 496 (V 49) — | |
| 1962 (1) Cri LJ 485, Gian Chand v. State of Punjab | 25, 26 |
| (1962) AIR 1962 SC 759 (V 49) — | |
| 1962 (1) Cri LJ 692, Mohammad Serajuddin v. R. C. Misra | 16, 17 |
| (1956) AIR 1956 Cal 609 (V 43) — | |
| 1956 Cri LJ 1396, S. K. Srivastava v. Gajanand Patriwalla | 16 |
| (1945) AIR 1945 Lah 47 (V 32) — | |
| 47 Cri LJ 32, Ghulam Ali v. Emperor | 8-A |
| K. M. Chhaya, Asst. Govt. Pleader, for the State; C. G. Mehta, for Opponent | |

ORDER:— This is a reference made under Section 438 of the Criminal P. C. by learned Sessions Judge, Bulsar at Navsari, Mr. R. K. Soonavala, in Criminal Revision Application No. 4 of 1969, recommending that the order of learned Judicial Magistrate, First Class, Umbergaon, Mr. K. V. Mehta, dated 5th April, 1969, to return the truck bearing No. GTD 3842 to the petitioner Raichand Lakhmashi Shah on confirmation of his producing an ownership registration certificate and on his depositing Rs. 15,000/- in cash in the Court along with a bond in the sum of Rs. 60,000/- on a condition to produce the truck in the Court in the same condition whenever so ordered, be set aside.

2. The facts giving rise to this reference, briefly stated, are as under:—

Raichand Lakhmashi who claims to be an owner of the truck, bearing No. GTD 3842, which was seized originally by the Mobile Anti Smuggling Staff, A. C. B. Bulsar, under the panchnama, dated 8th

February, 1969, with other goods alleged to be smuggled goods, filed an application on 28th February, 1969, under Section 523 of the Criminal P. C. It was stated therein that the aforesaid truck was stopped near Bhilad Checkpost while it was going towards Bombay side, for checking. It was stated therein that the applicant was residing at Bombay and the accused was Jitsingh. That Jitsingh was driving that truck. On checking, opium was found from the person of that driver and in the truck were found the goods in relation to which the offence under the Customs Act was suspected to be committed. That truck and goods were seized under the panchnama and that truck is in the custody of the Custom Superintendent. This truck is the only means of his livelihood. The driver was not his own driver, but was a driver of one Harischandra Transport Company. He knew nothing about this offence. He was quite innocent. He, therefore, prayed that the Custom Superintendent be directed to hand over the truck to him. He is prepared to abide by the terms that be imposed on him by the Court.

3. The Police Prosecutor endorsed on this application that the truck does not seem to have been attached under the Prohibition Act, but it was attached under the Customs Act. After hearing the petitioner and the Superintendent, Customs Vapi, the learned Magistrate passed the impugned order, directing the Superintendent, Customs and Central Excise, Vapi, to return the truck to the petitioner on the conditions referred to above.

4. Being dissatisfied with that order, the Superintendent, Customs and Central Excise, Vapi, preferred Criminal Revision Application No. 4 of 1969 in the Court of Sessions Judge, Bulsar at Navasari, and in this Revision petition, this reference is made.

5. The learned Sessions Judge has found that this order passed by the learned Magistrate is without jurisdiction. The Customs Officer has got powers to seize such vehicle when smuggled goods are being transported in exercise of his powers under Section 110 of the Customs Act, 1962 (which will be hereinafter referred to as the Act). He has powers to seize them if there is reasonable ground to believe that the goods are liable to confiscation and they can be seized from any person who is in custody of them, even though he has obtained such custody unlawfully. According to him, Section 110 of the Act does not place any limitation as to the person from whose possession or the time and the place at which the goods believed to be liable to confiscation can be seized. In view of this position, he has made the aforesaid reference.

6. A short, but very interesting question arises in this reference. The question

that is really posed before me for consideration is whether the Magistrate, in exercise of his powers under Section 523 of the Criminal P. C., can pass such an order like the impugned order when such a vehicle or goods which are believed to be smuggled goods, and are liable to confiscation, are seized by a Customs Officer in exercise of his powers under Sec. 110 of the Act, even if those goods or the vehicle were formerly seized or was seized, as the case may be, by a police officer.

7. It is submitted by Mr. C. G. Mehta, that the learned Magistrate had jurisdiction to pass this order as the goods were originally seized by Police Officer Pant. According to him, in view of the provisions of Sec. 550 of the Criminal P. C. (which will be hereinafter referred to as the Code), a police officer had powers to seize any property which may be found under the circumstances which create suspicion of the commission of any offence.

8. The word "offence" has been defined in Section 4(o) of the Code as under:—

"'Offence' means any act or omission made punishable by any law for the time being in force; it also includes any act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act, 1871."

In view of this definition of the word, "offence" given in the Code, it was submitted by Mr. Mehta that even if a police officer seized this vehicle and the goods alleged to be smuggled, which were being transported in this vehicle, on suspicion, the offence committed was an offence punishable under the Act, in view of the provisions of Section 550 of the Code, he had legal power to seize them. Section 550 of the Code reads:

"Any police-officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Such police-officer, if subordinate to the officer in charge of a police-station, shall forthwith report the seizure to the officer." It was further submitted by Mr. Mehta that the wording of Section 523 of the Code indicated that when such seizure is made by a police officer in exercise of his powers under Section 550 of the Code, it is the Court which can pass an order contemplated by that section. The material part of that section for our purposes, reads:

"(1) The seizure by any police-officer of property taken under Section 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property

tive detention from being held to be violative of Article 22 (5) of the Constitution of India, is no longer in force as the Article was originally added for a period of five years and the President could not by subsequent orders raise the period from 5 years to 20 years, that the President having once specified the modifications and exceptions subject to which certain provisions of the Constitution were applicable in relation to the State and these provisions having become applicable to the State, it was not within the competence of the President to make any amendment therein by means of a subsequent order, that fresh order for the petitioner's detention was violative of Section 22 of the Preventive Detention Act, that no new facts had come into existence after the revocation of the previous order warranting the making of a fresh order of detention and as such the detention was void and invalid, that detention of the petitioner was violative of Section 8 of the Preventive Detention Act as the petitioner was not afforded an opportunity of making representation against the order of detention, that the order was mala fide and that the fresh detention order had not been served on the petitioner.

6. Raizada Amar Chand, the learned Addl. Advocate-General appearing on behalf of the Government has produced a copy of the J. and K. Preventive Law (Amendment) Act 1969 (Act No. XXXI of 1969). In view of this Act, the first contention raised on behalf of the petitioner has no force and is, therefore rejected.

7. The second contention of the learned Counsel for the petitioner that the proviso to Section 8 of the Preventive Detention Act was violative of Article 22 (5) of the Constitution of India and the President having once added Article 35 (c) to the Constitution of India in relation to the State for a period of five years it was not open to him to amend it subsequently and consequently the Act was not immune from challenge has also no force. This point is concluded by the decision of the Supreme Court in *Samrat Prakash v. State of J. and K., Writ Petn. No. 3 of 1968* which was rendered on 10-10-1968 = (AIR 1970 SC 1118). In this judgment similar contention advanced on behalf of the detenu was elaborately dealt with and repelled by their Lordships in the following words:—

"The next submission made for challenging the validity of the Orders of modification made in the years 1959 and 1964 was that, under sub-clause (d) of Clause (1) of Article 370 of the Constitution, the power that is conferred on the President is for the purpose of applying the provisions of the Constitution to Jammu and Kashmir and not for the purpose of making amendments in the Constitution as applied to that State. The interpretation sought to be placed was that, at the time of applying any provision of the Constitution to State of Jammu and Kashmir,

the President is competent to make modifications and exceptions therein; but once any provision of the Constitution has been applied, the power under Article 370 would not cover any modification in the constitution as applied. Reliance was thus placed on the nature of the power conferred on the President to urge that the President could not from time to time amend any of the provisions of the Constitution as applied to the State of Jammu and Kashmir. It was further urged that the President's power under Article 370 should not be interpreted by applying Section 21 of the General Clauses Act, because constitutional power cannot be equated with a power conferred by an Act, rule, by-law, etc."

8. The argument, in our opinion, proceeds on an entirely incorrect basis. Under Article 370 (1) (d) the power of the President is expressed by laying down that provisions of the Constitution other than Article (1) and Article 370 which, under Article 370 (1) (c), became applicable when the Constitution came into force, shall apply in relation to the State of Jammu and Kashmir subject to such exceptions and modifications as the President may by order specify. What the President is required to do is to specify the provisions of the Constitution which are to apply to the State of Jammu and Kashmir and when making such specification he is also empowered to specify exceptions and modifications to those provisions. As soon as the President makes such specification, the provisions become applicable to the State with the specified exceptions and modifications. The specification by the President has to be in consultation with the government of the State if those provisions relate to matters in the Union List and the concurrent List specified in the Instrument of Accession governing the accession of the State to the Dominion of India as matters with respect to which the Dominion Legislature may make laws for that State. The specification in respect of all other provisions of the Constitution under sub-clause (d) of Clause (1) of Article 370 has to be with the concurrence of the State Government. Any specification made after such consultation or concurrence has the effect that the provisions of the Constitution specified with the exceptions and modifications become applicable to the State of Jammu and Kashmir. It cannot be held that the nature of the power contained in this provision is such that Section 21 of the General Clauses Act must be held to be totally inapplicable.

9. In this connection it may be noted that Article 367 of the Constitution lays down that unless the context otherwise requires the General Clauses Act, 1897, shall subject to any adoptions and modifications that may be made therein under Article 372, apply for the interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. This provision made by the Consti-

tution itself in Article 367, thus, specifically applied the provisions of the General Clauses Act to the interpretation of all the Articles of the Constitution which include Article 370. Section 21 of the General Clauses Act is as follows:—

"Where, by any Central Act or Regulation a power to issue notification, orders, rules, or by-laws is conferred, then that power includes a power exercisable in the like manner and subject to the like sanction and conditions (if any) to add to, amend, vary or rescind any notifications, orders, rules or by-laws so issued."

This provision is clearly a rule of interpretation which has been made applicable to the Constitution in the same manner as it applies to any Central Act or regulation. On the face of it, the submission that Section 21 cannot be applied to the interpretation of the Constitution will lead to anomalies which can only be avoided by holding that the rule laid down in this Section is fully applicable to all the provisions of the Constitution. As an example, under Article 77 (3), the President, and, under Article 166 (3), the Governor, of a State are empowered to make rules for the more convenient transaction of the business of the Government of India or the Government of the State, as the case may be, and for the allocation among Ministers of the said business. If, for the interpretation of these provisions Section 21 of the General Clauses Act is not applied, the result would be that the rules once made by the President or a governor would become inflexible and the allocation of the business among the Ministers would for ever remain as laid down in the first rules. Clearly the power of amending these rules from time to time to suit changing situations must be held to exist and that power can only be found in these articles by applying Section 21 of the General Clauses Act. There are other similar rule-making powers, such as the power of making service rules under Article 309 of the Constitution. That power must also be exercisable from time to time and must include within it the power to add to, amend, vary or rescind any of those rules. The submission that Section 21 of the General Clauses Act cannot be held to be applicable for interpretation of the Constitution must, therefore, be rejected. It appears to us that there is nothing in Article 370 which would exclude the applicability of this Section when interpreting the power granted by that Article.

10. The legislative history of this Article will also fully support this view. It was because of the special situation existing in Jammu and Kashmir that the Constituent Assembly framing the Constitution decided that the Constitution should not become applicable to Jammu and Kashmir under Article 394, under which it came into effect in the rest of India, and preferred to confer on the President the power to apply the various

provisions of the Constitution with exceptions and modifications. It was envisaged that the President would have to take into account the situation existing in the State when applying a provision of the Constitution and such situations could arise from time to time. There was clearly the possibility that, when applying a particular provision the situation might demand an exception or modification of the provision applied, but subsequent changes in the situation might justify the rescinding of those modifications or exceptions. This could only be brought about by conferring on the President the power of making order from time to time under Art. 370 and this power must, therefore, be held to have been conferred on him by applying the provisions of Section 21 of the General Clauses Act for the interpretation of the Constitution.

11. Lastly, it was argued that the modifications made in Article 35 (c) by the Constitution (Application to Jammu and Kashmir) Orders of 1959 and 1964 had the effect of abridging the fundamental right of the citizens of Kashmir under Article 22 and other articles contained in Part III after they had already been applied to the State of Jammu and Kashmir, and an order of the President under Article 370 being in the nature of law, it would be void under Article 13 of the Constitution. Article 35 (c) as originally introduced in the Constitution as applied to Jammu and Kashmir laid down that no law with respect to preventive detention made by the Legislature of that State could be declared void on the ground of inconsistency with any of the provisions of Part III with the qualification that such a law to the extent of the inconsistency was to cease to have effect after a period of five years. This means that, under clause (c) of Article 35, immunity was granted to the preventive laws made by the State legislature completely, though the life of the inconsistent provisions was limited to a period of five years. The extension of that life from five to ten years and ten to fifteen years cannot, in these circumstances be held to be an abridgement of any fundamental right, as the fundamental rights were already made inapplicable to the preventive detention law. On the other hand if the substance of this provision is examined, the proper interpretation would be to hold that as a result of Article 35 (c) the applicability of the provisions of Part III for the purpose of judging the validity of a law relating to preventive detention made by the State Legislature was postponed for a period of five years, during which the law could not be declared void. As already stated, Article 370 (1) (d) in terms, provides for the application of the provisions of the Constitution other than Articles 1 and 370 in relation to Jammu and Kashmir with such exceptions and modifications as the President may by order specify. It was not disputed that the President's Order of 1954 by which

immunity for a period of five years was given to the State's Preventive Detention law from challenge on the ground of its being inconsistent with Part III of the Constitution, was validly made under and in conformity with clause (d) of Article 370 (1). We have already held that the power to modify in clause (d) also includes the power to subsequently vary, alter, add to, or rescind such an order by reason of the applicability of the rule of interpretation laid down in Section 21 of the General Clauses Act. If the Order of 1954 is not invalid on the ground of infringement or abridgement of fundamental rights under Part III it is difficult to appreciate how extension of period of immunity made by subsequent amendments can said to be invalid as constituting an infringement or abridgement of any of the provisions of Part III. The object of the subsequent Orders of 1959 and 1964 was to extend the period of protection to the preventive detention law and not to infringe or abridge the fundamental rights, though the result of the extension is that a detenu cannot during the period of protection, challenge the law on the ground of its being inconsistent with Article 22. Such extension is justified *prima facie* by the exceptional state of affairs which continue to exist as before.

12. Regarding the third point Mr. Amar Chand has submitted that Section 14 (2) does not apply to a case where fresh detention order is issued on account of some technical defect. This contention is, in our opinion, wholly devoid of substance. Section 14 (2) reads as follows:—

“The revocation or expiry of a detention order shall not bar the making of a fresh detention order under Section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Government or an officer, as the case may be, is satisfied that such an order should be made.”

A bare perusal of the provision would be enough to show that it is very wide in amplitude and applies to every case of revocation for any reason whatsoever including a technical defect. The provision envisages that no fresh order of detention would be issued against a person where the previous order of his detention is revoked unless new facts warranting the detention have come into existence after the date of revocation. We are fortified in this view by a decision of the Supreme Court in *Hadibandhu Das v. District Magistrate Cuttack*, AIR 1969 SC 43 where it was laid down as follows:—

“In terms *Section 13 (2) authorises the making of a fresh detention order against the same person against whom the previous order has been revoked or has expired, in any case where fresh facts have arisen after the

date of revocation or expiry on which the detaining authority is satisfied that such an order should be made. The clearest implication of Section 13 (2) is that after revocation or expiry of the previous order, no fresh order may issue on the grounds on which the order revoked or expired had been made.

The power of the detaining authority must be determined by reference to the language used in the statute and not by reference to any predilections about the legislative intention. There is nothing in Section 13 (2) which indicates that the expression “revocation” means only revocation of an order which is otherwise valid and operative; apparently it includes cancellation of all orders invalid as well as valid. The Act authorises the executive to put severe restrictions upon the personal liberty of citizens without even the semblance of a trial, and makes the subjective satisfaction of an executive authority in the first instance the sole test of competent exercise of power. Courts are not concerned with the wisdom of the Parliament in enacting the Act or to determine whether circumstances exist which necessitate the retention on the statute book of the Act which confers upon the executive extraordinary power to detention for long period without trial. But the Courts would be loath to attribute to the plain words used by the Parliament a restricted meaning so as to make the power more harsh and its operation more stringent. The word “revocation” is not capable of a restricted interpretation without any indication by the Parliament of such an intention.

The very fact that a defective order has been passed or that an order has become invalid because of default in strictly complying with the mandatory provisions of the law bespeaks negligence on the part of detaining authority and the principle underlying Section 13 (2) is the outcome of insistence by the Parliament that the detaining authority shall fully apply its mind to and comply with the requirements of the statute and of insistence upon refusal to countenance slipshod exercise of power.”

As admittedly no new facts came into existence after the revocation of the previous detention order, the present detention of the petitioner based on Order ISD-305 of 1969 is clearly illegal. In this view of the matter, we think it unnecessary to express an opinion on the other points raised before us.

At this stage the Additional Advocate-General has brought to our notice that the detenu has since been released. In view of this submission of the learned Additional Advocate-General, the petition has become infructuous and shall be consigned to records.

Order accordingly.

*This corresponds to Section 14 (2) of the Jammu and Kashmir Preventive Detention Act, 1964.

AIR 1970 JAMMU AND KASHMIR 149
(V 57 C 31)

MIAN JALAL-UD-DIN, J.

Bk. Abdul Majid and another, Plaintiffs v.
Union Co-operative Insurance Society Ltd.,
Defendants.

Civil Suits Nos. 5 and 81 of 1965, D/-
4-5-1970.

(A) Co-operative Societies — Maharashtra Co-operative Societies Act (24 of 1961), Pro-
amble — Scope of Act is restricted to State
of Maharashtra only — Co-operative Insu-
rance Society registered under Maharashtra
Act — Activities carried outside State, with-
out permission of Registrar under Section 159,
will be governed not by Maharashtra Act
but by Section 2-D of Insurance Act — Con-
sequently, in an action against such society
outside the State of Maharashtra, Section 164
of Maharashtra Act which relates to notice
prior to suit, is not applicable. (Para 10)

(B) Co-operative Societies — Maharashtra Co-operative Societies Act (24 of 1961), Sec-
tion 163 — Bar of Civil Court's jurisdiction —
Section operates as bar to Civil Court's juris-
diction in respect of matters mentioned in
clauses (a) to (c) therein and not in respect
of any claim in dispute between a Policy-
holder and Insurance Co-operative Society.
(Para 11)

(C) Insurance Act (1938), Section 33 —
Assignment of Policy — Effect.

A suit by a Policy-holder for enforcement
of claim on his Policy which has been as-
signed in the name of another, in absence of
any agreement to the contrary, is maintain-
able. AIR 1966 All 385, Ref. (Para 13)

Cases Referred: Chronological Paras
(1966) AIR 1966 All 385 (V 53) =
37 Com Cas 869, Sterling General
Insurance Co. Ltd., New Delhi v.
Lala Bahali Rampuri 13

S. I. Koul, for the Plaintiffs; K. N. Raina
on behalf of D. N. Mahajan; S. N. Raina
on behalf of I. Singh, for Defendants.

ORDER:— In these two suits the follow-
ing preliminary issues were originally raised
which await disposal:—

1. Whether the suit is barred by the provi-
sions of Maharashtra Co-operative Societies
Act of 1960? O. P. D.

2. Whether the suit as framed is not main-
tainable? O. P. D.

2. These cases originally came up for
bearing before Hon'ble Mr. Justice S. M. F.
Ali, as His Lordship then was, and thereafter
before Hon'ble Mr. Justice J. N. Bhat when
these were transferred to the files of this
Bench. Part of the evidence has been re-
corded earlier when in suit No. 5 an ap-
plication was made by the defendant for incor-
porating in his written statement another pre-
liminary objection to the suit that by virtue
of the jurisdiction clause No. 15 in the Policy
No. 502, the suit in respect of this policy

was barred in Srinagar and the same could
not be tried here. That application was al-
lowed and the defendant filed an amended
written statement. Consequently upon it an
additional preliminary issue in Suit No. 5 of
1965 was raised which is as follows:—

"Has this court territorial jurisdiction to
hear and try the suit in view of the juris-
diction Clause in the Policy No. 502? O. P. P."
The plaintiff examined J. B. Daniels and Mr.
Bashir Ahmed Senior Assistant Jammu and
Kashmir State Financial Corporation on this
issue.

3. Previously the Court recorded the
statement of Bk. Abdul Majid plaintiff on
other preliminary issues.

4. Mr. J. B. Daniels stated that he was
the Divisional Manager of the defendant In-
surance Company in Srinagar upto 15th of
August, 1964. The Head Office of the
defendant is in Bombay and it had a Branch
in Srinagar. As Divisional Manager he trans-
acted business in General Insurance in Sri-
nagar for the defendant. The plaintiff took
out policies under the General Insurance from
the defendant. Amaresh Cinema, Ramposh
Hotel and other buildings were got insured
by the plaintiff with the defendant. Up to
the end of 1962 or earlier the position was
that clause relating to the jurisdiction which
found place in the policies used to be Bom-
bay, but later on in September, 1962, the
witness addressed communication to the Head
Office requesting them to change the place
of jurisdiction from Bombay to Srinagar in
respect of all the policies that were to be
issued by the defendant. This request was
accorded to by the Head Office and the juris-
dictional clause was modified by changing
Bombay to Srinagar. This also applies to the
Insurance policies taken out by the plain-
tiff. In regard to policy No. 502 the witness
stated that he remembered that one of the
Insurance experts of Kashmir who was also
the Director of State Financial Corporation
called the witness to his office and therein
the jurisdictional clause viz., place from
'Bombay' to 'Srinagar' was changed among
other things. But, the witness went on to
say, any further modification in the policy
was to be recorded by way of an endorse-
ment or by means of a letter. The witness
has proved copies of the letters Ex. P. W.
1/4, Ex. P. W. 1/5, Ex. P. W. 1/6 and Ex.
P. W. 1/7. The witness has admitted in
cross-examination that Policy No. 502 was
taken out in January 1963 and at that time
according to the copy of the Insurance Policy
on the file Bombay was the place of jurisdic-
tion and then it was modified in the month
of September, 1963. It was then when the
Interest of Financial Corporation was endors-
ed on the policy. The witness is no longer
in the service of the defendant and his ser-
vices have been terminated.

5. Bashir Ahmed P. W. stated that the
original Policy No. 502 is not in the custody
of J. and K. State Financial Corporation
and has been destroyed.

6. Bk. Abdul Majid as his own witness stated that in respect of General Insurance Policies all the disputes had to be settled at Srinagar. The defendant had a Branch office at Srinagar. Mr. Daniels was its Manager. The witness was never told that the defendant Insurance Company has been registered under the Maharashtra Co-operative Societies Act. In cross-examination he stated that he never knew that the defendant was registered under the Maharashtra Co-operative Societies Act; he did not issue any notice to the Company.

7. The first question to be decided in the case is whether the plaintiff has got cause of action to institute the suit in respect of the policies in Srinagar. There is an endorsement in respect of all the policies other than Policy No. 502 that the place of jurisdiction has been substituted from Bombay to Srinagar. Therefore in respect of policies other than 502 it cannot be said, that the Court at Srinagar has got no territorial jurisdiction to proceed with the suits. However, as regards Policy No. 502 it is to be borne in mind that there has been no modification in the jurisdiction clause. That policy shows that the jurisdictional clause has remained intact. According to Clause 15 of the policy any claim in respect of Policy No. 502 will lie only in a competent Court in the city of Bombay and not in Srinagar. There is no proof available of the fact that there has been any change recorded in this respect. The statement of Mr. J. B. Daniels does not lead us anywhere. It is indeed conceded by the counsel for the plaintiff that in respect of the claim on account of Policy No. 502 this Court has got no territorial jurisdiction. It is, therefore, held that no action for enforcing a claim on Policy No. 502 will lie in Srinagar and the same can only be entertained by a competent Court in Bombay.

8. As regards other policies it is held that jurisdiction clause having been modified and the word 'Srinagar' having been substituted for 'Bombay' and also in regard to suit No. 5 relating to Marine Insurance Policy the claim being payable in Srinagar this Court has got jurisdiction to proceed with the determination of all claims in respect of the said Policy.

9. Another preliminary point raised at the bar is to the effect that the suit is barred by the provisions of Maharashtra Co-operative Societies Act 1960. Indeed this plea is the subject-matter of issue No. 1. Attention is invited to Sections 163 and 164 of the Maharashtra Co-operative Societies Act (hereinafter called 'the Act'). It is submitted that the defendant having been registered under the Bombay Co-operative Societies Act of 1925 is deemed to be registered under this Act. Because the defendant is a registered entity under the Maharashtra Co-operative Societies Act, therefore by virtue of Section 163 suit in respect of any claim

against the defendant is barred. Also no suit can be instituted against a society in respect of any act touching the business of the society until the expiration of two months notice in writing has been delivered to the Registrar.

10. In my opinion this plea has got no substance. The Act extends only to the whole of the State of Maharashtra and not beyond that. Under Section 159 of the Act no society is to open a Branch, or a place of business outside the State of Maharashtra and no Co-operative Society registered under any law in any other State shall open a branch or a place of business in the State of Maharashtra without the permission of the Registrar. From this section it is clear that a Branch or a place of business of a society registered under the Act cannot be opened without the permission of the Registrar. That any permission of the Registrar as envisaged by Section 159 of the Act was obtained for opening a Branch or a place of business in the State of Jammu and Kashmir has not been made available.

Moreover the application of the Act is restricted to the State of Maharashtra and not outside the said State. The Preamble of the Act clearly mentions that with a view to providing for the orderly development of the Co-operative Movement in the State of Maharashtra it is expedient to consolidate and amend the law relating to the co-operative societies in that State. Suppose a branch of the Society or a place of business is opened outside the State of Maharashtra the relevant question posed would be whether the Act applies to such cases. In my opinion the scope of the Act cannot be extended to limits outside the Maharashtra State, and the places where business is transacted or Branch is opened cannot be said to be amenable to the jurisdiction of this Act. The defendant is the Union Co-operative Insurance Society which transacts business of Insurance not only in the State of Maharashtra but also outside the State. When the defendant extends its activities outside the State then such activities cannot be governed by the provisions of the Act but then ordinarily would be governed by Section 2-D of the Insurance Act and also by the relevant clause and guarantees of the Insurance policies.

11. Again Section 163 of the Act merely provides that no Civil Court shall have jurisdiction in respect of;

(a) the registration of a society, or the amendment of its bye-laws, or the dissolution of the committee of a society, or the management of the society on dissolution thereof; or

(b) any dispute required to be referred to the Registrar, or his nominee, or Board of nominees, for decision;

(c) any matter concerned with the winding up and dissolution of a society.

This section does not operate as a bar to the jurisdiction of a Civil Court in respect of entertainment of any claim in dispute be-

between the policy holder and the defendant. It is not, therefore, clear how Section 163 has been invoked by the defendant in the present case to act as a bar to the trial of the present suit. Section 164 relating to the notice also has got no application to the instant case, inasmuch as the Act does not apply outside the State; therefore any claim made in respect of a policy which is payable in Srinagar is not governed by the Act and Section 164 will not operate as bar to the institution of such a suit.

12. The result is that this issue is found against the defendant.

13. Issue No. 2: It has been contended that the suit of the plaintiff for enforcement of claim on the policies is not maintainable inasmuch as the policies have been assigned in the name of the Jammu and Kashmir Bank. But nothing has been shown that the plaintiff cannot lay his claim under the policies. There is no agreement to the contrary. The same point arose before their Lordships of Allahabad High Court in a case reported as AIR 1966 All 385.

That was a case where the applicant had insured his stock of sugar with the Insurance Company against loss-cum-fire risk. The sugar stock was mortgaged with a Bank. The stock of sugar was looted during the disturbances and the applicant claimed from the Insurance Company. It was contended by the Company that the Bank alone was entitled to receive money from the Insurance Company and that no claim could be made by the applicant. Their Lordships held that the terms of the agreement could be ascertained from the printed forms of the policies. Any-one of the insured either the policyholder or the Bank could have made a claim against the Insurance Company. There was nothing in the agreement to show that under no circumstances could the applicant lay any claim under the policy. Had the Insurance Company made any payment to the Bank in respect of the claim under the policy the receipt granted by the Bank would have been complete discharge of liability and must have been binding on all the parties including the applicant. The insurance policy having been taken out by the applicant he was entitled to claim the loss from the Insurance Company.

14. In the instant case it has not been shown that right to claim loss sustained by the plaintiff vested only in the Bank and not with the plaintiff. The rights and liabilities of the parties are governed by the ordinary conditions, clauses, warranties of the policies which, however, do not debar the plaintiff from enforcing his claim. Therefore the view that the suit is not maintainable by the plaintiff in the present form cannot be accepted.

15. However, as stated above, that the suit of the plaintiff in respect of Policy No. 502 is not triable by this Court, therefore, the claim of the plaintiff under this policy

is not maintainable in the present form in this Court. The claim in respect of Policy No. 502 amounting to Rs. 82,000.00 the loss assessed in respect of Pomposh Hotel will stand deleted. The suit will now proceed in respect of the claims payable under other policies. The case will come up for further proceedings on 21st of May, 1970.

Order accordingly.

AIR 1970 JAMMU AND KASHMIR 150 (V 57 C 32)

J. N. BHAT AND JASWANT SINGH, JJ.

Sardari Lal, Appellant v. Mst. Vishano, Respondent.

Civil First Misc. Appeal No. 35 of 1969, D/- 7-5-1970, from order and decree of Dist. J., Kathua, D/- 27-5-1969.

Hindu Marriage Act (1055), Section 25 (1), (3) — Grant of maintenance — Wife already held unchaste in judicial separation proceedings — She is not entitled to maintenance.

Where the decree for dissolution of marriage was granted on the ground of unchastity of wife and it was also held that the son born was not the son of the husband, maintenance either in favour of the wife or the child could not subsequently be granted under Section 25 (1). (Para 7)

If the unchastity of the wife subsequent to the grant of maintenance can form the basis of cancellation of an order of maintenance under Section 25 (1), a finding recorded during the judicial separation proceeding regarding unchastity of the wife must and should be taken into account even at the time of initially granting maintenance under Section 25 (1). Otherwise it will lead to a very incongruous situation, namely, that it is only when a wife becomes unchaste after the award of maintenance she is disabled from continuing to receive the maintenance whereas a wife who has been held guilty by the Court of unchastity even in the main proceedings, will nevertheless be entitled to get maintenance in the first instance under Section 25 (1). AIR 1967 Ker 181 & AIR 1960 Cal 575, Rel. on; AIR 1960 Cal 438, Disting. (Para 6)

Cases Referred: Chronological Para
(1967) AIR 1967 Ker 181 (V 54) =

ILR (1966) 2 Ker 201, Raja Gopalan v. Rajamma 6

(1960) AIR 1060 Cal 438 (V 47),

Amar Kanta Sen v. Sovana Sen 5

(1960) AIR 1960 Cal 575 (V 47) =

64 Cal WN 225, Sachindra Nath

Biswas v. Sm. Banamala Biswas 5

Baldev Singh, for Appellant; S. D. Sharma,

for Respondent.

BHAT, J.— This is an appeal against the order and decree dated 27-5-1969 passed by the District Judge, Kathua, for a payment of monthly alimony at the rate of Rs. 20/-

FN/FN/G570/70/SNV/D

"to Mst. Vishano till she dies or remarries and Rs. 15/- to Pawan Kumar minor son till he attains the age of majority" by the appellant.

2. The brief facts are that the appellant was the husband of the respondent No. 1. He instituted an application under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) for dissolution of his marriage with the respondent on the allegation of her living in adultery. The application was decided in his favour on 13-5-1968 by means of an ex parte decree. The appellant had further alleged that Pawan Kumar who was born of the respondent was not the son of the appellant but was the result of an adulterous life led by the respondent. This ex parte decree has become final because after making an application for setting aside this ex parte decree, the respondent did not press the application. These are the admitted facts before us.

3. After the decree for divorce was passed, the respondent put in an application under Section 25 of the Act on 22-10-1968 claiming maintenance for herself as well as for her son Pawan Kumar. The trial Court without perusing the objections of the appellant, recorded the evidence of the parties and ultimately passed the order and decree under appeal.

4. Before we take up the other points involved in this case, we are constrained to remark that the trial Court has dealt with the matter, to say the least, in a very careless manner. In the objections with respect to this application for maintenance of the respondent, the appellant had stated at more than one place that the marriage between him and the respondent had been dissolved by a decree of the Court dated 13-5-1968 and the respondent was living an unchaste life. The paternity of Pawan Kumar also was denied. It was however necessary for the trial Court as well as for the learned Counsel engaged in the case to conduct the case on the basis that the marriage of the respondent with the appellant had been dissolved by a proper decree for divorce on 13-5-1968 on the ground of the wife living an adulterous life. But nobody, it seems, cared to bestow any thought on this aspect of the case. The learned Counsel for the appellant, however, argued before us that the trial Court did not frame any issue although a request was made in that behalf. However, in our opinion the factual position being admitted, there was no necessity of framing any issue on any point of fact in the case. The only point for consideration by the Court below was whether the wife namely the respondent Mst. Vishno Devi could be entitled to any maintenance allowance against the appellant on the facts of the case. The order of the trial Court dated 27-5-1969 seems to have been passed under Section 25 of the Act. That section applies to grant of permanent alimony or maintenance to the wife or the husband, as

the case may be, at the time of passing any decree or at any time subsequent thereto under certain conditions. This section applies only either to the husband or to the wife. The section pertaining to minor children is Section 26 of the Act and not Section 25. Anyhow in this case whether one section applies or the other, is not material.

5. Under sub-section (3) of Section 25 of the Act if the Court is satisfied that the party in whose favour an order has been made under this section has remarried, or if such party is the wife, that she has not remained chaste or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order, which in other words means that even if an order under this section is passed in favour of the wife and it is later on proved that she lives in unchaste life, the order has to be rescinded. In this case the wife has been held to be living an adulterous life and Pawan Kumar has been held to be not a child of the appellant but a result of the adulterous life led by the respondent. This is what is unmistakably contained in the judgment and decree of the District Judge, Kathua, dated 13-5-1968. Therefore, the point for determination is only whether on these facts the erstwhile wife or her child is entitled to any maintenance from the appellant. An argument has been advanced that sub-section (3) of Section 25 of the Act applies only when an initial order is made for maintenance at the time of passing of decree or at any time subsequent thereto and the wife later on is found to lead unchaste life, the order can be and has to be rescinded; but the order cannot be rescinded unless there is a proper application and the unchastity of the wife takes place after the initial order for maintenance was passed. Reliance was placed on a Calcutta High Court case reported as AIR 1960 Cal 438 but this authority does not help the case of the respondent at all. The facts are given in paras 2 to 9 of the judgment and the finding is recorded in para 10, which is to this effect that:—

"It is clear from the evidence before me that the applicant was appointed an Assistant Producer (Music) of the All India Radio on a salary of Rs. 300/- (consolidated) prior to 7-9-1959, and she joined her duties at Delhi on 17-9-1959.

There is no evidence before me as to any misconduct of the applicant after the judgment. In this background the application has to be considered in the light of Section 25 of the Hindu Marriage Act 1955."

In para 20 the ratio decidendi of the case is given which is as under:—

"In my opinion on the authorities referred to she is entitled to a bare subsistence allowance or starving allowance. When she is earning a living and is not in helpless position her right to maintenance, even of the bare subsistence disappears for the allowance

is meant to prevent 'Starvation'. In these circumstances she is not at all entitled to any allowance after 17-9-1959 when she joined the service."

The wife in this case was not given any allowance after 17-9-1959. Therefore this authority cannot help the respondent at all. There is however, another authority reported as AIR 1960 Cal 575 which lays down that:-

"In the exercise of judicial discretion expressly vested in courts of law under Section 25 (1) of the Hindu Marriage Act, a judge should, unless there be very special grounds, leave, a wife, divorced on the ground of proved unchastity or adultery, to the resources of her immorality and deny her the lawful means of support by passing a decree for maintenance in her favour."

This authority rightly says that a woman once divorced on the ground of proved unchastity should be left to the resources of her immorality and should be refused the lawful means of support by passing a decree for maintenance in her favour.

6. But in our opinion the true significance of Section 25 (3) of the Act is given in AIR 1967 Ker 181. We reproduce verbatim some portion of that judgment and we have no hesitation in stating that the ratio decidendi and even the language of the decision is exactly what it occurred to us to be true intent and purpose of this sub-section (3). We therefore, do not record any finding of our own except reproducing the finding given in that case and adopt it as ours:—

"Section 25 (3) makes it mandatory on the part of the Court to revoke an order for maintenance under sub-section (1) of Section 25, if the wife, who is the recipient of maintenance, has not remained chaste after the order has been passed. That itself gives an indication that the unchastity of the wife if it had been established will certainly be a very vital and crucial circumstance to be taken into account as 'the conduct of the parties', when the Court is called upon under Section 25 (1) to exercise jurisdiction for the grant of alimony or maintenance. If a subsequent conduct of the wife who has become unchaste can form the basis for cancellation of an order passed under Section 25 (1) a finding recorded during the judicial separation proceedings, regarding unchastity of the wife must and should be taken into account even in the first instance, when an order is being passed under Section 25 (1) of the Act. Otherwise it will lead to a very incongruous situation namely, that it is only when a wife becomes unchaste after the award of maintenance she is disabled from continuing to receive that maintenance whereas a wife who has been held guilty by the Court of unchastity even in the main proceedings, will nevertheless be entitled to get maintenance, in the first instance under Section 25 (1) of the Act. In such a case even a stray incident of unchastity matters. If there is a legal bar, there is no question of awarding

any amount whatsoever, by whatever name it may be called as starving allowance or as subsistence allowance. There is a discretion in the Court under Section 25 (1) and that discretion ought to be exercised against a person whose conduct is reproachable.

Section 25 (1) emphasises "the conduct of the parties" which must mean "the conduct of the parties" during their matrimonial life and Court must have due regard to that factor. The provisions of Section 25 (1) and (3) place considerable emphasis on the wife being chaste not only during subsistence of the matrimonial relationship, but also after the decree so as to make her eligible to continue to get the maintenance.

Section 25 (1) contemplates the case of a claim of wife who is chaste at that time and who has been chaste during the matrimonial relationship. The view finds support from the expression "if such party is the wife, that she has not remained chaste" occurring in Section 25 (3). Section 25 (3) proceeds on the basis that the wife was chaste, when the order under Section 25 (1) was passed, but has not remained chaste after the date of the order under Section 25 (1). If the wife was found guilty of the act referred to in Section 10 (1) (f) that means she was not chaste even at the time she makes a claim under Section 25 (1) there is no question of such a wife not remaining chaste after the date of an order under Sec. 25 (1) because she is already unchaste. If she was already unchaste there is no question of her becoming unchaste for a second time for the purpose of Section 25 (3)."

7. The result is that the wife respondent having been held to be living an unchaste and adulterous life even before the dissolution of her marriage with the appellant and Pawan Kumar having been held to be not the son of the appellant, the decree for maintenance of the wife as well as of Pawan Kumar her son passed by the lower Court dated 27-5-1969 cannot be maintained and is hereby set aside. The result is that the appeal is accepted with costs.

8. JASWANT SINGH, J.—I agree.
Appeal allowed.

AIR 1970 JAMMU AND KASHMIR 152
(V 57 C 33)
FULL BENCH

S. MURTAZA FAZL ALI, C. J., J. N.
BHAT AND JASWANT SINGH, JJ.

Maqbool Shah, Appellant v. Sitara and others, Respondents.

First Appeal No. 79 of 1968, D/- 1-5-1970, against order of Dist. J., Poonch, D/- 28-8-1968.

Tenancy Laws — J. and K. Big Land-
ed Estates Abolition Act (17 of 2007), Sec-

FN/EN/C840/79/RSK/M

tions 20B, 4 (2) — Section 20B must be read along with Section 4 (2) — Section 20B not only contemplates unculturable kaps but also kaps as such.

The phrase 'and such lands as are unculturable' in Section 20B admits only of one construction and that is that the word 'such' qualifies the land description of which follows the words 'such lands including those used for raising fuel or fodder which are unculturable'. Section 20B cannot be interpreted in isolation but must be read along with Section 4 (2). (Para 6)

The correct interpretation of Section 20B, therefore, would be that it contemplates two separate categories of lands the transfer of which is completely prohibited. The transfer of Kah Krishnam, Araks and Kaps is prohibited as also transfer of lands which are unculturable including such lands as are used for raising fuel or fodder. Any land which answers either of the description mentioned above cannot be sold by the owner but only by the Government under the circumstances mentioned in the proviso to Section 4 (2) (b) of the Act.

(Para 7)

Avatar Singh, for Appellant; I. K. Kotwal and Amar Chand, for Respondents.

ALI, C. J.: This is a miscellaneous first appeal by the defendant against the judgment of the District Judge, Poonch framing an additional issue in the case and remanding the same for a fresh trial to the trial court. The appeal arises in the following circumstances.

2. The plaintiff respondent brought a suit for pre-emption by exercising his right of prior purchase under the Right of Prior Purchase Act on the land in dispute which was sold by Noor Hussain to the defendant-appellant Maqbool Shah for a sum of Rs. 800 by a registered sale deed dated 17-1-64. Noor Hussain was the owner and proprietor of Khasra No. 567 consisting of 29 kanals and 9 marlas which was entered in the revenue papers as Kap land. By virtue of the sale deed (supra) half of the land was sold to the defendant-appellant. The plaintiff claimed that he was a co-sharer in the land sold and was therefore entitled to purchase it in preference to the purchaser.

3. The suit was resisted by the defendant firstly on the ground that the plaintiff was not a co-sharer and secondly on the ground that the plaintiff had been offered sale of the land, but having refused to accept the same it was sold to the defendant. During the course of arguments before the trial court, an additional issue to the following effect was raised:—

"Whether the plaintiff's suit was not maintainable as the sale was hit by Section 20-B of the Big Landed Estates Abolition Act?" The trial court after deciding this issue against the plaintiff held that the sale was void and the plaintiff was not entitled to any relief. The trial court accordingly dismissed the suit. The appellate court did

not agree with the finding of the trial court and held that only such kap land as is not culturable would fall within the mischief of Section 20B of the Big Landed Estates Abolition Act (hereinafter to be referred to as the Act), and as there was no issue on the point whether or not the land sold in the present case was culturable, it framed an issue on the point and remitted it to the trial court. Against this order, the defendant has come up in appeal before us.

4. The case was heard in the first instance by a Division Bench, but in view of the fact that a substantial question of law was involved which had far-reaching consequences, the case was referred to the Full Bench.

5. In this case we are called upon to interpret the true ambit and scope of Section 20B. The point raised is no doubt one of first impression, because there is no decided case on the point. Even the provision contained in Section 20B of the Act is peculiar to this State and therefore no assistance can be drawn from the authorities of other High Courts. It has been argued by the appellant that the learned District Judge was wrong in interpreting Section 20B and holding that it contemplated only those types of Kap lands which were unculturable. The learned counsel submitted that the learned District Judge had done violence to the language of Section 20B and had grossly misconstrued it. The counsel for the respondents, however, submitted that the interpretation of Section 20B by the learned District Judge was right and should be adopted by this court. Section 20B of the Act runs thus:

"Transfer of Kah Krishnam Land, Araks, Kaps and such lands including those used for raising fuel or fodder as are unculturable or any interest therein shall be prohibited and no documents relating to the transfer of such land shall be admitted to the Registration."

6. Reading this section, it is manifest that it contemplates two categories of lands: (1) Those that are described in the first part of the Section, namely, Kah Krishnam, Araks and Kaps (2) those lands which are unculturable or are being used for raising fuel and fodder. The contention of the counsel for the respondents is that the words 'such lands' qualify not only the nature of the lands that follow but also the nature of the lands that precede, viz. 'Kah Krishnam, Araks and Kaps'. We find it difficult to accede to this contention. The phrase 'and such lands as are unculturable', admits only of one construction and that is that the word 'such' qualifies the land description of which follows the words such lands including those used for raising fuel or fodder which are unculturable. Section 20B cannot be interpreted in isolation but certain previous provisions of the Act where the description of these lands is mentioned have

also to be taken into consideration. In this connection reference may be made to S. 4 (2) of the Act which runs thus:

"Extinction of the right of ownership under sub-s. (1) shall not apply to

(a) unit of land not exceeding 182 kanals including residential sites, Bedzars and Safedzars

(b) Kah-Krisham areas, Araks, Kaps and (such lands including those used for raising fuel or fodder as are unculturable.)"

7. It would thus appear that the lands mentioned in Section 20B are also mentioned in Section 4 (2) (b) and have been exempted from the operation of the Act. It would further appear that previously Section 4 (2) (b) contained the words "Kah-Krisham, Araks and Kaps" but by an amendment that is to say by Act XV of 2008 the words and such lands 'including those used for raising fuel or fodder as are unculturable' were added. This clearly shows that the legislature intended to treat kaps and other unculturable lands as two different categories one of which was previously exempted from the operation of the Act and the second which was added to it some time later. Indeed if the intention was to exempt such Kap lands as were unculturable, then in the previous Act prior to the amendment of 2008 we should have expected the legislature to say so by qualifying Kaps as being unculturable. This, however, does not appear to have been done. It would thus appear that 'Kaps' in Section 4 (2) (b) has been used in the same sense as in Section 20B of the Act. While the legislature intended to exempt these lands from the operation of the Act, yet by virtue of Section 20 it prohibited transfer of these lands. The reason for doing so is found in the proviso to Section 4 (2) which runs thus:—

"Provided that the Government may dispose of the land mentioned in Clause (b) in such manner as may be recommended by the committee that shall be set up for this purpose."

A perusal of this proviso shows that the Government reserved to itself the right to dispose of Lands mentioned in Sec. 4 (2) (b), and therefore their sale by the owners was completely prohibited by Section 20B of the Act. This proviso clearly shows that the legislature intended two separate types of lands, one of the nature of Kaps and the other such lands as are unculturable including those used for raising fuel or fodder. For these reasons we are satisfied that the correct interpretation of Section 20B of the Act would be that it contemplates two separate categories of lands the transfer of which is completely prohibited. In other words the position is that transfer of Kah-Krisham, Araks and Kaps is prohibited as also transfer of lands which are unculturable including such lands as are used for raising fuel or fodder. Any land which answers either of the descriptions mentioned above cannot be sold by the

owner but only by the Government under the circumstances mentioned in the proviso to Section 4 (2) (b) of the Act. We are therefore of the opinion that the learned District Judge committed an error of law in holding that S. 20B contemplates only unculturable Kaps and not Kaps as such. In this view the very basis for remanding the suit to the trial Court by the District Judge disappears. According to our decision transfer of Kap Land was prohibited whether it was culturable or not. In the present case it is not disputed that the land sold to the defendant-appellant was a Kap Land and was regarded as such. In these circumstances it is manifest that the sale by Noor Hussain to the defendant appellant was void. The plaintiff could have a right of pre-emption only if there was a valid sale, but if the sale itself was void the plaintiff had no right to pre-empt.

8. For these reasons the appeal is allowed, the judgment and order of the learned District Judge is set aside and that of the trial Court is restored. The suit is dismissed, but in the circumstances of the case there will be no order as to costs in this Court as also in the Court of the District Judge.

9. J. N. BHAT, J.: I agree.

10. JASWANT SINGH, J.: I agree.

Appeal allowed.

AIR 1970 JAMMU AND KASHMIR 134
(V 57 C 34)

MIAN JALAL-UD-DIN, J.

Mst. Jani and others, Appellants v. Mohd. Khan, Respondent.

Second Appeal No. 63 of 1968, D/- 25-3-1970.

(A) Mohammedan Law — Marriage — Restitution of conjugal rights — Suit by Khana Damad for — On proof that wife has refused to live with her husband in her own house or to perform her marital obligations, Khana Damad is entitled to a decree to that extent — Second Appeals Nos. 201 and 204 of 2003 (J. & K.), Distinguished. (Para 2)

(B) Mohammedan Law — Marriage — Divorce — Agreement between husband (Khana Damad) and wife that on breach of any of the conditions therein wife would be entitled to divorce — Agreement held opposed to public policy.

Where by an agreement between Mohammedan husband (a Khana Damad) and wife, the husband agreed that he would not commit an act of deceit by disobeying his father-in-law or by not rendering service to him and on breach of any of the conditions therein the wife would be entitled to divorce her husband, such conditions were not conducive to best spirit of marriage and the agreement was opposed to public policy.

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If the Khana Damad failed to render service to his father-in-law, that would not operate as a divorce or dissolution of marriage between the couple. (Para 6)

Cases Referred: Chronological Paras
(2003) Second Appeals Nos. 201 and
204 of 2003, (J. & K.) 2

M. L. Qureshi, for Appellant; B. N. Dhar,
for Respondent.

JUDGMENT: This is the defendant's second appeal and arises out of a suit for restitution of conjugal rights brought by Mohd. Khan the respondent against the appellant in the Court of the Sub-Judge Nandwara. The suit was decreed by the learned Sub-Judge and on appeal the decree was affirmed by the learned District Judge Bara-mulla.

2. When this case came up for hearing before my Lord the Hon'ble Chief Justice a question was posed whether a suit for restitution of conjugal rights can be maintained at instance of a Khana Damad. It being a common ground in the case that Mohd. Khan was brought as Khana Damad for Mst. Jani. The necessity of referring this question to the Full Bench arose because of the existence of a Division Bench Ruling given in Civil Second Appeals 201 and 204 of 2003 by Ghose C. J. and Masud Hussan J. who observed that a Khana Damad was not entitled to bring a suit for restitution of conjugal rights as the custom of making a Khana Damad prevalent in the Valley abrogated the Muslim Law of marriage and it imposed an obligation upon the husband to reside in the bride's father's house and not to compel his wife to leave it and reside with him elsewhere. The question was therefore referred to a Full Bench. The Full Bench considered the judgment of the Division Bench and observed that this judgment did not serve as an authority for the general proposition that no suit under any circumstances lies for restitution of conjugal rights at the instance of Khana Damad. The Full Bench answered the question thus:—

“Thus if in the present case the wife has refused to live with the husband in her own house or to perform her marital obligations and the husband can prove this fact, he is entitled to a decree, for a restitution of conjugal rights to the extent indicated above.”

3. The answer to the question having come from the Full Bench a further question for consideration in the present case is whether an agreement between the husband and the wife by which the husband gives a right to his wife to divorce him on certain conditions is invalid as being opposed to public policy. The defence of the defendant in the case was that the marriage between the couple had stood dissolved inasmuch as Mohd. Khan had executed an agreement dated 29-12-55 in which he had agreed that he would not commit an act of deceit or would be guilty of disobedience to his

father-in-law or would not render service to him (sic). In the event of breach of any of the aforesaid conditions divorce would follow. Both the Courts below have gone into this question and they have found this agreement not in accordance with law. The trial Court has also held that this agreement was not proved. The first appellate Court has recorded the same finding. It has, however, even proceeded to consider the legal value of these documents and has come to the conclusion that this document, being opposed to the public policy, cannot be given any effect.

4. The learned counsel for the appellant has contended before me that there is no reason why this document should not be given effect to when it is established that the respondent has infringed the conditions of this agreement and in these circumstances the marriage of the couple stood as dissolved. Counsel for the respondent has, however, argued that this is not the case. The agreement is unstamped and therefore is inadmissible in evidence.

5. I have considered the arguments advanced in the case.

6. The argument that the agreement is not duly stamped and is therefore inadmissible in evidence has got no merit in view of the fact that the document has already been admitted in evidence. Under Section 36 of the Stamp Act a document once received in evidence its admissibility cannot subsequently be called in question. However, there is considerable force in the argument of the learned counsel for the respondent that not only the defendant has failed to establish that the plaintiff has been guilty of infringement of the conditions of the agreement but also the very agreement is opposed to public policy and therefore cannot be given effect to. In my view the conditions provided in the agreement are such that they cannot be said to be wholesome and conducive to the best spirit underlying the marriage. A Khana Damad is not to work as a servant in the house of his in-laws. He is not a serf that he has to remain at the beck and call of his father-in-law and mother-in-law. It is true that as a son he has to respect them and render services according to his capacity but at the same time if he fails to do that that should not bring within its wake the dissolution of matrimonial ties with his wife. In my opinion breach of this condition cannot be said to operate as a divorce and would not operate as a dissolution of marriage between the couple.

7. I am, therefore, of the view that the Courts below have taken a correct view of the matter. Issue No. 3 has also been decided in favour of the plaintiff.

8. For the foregoing reasons the plaintiff has been found entitled to a decree for restitution of conjugal rights in his favour. The judgments and the decree passed by the Courts below are, therefore, upheld. I

see no force in this second appeal which is hereby dismissed. But, in view of the circumstances of the case I leave the parties to bear their own costs.

Appeal dismissed.

AIR 1970 JAMMU AND KASHMIR 150
(V 57 C 35)

MIAN JALAL-UD-DIN, J.

Mohd. Sharif, Petitioner v. State of Jammu and Kashmir, Respondent.

Writ Petn. No. 134 of 1969, D/- 16-3-1970.

Constitution of India, Article 311 — Termination of service in terms of service Rules — Non-applicability of procedure under article.

Person in temporary service under Government — Termination of service by one month's notice under Rule 5 (1), J. and K. Civil Service (Temporary Service) Rules, 1961 Order neither mala fide nor offending Article 14 on the ground of discrimination — Order of termination carries no stigma against the person and hence will not be set aside on the ground of non-fulfilment of procedure prescribed by Article 311 read with Section 120, J. and K. Constitution. (Para 7)

K. N. Raina, for Petitioner; A. K. Malik Dy. Advocate-General, for Respondent.

ORDER.— This is a writ petition under Section 103 of the Jammu and Kashmir Constitution made by Mohd. Sharif, the petitioner, with the following averments:—

2. This petitioner has stated that he was employed as Junior Clerk in the office of the Joint Director, Women's Education against a vacant post of senior clerk which is a permanent post. The petitioner was once on a false charge of misconduct discharged from service by the said Director, Women's Education on 8-5-68 without holding any enquiry and without giving any opportunity to the petitioner to show cause against the order of discharge. Aggrieved by this order the petitioner approached the High Court which was pleased to pass the order on 15-5-69 declaring the order of the termination of service of the petitioner as illegal.

After this judgment the said Director took a long time to implement the order of the Court. However, after persistent reminders and directions of Law Department the said Joint Director re-instated the petitioner on his own post on 30-8-69. But, in order to circumvent this direction and somehow to terminate the services of the petitioner the Joint Director being gravely biased against the petitioner started victimising and harassing him and consequently terminated the services of the petitioner showing in the order that the services of the petitioner were no longer required.

This order is liable to be quashed on the ground that it amounts to termination on

stigma and by way of punishment. No enquiry was held against the petitioner and the impugned order was passed arbitrarily and in a mala fide way. The petitioner has been discriminated against on the basis of personal bias. In these circumstances it is prayed that the impugned order be quashed by issue of a writ of certiorari and the respondent be directed to re-instate the petitioner against his own post. The petitioner has filed a copy of the original order of appointment (Annexure 'A'), a copy of the judgment of this Court (Annexure 'B') and a copy of the impugned order (Annexure 'C').

3. A notice was issued to the respondent to show cause as to why the writ be not admitted. The Deputy Advocate-General has appeared on behalf of the State.

4. I have heard the arguments in the case.

5. It is conceded by the learned Counsel for the petitioner that the writ does not fall within the purview of Article 311 of the Constitution of India read with Section 120 of the Jammu and Kashmir Constitution. He has, however, invoked the provisions of Article 14 of the Constitution of India to his aid. The argument is that the petitioner has been discriminated against inasmuch as the impugned order has been passed in a mala fide way without any enquiry. The services of the petitioner have been terminated in a slipshod manner.

The counsel for the respondent has on the other hand referred me to Rule 5 of the Jammu and Kashmir Civil Service (Temporary Service) Rules, 1961. According to Rule 5 (1) the services of a temporary Government servant can be dispensed with by the appointing authority on one month's notice on either side. This Rule 5 (1) provides:—

"The service of a temporary Government (sic) (servant?) who is not in quasi-permanent service shall be liable to termination on the expiry of the life of the post, or at any time by notice in writing given either by the Government Servant to the appointing authority, or by the appointing authority to the Government servant."

6. It is submitted that the impugned order has been passed by the Joint Director of Women's Education under this Rule and as such it cannot be called in question as the petitioner had not acquired any rights. There was no question of any mala fide on the part of the appointing authority and the allegation of discrimination is wholly baseless.

7. On a consideration of the provisions of R. 5 referred to above it is clear that the services of a temporary hand in a Government department can be terminated by the appointing authority in accordance with the procedure as indicated in the said Rule. The case of a temporary Government servant stands on a different footing from the one who holds a quasi-permanent post or a permanent post in a Government institution. In

the case of a quasi-permanent or permanent Government servant his services cannot be terminated by a mere notice and in case any such Government servant is to be dismissed or demoted in rank or any other punishment is proposed to be passed against him the constitutional requirements as provided by Art. 311 of the Constitution of India read with Section 126 of the Jammu and Kashmir Constitution must be fulfilled. But such is not the procedure contemplated in the case of a temporary Government servant.

It is only when the order of discharge carries a stigma with it and a temporary Government servant is discharged without any enquiry in regard to the stigma made against him that he can approach the Court by means of a writ and get his grievance vindicated. But where the order merely fulfils the requirements of Rule 5 and the order simply says that the services of such Government servant are no longer required it does not mean that the order carries with it any stigma and the case calls for any enquiry in his case. In the instant case notice of one month as required by Rule 5 (1) of the aforesaid Rules has been given to the petitioner by the appointing authority. The order does not carry with it any stigma as against the petitioner. From the order it does not appear that the same has been passed in a mala fide way or there has been any discrimination exercised by the appointing authority so as to offend the provisions of Article 14 of the Constitution of India.

8. In these circumstances no writ can lie against the respondent. The petition is, therefore, dismissed but without making any order as to costs.

Petition dismissed.

AIR 1970 JAMMU AND KASHMIR 157
(V 57 C 36)

MIAN JALAL-UD-DIN, J.

Haji Ghulam Nabi Reshi, Petitioner v. Tehsildar Pulwama and others, Respondents.

Writ Petn. No. 26 of 1969, D/- 16-3-1970.

Constitution of India, Article 226 — Mandamus — Petitioner's truck and military truck collided — Petitioner was acquitted by Competent Court on a charge of rash and negligent driving — Behind his back, Court of enquiry constituted by military personnel, passing an order against him to pay certain amount as compensation — Deputy Commissioner and Tahsildar proceeding to recover the said amount as arrears of land revenue — Mandamus was issued as the proceedings were without jurisdiction. (Paras 5, 6, 7).

S. I. Kaul, for Petitioner.

ORDER:— This is a petition made by Haji Ghulam Nabi Reshi for issuance of a writ of mandamus restraining the respondents from

recovering the alleged amount of Rs. 23061.50 from the petitioner as land revenue and also for issuance of any other writ, direction or appropriate order as the circumstances warrant.

2. It is alleged by the petitioner that an accident took place on 2-10-67 on Udhampur-Jammu Road in which the petitioner's truck and the military truck No. SD 31019 collided. The petitioner was challaned by the Police Udhampur before the Chief Judicial Magistrate Udhampur for alleged causing of the accident by rash and negligent act. The trial concluded in the acquittal of the petitioner on 13-3-1969. The Magistrate held that the petitioner was not guilty of any rash and negligent act. However, before the judgment of the C. J. M. acquitting the petitioner was announced the respondent No. 3 O. C. 682 TPT Company A. S. C. (3 Ron Type D) intimated the petitioner on 23-1-1969 that a court of enquiry was held under the military arrangements and the blame of the accident has been placed on the petitioner and that the petitioner is liable to pay Rs. 23061.50 as cost of damage caused to the military vehicle No. SD-31019. The petitioner has no knowledge of any such Court of enquiry, nor the petitioner had been a party to the enquiry. The said enquiry appears to have been held behind the back of the petitioner. The report of the accident was made over to the police who challaned the petitioner for committing the accident which resulted in the acquittal of the petitioner. The respondent No. 3 in spite of the order of acquittal by the competent court has by his letter No. 5250-31019/XXI/STII dated 18-3-1969 asked the Deputy Commissioner respondent No. 2 who has in turn asked the respondent No. 1 to make the recovery of the aforesaid amount from the petitioner as arrears of land revenue from the person and property of the petitioner. The respondents have no right to recover any such amount as land revenue, nor have the respondents 1 and 2 any jurisdiction to recover any such amount from the petitioner. In the face of acquittal order of the Chief Judicial Magistrate the respondent No. 3 had no right to levy any amount on the petitioner nor has he any right and authority to ask the respondents Nos. 1 and 2 to make any recovery from the petitioner. The respondent No. 3, if he has any right that is by way of institution of a suit in a civil court and not by the process and the method which he has adopted. Neither can any such amount be recovered as arrears of land revenue. The said amount is now being recovered as arrears of land revenue by the respondents 1 and 2 without jurisdiction. It is, therefore, prayed that necessary writ be issued in the matter. Along with the petition an affidavit in support of the petition has also been filed by the petitioner. Also a copy of the acquittal judgment passed by the C. J. M. Udhampur, copy of the order of the O. C. and copy of the letter

sent by O. C. to the D. C. Anantnag have been filed.

8. The respondents 1 to 3 were summoned in this case. It appears that Chulam Qadir Tehsildar respondent No. 1 appeared in person and also for respondent No. 2 on 29-9-69. He was asked to file objections on the next date of hearing that is on 22-10-1969. On this date Mr. A. K. Malik Deputy Advocate-General appeared for these respondents and also on 11-11-69 before the Deputy Registrar. But on 1-12-69 he stated that he was not engaged as counsel on behalf of the respondents 1 and 2. Respondent No. 3 was also served; vide order dated 19-7-69. There is also an endorsement of the O. C. Major H. S., Nanda which is on the file. But uptill now nobody appeared on behalf of respondent No. 3 to contest this petition. It was on 1-12-1969 that the Court proceeded ex parte against all the respondents.

4. I have heard the learned Counsel for the petitioner.

5. It appears that the petitioner was challoaned for rash and negligent driving in the Court of the C. J. M. Udhampur and was acquitted of the charge which is proved by the copy of the judgment filed by the petitioner in the case. It also appears that a Court of enquiry was constituted by the military personnel behind the back of the petitioner. The petitioner was not associated with this enquiry. It does not appear that any notice was sent to him by the Court of enquiry to appear before it for answering the charges. In these circumstances it can legitimately be argued on behalf of the petitioner that any decision given by the court of enquiry is opposed to the principles of natural justice as the petitioner was not given any opportunity to be heard in his defence. It is an ex parte judgment. The decision of the said court of enquiry is undoubtedly visited with civil consequences as the petitioner has been asked to pay Rs. 23000 and odd as cost of damages sustained by the military vehicle in consequence of the alleged collusion between the vehicles. It is manifestly clear that any order which is pregnant with civil consequences must be made in conformity with the principles of natural justice.

6. Again, any decision given by the Court of enquiry asking the petitioner to pay compensation for the loss sustained cannot be implemented in the way in which it has been done in the present case. There is no provision of law under which the Deputy Commissioner or the Tehsildar can realise the amount of compensation awarded by the Court of enquiry as arrears of land revenue. The said act of respondents Nos. 2 and 3 is clearly without jurisdiction. I am told that a Single Bench of this Court has also taken a similar view in case of S. Balwant Singh v. State, but the copy of the said judgment has not been made available to me. However, viewing the matter as a whole it is

clear that the proceedings instituted in the case for realising the amount of compensation as arrears of land revenue is without jurisdiction. The petitioner is, therefore, entitled to the writ prayed for.

7. The result is that the petition is accepted and a writ of mandamus is issued against the respondents restraining them from realising the amount of Rs. 23061.50 from the petitioner as arrears of land revenue. The petitioner will be entitled to the costs of the petition and also to the counsel fee which is assessed at Rs. 100/-.

Writ petition accepted.

AIR 1070 JAMMU AND KASHMIR 159
(V 57 C 37)

S. MURTAZA FAZL ALI, C. J.
AND J. N. BHAT, J.

Rup Lal, Appellant v. Kartaro Devi, Respondent.

First Appeal No. 139 of 1969, D/- 4-3-1970.

Hindu Marriage Act (1955), Section 10 (b) — Legal cruelty — Matters to be considered in deciding question.

Wife suffering from deadly disease — Husband prevented thereby from performing his marital functions — Amounts to a case of legal cruelty to husband — In deciding question of legal cruelty Court must consider the social status, environments, the mental and physical conditions and the susceptibilities of the innocent spouse and also the custom and manners of the parties — In cases of mental cruelty the whole matrimonial relation must be taken into account. (1949) 1 All ER 774 & (1952) 1 All ER 875, Rel. on. (Paras 5, 6, 7)

Cases Referred: Chronological Paras
(1952) 1952-1 All ER 875 = 1952

AC 525, Jamieson v. Jamieson 5
(1949) 1949-1 All ER 774 = 1949 P
350, Walsham v. Walsham 5

R. Singh, for Appellant; B. R. Sharma, for Respondent.

FAZL ALI, C. J.:— The appellant, Rup Lal, filed a petition for divorce against his wife Mst. Kartaro on the ground of desertion and legal cruelty and the fact that Mst. Kartaro was suffering from a virulent and incurable disease of leprosy.

2. The petition was resisted by the wife who denied all the allegations made by the husband appellant.

3. The learned District Judge, Jammu framed the following issues:

1. Is the non-applicant suffering from a virulent and incurable form of leprosy for a period of not less than three years immediately preceding the presentation of this application? O. P. P.

2. Whether the non-applicant deserted the applicant for a continuous period of not less

than 2 years immediately preceding presentation of this application? O. P. P.

3. Whether the non-applicant treated the applicant with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the non-applicant? O. P. P.

4. Relief to which the parties are entitled to in the end? O. P. P.

After considering the evidence on the record the District Judge decided all the issues against the appellant. Hence this appeal before us.

4. The learned Counsel for the appellant has pressed only one issue before us, namely the issue relating to legal cruelty. It has been argued by the counsel for the appellant that the appellant has been able to prove to the satisfaction of the Court that the respondent, Mst. Kartaro, was suffering from a dirty and deadly disease of the nose which emitted such a bad smell as made it impossible for the husband to live with her. The learned Judge appears to have accepted this fact but held that since the appellant had taken his wife for better or for worse, he could not be allowed to get a decree for divorce merely because the wife suffered from a disease which made her company with the husband difficult. This view of the learned Judge has been seriously assailed by the learned counsel for the appellant.

5. We have gone through the evidence and it would appear from the medical evidence of Dr. D. N. Goel that the wife is suffering from Atrophic Rhinitis as a result of which she has developed a serious type of sinus and the fleshy portion of the nose has got putrified and consequently it emits a very bad smell. The doctor further deposes that the disease takes a long time to be cured. The doctor also states that the smell which is emitted from the nose is like that of putrified meat. The husband has deposed that he cannot stand the smell of the nose which makes it impossible for him to live with his wife or to have any sexual intercourse with her. We have therefore to see whether in the circumstances a case of mental cruelty as alleged by the husband has been made out or not.

It is really difficult to give a precise and exhaustive definition of the concept of mental cruelty so as to amount to a matrimonial offence resulting in a decree for divorce, but in considering this question the mental aspect of cruelty has to be borne in mind. In deciding whether or not a particular state of affairs amounts to legal cruelty, the court has to consider the social status, the environments, the education, the mental and physical conditions, and the susceptibilities of the innocent spouse as also the custom and manners of the husband and the wife, in cases depending on mental cruelty the whole matrimonial relations must be taken into account. In (1949) 1 All ER 774, *Walsham v. Walsham* it was held that where

the act of the husband was having an increasingly injurious effect on the bodily and mental health of the wife, it amounted to cruelty. Similarly in a later case in *Jamieson v. Jamieson*, (1952) 1 All ER 875 it was held that

"the respondent's acts must be judged in relation to the surrounding circumstances, which include the physical or mental condition and the capacity for endurance and the offender's knowledge of the actual or probable effect of his conduct on the other's health."

6. In the instant case it is manifest that in view of the dirty disease from which Mst. Kartaro is suffering it was impossible for the husband either to have sexual intercourse with the wife or to enjoy her company. In this view of the matter the very purpose of marriage would be foiled so long as the wife was suffering from this disease. It is true that the wife could not have helped it, but at the same time it must be remembered that the husband could not be blamed for it, and if he sought a decree for judicial separation on the ground that he was not able to perform his marital functions due to a deadly disease from which his wife was suffering, the Court had to consider such a case.

7. Having given our anxious consideration to all the aspects and circumstances of this case, we are satisfied that a case of legal cruelty as envisaged by Section 10 (b) of the Hindu Marriage Act has been established. The respondent has not appeared, despite service, to contest this appeal. For the reasons given above, the appeal is allowed, the judgment and decree of the learned District Judge is set aside and a decree for judicial separation against the respondent Mst. Kartaro is hereby passed.

8. J. N. BHAT, J.:— I agree.

Appeal allowed.

AIR 1970 JAMMU AND KASHMIR 159
(V 57 C 38)

S. MURTAZA FAZL ALI, C. J.

Ghulam Mohd., Appellant v. Badshah Begum and others, Respondents.

Second Appeal No. 86 of 1968, D/- 1-5-1970.

(A) Evidence Act (1872), Sec. 114 Illus. (e) — Regularity of official acts — Presumption — Affidavit sworn before Oaths Commissioner in Pakistan — Presumption does not apply. (Para 5)

(B) Evidence Act (1872), Section 1 — Affidavit — Sworn in foreign country — Affidavit is not admissible in evidence before Custodian of Evacuee Property when no evidence is adduced to prove identity or signature of persons swearing it or that it was sworn in presence of witnesses produced before the Custodian. (Para 5)

GN/GN/C943/70/KSB/P

(C) J. and K. Evacuees' (Administration of Property) Act (2006) — Proceedings under before Custodian — Are quasi-judicial in nature — Rules of pleading cannot be enforced strictly — (Civil P. C. (1908), O. 6, Gen). (Para 6)

(D) J. and K. Evacuees' (Administration of Property) Act (2006), Sec. 80 (1) — Who can appeal — Person aggrieved.

Where the Custodian had held that part of the property in dispute was evacuee property but the Custodian-General in appeal held that the entire property was not evacuee property, the person aggrieved by such order would be either the Custodian department or the evacuee and not the tenant inducted into the property by its owner. The tenant is not entitled to file an appeal under Sec. 69 (1) and merely because he was an informant about the existence of evacuee property he cannot be said to have semblance of any interest in the property. AIR 1952 SC 819, Distinguished. (Para 7)

(E) Letters Patent (J. & K.) Clause 21 — Difference of opinion between two Judges — Case has to be referred to a third Judge and not to a Full Bench as required under Section 62 of the J. and K. Constitution Act (1936) which must be deemed to have been modified by the Letters Patent subsequently granted to High Court — (J. and K. Constitution Act (1936), Section 62.) (Para 9)

Cases Referred: Chronological Paras (1952) AIR 1952 SC 819 (V 09) = 1952 SCR 696, Ebrahim Aboobakar v. Custodian-General of Evacuee Property, New Delhi

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Abdul Karim and R. C. Nanda, for Appellant; J. L. Sehgal and S. P. Gupta, for Respondents.

JUDGMENT:— This appeal was heard in the first instance by a Bench consisting of Bhat and Anant Singh, JJ., but as a result of difference of opinion between the two learned Judges, the appeal has been referred to me for hearing and disposal.

2. The appeal is directed against the order of the Custodian-General 'Evacuees' property dated 19-7-63 by which he had held that the properties in dispute are not evacuee properties and had accordingly ordered their release. The facts giving rise to this appeal have been narrated with sufficient precision and detail in the judgment of my learned brother Bhat, J., but I would give a brief resume of the relevant facts in order to understand the scope and ambit of the appeal before me.

3. It appears that the original owner of the properties in question was one Raja Hussain Khan who died in 1940, the only issue which he had, was a daughter Pukhray Begum who was married to Raja Hayat Mohd. Khan, but she also pre-deceased her father and thereafter Raja Hayat Mohd. Khan continued to live with his father-in-law and look after his properties. Raja Hayat Mohd. Khan had two daughters: Sarwar Sultana and

Badshah Begum; Badshah Begum being the elder daughter was married to Col. Abdul Majid who lived in Jammu. The younger daughter namely Sarwar Sultana was married to one Munsha Khan who was a resident of Kathar in the district of Mirpur (at present Pak occupied territory). Hussain Khan had considerable properties in Jammu which according to the case of the respondents, was inherited by the two daughters of Pukhray Begum. In fact the case made out by respondent 1 was that Raja Hayat Mohd. Khan was a Khan Damad of Raja Hussain Khan and therefore inherited all his properties. It was further alleged that in the year 1942, at the time of the marriage of the second daughter Sarwar Sultana with Munsha Khan, Raja Hayat Mohd. Khan made a declaration before a large number of persons that the two sisters had divided the properties inherited by them in the following manner; that the property situate in Jammu was allotted to Badshah Begum respondent 1 and those situate in Kathar and Bimher were allotted to Sarwar Sultana. This partition was made because it suited the convenience of the parties inasmuch as both Badshah Begum and her husband were residents of Jammu, while the husband of Sarwar Sultana, Major Munsha Khan, belonged to Kathar and had properties there. It was further sought to be proved by respondent 1 that at the time of marriage of Sarwar Sultana in 1942, it was also declared that the two sisters had been put in possession of the properties allotted to them. In other words, the partition was acted upon ever since 1942. The Jammu properties having fallen exclusively to the share of Badshah Begum, the question of their being declared as evacuee properties did not arise as after partition Sarwar Sultana ceased to have any interest in the properties. The learned Custodian-General accepted the case made out by Badshah Begum and held that the properties were not evacuee properties. My learned brother Bhat, J., also, after going through the material and the evidence on the record, agreed with this finding of fact arrived at by the Custodian-General. Anant Singh, J., however did not enter into a discussion of the evidence led by the parties on the subject but thought that the sheet anchor of the case of Badshah Begum was an affidavit alleged to have been sworn by Sarwar Sultana in Pakistan which was filed before the Custodian. The learned Judge held that this affidavit was wholly inadmissible in evidence and therefore would be of no assistance in supporting the claim of Badshah Begum. The learned Judge further held that in his opinion as Badshah Begum had not proved that she was exclusively entitled to the properties in Jammu and the share of Sarwar Sultana who had gone to Pakistan should have been declared as evacuee property. In other words my learned brother Anant Singh, J., agreed with the findings of the Custodian who had also held that the interest of Sarwar Sultana in the Jammu pro-

that the impugned Act was in pith and substance an Act in respect of betting and gambling, and since betting or gambling was not trade, commerce or business "the validity of the Act had not to be decided by the yardstick of reasonableness and public interest laid down in Articles 19 (6) and 304. "In this connection it may, with respect, be pointed out that what purports to be a quotation from Lord Porter's Judgment in 1950 AC 235, has not been accurately reproduced. In fact, referring to phrases such as 'pith and substance' Lord Porter has observed that:

"They no doubt raise in convenient form an appropriate question in cases where the real issue is one of subject-matter, as when the point is whether a particular piece of legislation is a law in respect of some subject within the permitted field. They may also serve useful purpose in the process of deciding whether an enactment which works some interference with trade, commerce and intercourse among the States is nevertheless untouched by Section 92 as being essentially regulatory in character."

These observations would indicate that the test of pith and substance is generally and more appropriately applied when a dispute arises as to the Legislative competence of the Legislature, and it has to be resolved by reference to the entries to which the impugned legislation is relatable. When there is a conflict between the two entries in the legislative lists, and legislation by reference to one entry would be competent but not by reference to the other, the doctrine of pith and substance is invoked for the purpose of determining the true nature and character of the legislation in question (vide *Prafulla Kumar Mukherjee v. Bank of Commerce Ltd.*, Khulna, 74 Ind App 23 = (AIR 1947 PC 60) and *Subrahmanyan Chettiar v. Muttuswami Goundan*, 1940 FCR 188 = (AIR 1941 FC 47). But even the application of the test of pith and substance yields the same result in the present proceedings. The pith and substance of the legislation is taxation on the carriage of goods and that clearly falls within the terms of Article 302".

In the same case, Shah, J. expressed no opinion on the applicability of the "pith and substance doctrine" to cases involving violation of Article 301. In the *Rajasthan Transport case*, AIR 1962 SC 1406, Hidayatullah, J. (who was in a minority) observed:

"No question of pith and substance in this context arises as was pointed out by the Privy Council in the *Bank's case*, (1948) 76 CLR 1 but nature of the tax and its relation to trade and commerce and intercourse are the matters to consider." In 1950 AC 235, dealing with Section 92 of the Australian Constitution Lord Porter observed:

"An analogous difficulty in one section of constitutional law, namely, in the deter-

mination of the question where legislative power resides, has led to the use of such phrases as "pith and substance" in relation to a particular enactment. These phrases have found their way into the discussion of the present problem also and, as so used, are the subject of just criticism by the learned Chief Justice. They, no doubt, raise in convenient form an appropriate question in cases where the real issue is one of subject-matter, as when the point is whether a particular piece of legislation is a law in respect of some subject within the permitted field. They may also serve a useful purpose in the process of deciding whether an enactment which works some interference with trade, commerce, and intercourse among the States is, nevertheless, untouched by Section 92 as being essentially regulatory in character. But where, as here, no question of regulatory legislation can fairly be said to arise, they do not help in solving the problems which Section 92, presents. Used as they have been to advance the argument of the appellants they but illustrate the way in which the human mind tries, and vainly tries, to give to a particular subject-matter a higher degree of definition than it will admit. In the field of constitutional law—and particularly in relation to a federal constitution—this is conspicuously true, and it applies equally to the use of the words "direct" and "remote" as to "pith and substance". But it appears to their Lordships that, if those two tests are applied: first whether the effect of the Act is in a particular respect direct or remote; and, secondly, whether in its true character it is regulatory, the area of dispute may be considerably narrower. It is beyond hope that it should be eliminated."

We are of the opinion that there is no scope for applying the "pith and substance doctrine" in the sphere of Article 301.

13. We would next refer to the Division Bench ruling of this Court in (1965) 16 STC 659 (Ker). Sections 29, 30 and 31 of the Act were attacked as offending Article 301, and also as violative of Article 14, in that they operated only against transport operators other than railways. The challenge was unlike in the present case, by a transport operator, and not by a dealer. In repelling the challenge this Court observed:

"Both the contentions have been answered well in *Rama Transport Co. (P) Ltd. v. State of Uttar Pradesh*, (1957) 8 STC 725 = (AIR 1957 All 448). We are in entire agreement with the decision as well as the reasoning in that precedent. A requirement that carriers should take the documents relating to the transport, purchase or ownership of the goods in carriage to convince the authorities that the transport does not involve any evasion of legitimate taxation in the State cannot be said to offend anybody's legitimate freedom to move the goods. All freedoms are within the precincts of law, not

outside, and Article 301 of the Constitution provides no exception thereto. So long as the sales-tax law is not impugned, provisions designed for its efficient administration cannot also be impeached. Such provisions not only aid the collection of tax, but assure the fair distribution of its impact lest a tax-evader shall steal a march over the honest tax-payer and thereby affect the latter's legitimate freedom in trade, commerce and intercourse."

The Allahabad decision of a single Judge, which was followed, (1957) 8 STC 725 = (AIR 1957 All 448), was one rendered before the pronouncements in the Atiabari Tea Co.'s case, AIR 1981 SC 232 and the Rajasthan Transport case, AIR 1962 SC 1406 which clarified and crystallised the distinction between regulation and restriction in the region of Article 301. Neither in the Allahabad case, nor in the Division Bench ruling of this Court, was there any discussion as to whether the impugned provisions were regulatory or restrictive of the free flow of trade. The Allahabad decision itself states that the impugned provisions only required the production of a declaration in such form and in such manner as may be prescribed. An examination of the relevant statute (The U. P. Sales Tax Act) has disclosed that there was no provision for confiscation of goods. With respect, we cannot, in the circumstances, accept the ruling of the Division Bench in *Sree Nanyana Transports Case*, (1965) 16 STC 659 (Ker) insofar as it relates to Article 301, as correct.

14. We shall next consider the contention that the power of confiscation is beyond Entry 54 of List II of Schedule VII relating to sale and purchase of goods, and to the powers incidental and ancillary thereto. It is well settled that legislative entries have to be considered in their widest amplitude and that a power authorising the imposition of a tax also includes a power to prevent the tax imposed being evaded, and to check such evasion. There are however certain obvious limitations to stretch the entries, and to extend the scope of the incidental and ancillary powers. Judicial decisions appear to be in conflict as to whether a power of confiscation can be said to be incidental and ancillary to a power to impose a tax on sale and purchase of goods. The Madras High Court in *Jhaver's case*, (1965) 16 STC 708 (Mad), held that such a power of confiscation was not incidental and ancillary to a power to tax the sale and purchase of goods. On appeal from the said decision the Supreme Court left open the question. (See *Commr. of Commercial Taxes v. Ramkishan Shrikishan Jhaver*, (1967) 20 STC 453 = (AIR 1968 SC 59). The Supreme Court held that sub-section (4) of Section 41 of the Madras Act which gave the power of confiscation, and in particular, Clause (a) of the second proviso thereof, which, ordered recovery of the

tax even, before the taxable event, namely, a sale of goods had occurred, was clearly repugnant to the general scheme of the Act, which was to provide for recovery of tax at the point of first sale in the State. As the second proviso could not be severed from the rest of sub-section (4) of Section 41, the conclusion of the Madras High Court striking down the sub-section was sustained for different reasons. The Andhra High Court in *K. S. Papanna v. Deputy Commercial Tax Officer, Cuntakal*, (1967) 19 STC 506 (Andh Pra) took the view that the power to confiscate is incidental and ancillary to the power conferred by Entry 54 of List II of Schedule VII of the Constitution. The case was concerned with Section 28 of the Andhra Pradesh General Sales Tax Act. This decision was noticed by the Supreme Court in (1967) 20 STC 453 = (AIR 1968 SC 59) and it was observed that there was no provision in the Andhra Act corresponding to the offending proviso in Section 41 (4) (a) of the Madras Act. Subsequent to the Supreme Court's pronouncement in *Jhaver's case*, (1967) 20 STC 453 = (AIR 1968 SC 59) the Andhra High Court and the Madras High Court have re-affirmed their views as to the power of confiscation being incidental and ancillary to the taxing entry under Item 54, of List II, each maintaining that its decision on this aspect was unaffected by the Supreme Court's pronouncement in *Jhaver's case*, (1967) 20 STC 453 = (AIR 1968 SC 59). The Madras decision subsequent to Supreme Court's pronouncement is *K. P. Abdulla and Bros. v. Check Post Officer*, (1968) 22 STC 552 = (AIR 1970 Mad 25) and the Andhra decision is *Kalangi Krishna Murty and Co. v. Commercial Tax Officer, Guntur*, (1988) 22 STC 540 (Andh. Pra.). The Mysore High Court in *P. Venkatachalapathi v. Commercial Tax Inspector*, (1965) 16 STC 894 (Mys) also considered the vires of the provision for confiscation of goods at check-post in the Mysore Sales Tax Act. It was of the view that the power was incidental and ancillary to the powers conferred by Entry 54 of List II (see (1965) 16 STC 894 at pp. 903, 907 and 909 (Mys)). In the view that we take regarding the validity of the provision, assuming there is power to enact it, and as the provisions have anyway to be struck down as violative of Article 301, we do not think it necessary to express a final and concluded opinion on the question.

15. We shall then turn to the attack made on the provisions as to confiscation on the basis of Article 14. Before the Mysore High Court in *Venkatachalapathi's case*, (1965) 16 STC 894 (Mys) some argument based on Article 14 seems to have been advanced and repelled (See p 911 of (1965) 16 STC 894 (Mys)). The Andhra High Court in *Papanna's case*, (1967) 19 STC 506 (Andh. Pra), and in *Kalangi Krishnamurthy and Co's case*, (1968) 22 STC 540 (Andh. Pra.) held that the corres-

ponding provisions of the Andhra Pradesh General Sales Tax Act do not offend either Article 14 or Article 19 (1) (f) and (g) of the Constitution. The argument before us was that the power conferred by the impugned provisions was liable to abuse, that the conditions for the exercise of the power had not been clearly defined, that safeguards against the exercise of the drastic power were inadequate, if not nil, that there was no sufficient provision for affording reasonable opportunity to the owner before being deprived of his goods, and that the scope and purpose of the enquiry had not been defined. It has been pointed out time and again that abuse of powers even by Officers of the type empowered to take action under these provisions is not easily to be presumed and that the mere possibility of abuse is no ground to strike down a statutory provision, but rather to relieve an individual against a particular action shown to be discriminatory or arbitrary. Section 29 (4) (Proviso) and Rule 35 (6) provide for notice to the owner before seizure and confiscation, the section, if the owner is "ascertainable", and the rule, if he is "present". We may well reserve our opinion as to the effect of this disparity on arbitrariness of the action, to a case where the owner, despite being 'ascertainable', was denied notice because he was not 'present', especially, in the view that we take that these provisions anyway offend other provisions of the Constitution. We are satisfied from an examination of the provisions of the Act and the Rules that the documents, the production of which has been insisted on by Section 29 (2) sufficiently disclose the name and particulars of the owner, and we do not expect action for confiscation of goods to be taken without notice to him. Against action taken by the Officer at the check-post there is the safeguard of an appeal under Section 34, a further appeal to the Tribunal under Sec. 39, and a revision to the High Court under Section 41 of the Act. The conditions for taking action are defined by Section 29 (2) and (4) of the Act, and the scope and purpose of the enquiry, are defined by R. 35 (5) in the face of which, we cannot hold as the Mysore High Court did in Venkatachalapathy's case, (1965) 16 STC 894 (Mys) that once the absence of the documents was disclosed, confiscation was bound to follow, and there was no further scope or purpose for an enquiry. The owner is also given an option, for what it is worth, to avoid confiscation by furnishing cash security to the extent of twice the amount of the tax payable on the goods. With the safeguards thus thrown in, we find it difficult to hold that the power of confiscation violates Article 14. Whether they are as reasonable restrictions on the fundamental rights to acquire and hold property and to carry on a trade or business, is a different matter.

16. We may next turn to the attack based on Article 19 (1) (f) and (g). These

clauses of the Article provide for the fundamental right to acquire, hold and dispose of property and to practice any profession or to carry on any occupation trade or business. By reason of Clauses (5) and (6) of the Article, these rights are subject to reasonable restrictions in the interests of the general public. That the impugned provisions operate as restrictions on the right to property and to carry on trade, is clear enough. But are they reasonable restrictions in the interests of general public? Our attention was called to the report of the Nataraja Pillai Committee in this State, some time in the year 1962 that there was considerable evasion of the tax and that effective measures to check the same had to be devised. The Committee observed that the checking of goods alone was contemplated, so as to enable the Sales Tax Officers to keep track on the commodities transported and to identify their owners. Our attention was also called to the Statement of Objects and Reasons of the 1963 Act one of which was to devise sufficient safeguards to effectively check and prevent tax evasion. In answer to our enquiries, we were also informed that provision for check-posts and for confiscation of goods, have been incorporated in the sales tax legislations of the States of Andhra Pradesh, Kerala, Madras, Mysore, Orissa and Rajasthan, and that in the remaining States of this country (except in the State of West Bengal) provision has been made for check-posts without any power to confiscate goods. In the State of West Bengal alone, there is no provision at all either for check-posts or for confiscation of goods. We shall have due regard to the report of the expert committee, (not forgetting that the members of the Committee were not constitutional pandits), and to the other factors referred to supra, in assessing the reasonableness of the restrictions on the rights guaranteed under Article 19 (1) (f) and (g). In doing so, we shall remind ourselves of the caution administered in the classic language of Patanjali Sastri, C. J. in the State of Madras v. V. G. Row, AIR 1952 SC 196.

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

The provisions of Section 29, and of R. 35, have been sufficiently set out and stressed. They amply bring out that unless the owner travels with the goods, the notice provided

is hardly likely to reach him in time to avoid the catastrophe of confiscation. We have already noticed the disparity between Section 29 (4) and Rule 35 (6) in providing for notice to the owner, the former directing notice if the owner is "ascertainable", and the latter, only, if he is 'present'. The further provisions in Rule 35 (8) to ascertain the address and particulars of the owner, and afford him an opportunity, are, in the nature of things, illusory and ineffective, unless the owner travels with the goods or is near at hand to the check-post. It is little consolation for the owner that confiscation can be avoided by tendering twice the amount of tax payable on the goods, under Cl (5) of Section 29 read with Clause (15) of Rule 35. The effectiveness of these provisions as a sufficient safeguard stands considerably attenuated, if not entirely destroyed by the prospect of his having to do so at successive check-posts, or in respect of successive consignments of goods at the same check-post, to allay the suspicions of the officers in charge. Both by the terms of the section and the rule, the confiscated goods are to be sold in public auction, and all that the deprived owner can get in case he eventually succeeds in appeal against the order of confiscation would be, not even the market value of the goods, but the proceeds fetched at the auction, less the charges incurred for conducting the same. We have no doubt that these provisions operate as unreasonable restrictions on the fundamental right of a person with respect to his property and with respect to his right to carry on a trade or business in goods.

16A. We were pressed with the decision in *Nathella Sampathu Chetty v. Collector of Customs*, AIR 1962 SC 316 where a right of confiscation in respect of smuggled goods under Section 178-A of the Sea Customs Act was upheld by the Supreme Court. For one thing, we cannot equate smuggled goods with goods in respect of which sales-tax is payable, or is apprehended to be payable. On the analogy of the reasoning in *Chamarbaugwala's case*, AIR 1957 SC 699 noticed in the passage from the *Atiabari Tea Co.'s case*, AIR 1961 SC 232 which we have extracted earlier, it might perhaps be argued that there is no fundamental right to trade in smuggled goods or to acquire, hold and dispose of such goods. But we doubt if the same can be posited of goods evading, or suspected to be evading, liability to sales tax. That apart, in *Nathella Sampathu Chetty's case*, AIR 1962 SC 316 the Supreme Court referred to the report of the Taxation Enquiry Commission, 1953-54 which had pointed out the deleterious effects of smuggling; and then observed:

"If therefore for the purpose of achieving the desired objective and to ensure that the intentions of Parliament shall not be defeated a law is enacted which operates somewhat harshly on a small section of the public

taken in conjunction with the position that without a law in that form and with that amplitude smuggling might not be possible of being effectively checked, the question arises whether the law could be held to be violative of the freedom guaranteed by Article 19 (1) (f) and (g) as imposing an unreasonable restraint. That the restrictions are in the "interest of the general public" is beyond controversy. But is the social good to be achieved by the legislation so disproportionately small that on balance it could be said that it has proceeded beyond the limits of reasonableness? We would answer this in the negative."

The guarded language in which the above observations are couched, and the background against which they were made, taken along with the test propounded by Patanjali Sastri, C. J. in *V. G. Rao's case*, AIR 1952 SC 196 which we have extracted earlier, make it impossible for us to apply the same yardstick in judging the reasonableness of the restrictions to prevent evasion of sales tax. Dealers in goods, liable for payment of sales tax are by no means a 'small section of the public' such as those who traffic in smuggled goods, which were the subject-matter of decision in *Nathella Sampathu Chetty's case*. Nor are we satisfied that the magnitude of the evil of sales tax evasion could be met only by a law in such form and of such amplitude as has been enacted by the impugned section and Rule. We rather feel that some analogy is afforded by the decision in *Hammad v. Union of India*, AIR 1960 SC 554 where, the court struck down the provision for forfeiture of certain articles on the ground that the same goes far beyond the purpose of the Act and contained no safeguards. We are in agreement with the Mysore High Court in *Venkitachalapathy's case*, (1965) 16 STC 891 (Mys) which struck down similar provisions under the Mysore Act as violative of Article 19 (1) (f) and (g). We hold that the provisions of Section 29 (4) and (5) and of Rule 35 (5) to (12) and (15) violate the rights guaranteed by Article 19 (1) (f) and (g) of the Constitution and cannot be saved as reasonable restrictions on the exercise of the said rights. Some of the provisions of Rule 35 may, by themselves, be innocuous, but they are so integrally connected with the process of confiscation provided therein, that portions of them alone cannot be allowed to stand. The whole of Clauses (5) and (12) of Rule 35 must be struck down.

17. The next argument advanced by counsel for the petitioner is that Rule 35 (5) goes beyond Section 29. Sections 29 (4) authorises confiscation where transport is not accompanied by any of the documents referred to in sub-clause (a) of Section 29 (2), namely, a Bill of Sale, a Delivery Note, a Way-Bill or a Certificate of Ownership; or, where the document referred to in sub-clause (b) of Section 29 (2), namely the declaration, is false or is reasonably suspected

to be false. Rule 35 (5) seems to enlarge the content of the section by extending the suspicion as to the false or bogus nature, to all the documents mentioned both in sub-clause (a) and (b) of Section 29 (2). Strictly, the complaint of the petitioner appears justified. But we are inclined to think that when Section 29 (2) and (4) referred to the documents in Clause (a) therein, they contemplate valid and proper documents and that the question as to whether they are so or not, is open to investigation. In that view, we are inclined to hold that R. 35 (5) does not go beyond the purview of Section 29 (2) and (4); but, as the section and the rule have to be struck down on other grounds, it is not necessary to venture a final opinion.

18. We may also notice that on the facts in O. P. No. 4977/1967 which we have set out earlier, the notices Exts. P4, P4 (a), P4 (b), P5, P5 (a), P5 (b) and P6 appear to us to be quite unreasonable and unwarranted by the provisions of the Act and the Rules. We are unable to see how by these notices, the petitioner can be called upon to produce evidence that he was a registered dealer in Mahe—especially when the invoices accompanying the transport showed the number of his registration certificate under the Central Sales Tax Act—or how the Officer can direct an enquiry at the check post into the genuineness of the purchase purported to have been effected in Mahe. These appear to us to be wholly outside the province of the machinery of setting up check-posts for evasion of tax. These notices only confirm the apprehension expressed in several quarters and even in the Nataraja Pillai Committee's Report that these provisions have to be worked carefully, so as to avoid harassment. Quite apart from the constitutionality of the provisions impugned, on this ground again, the notices in question appear to be open to objection.

19. In the light of our discussion and conclusion, we hold that Clauses (3), (4) and (5) of Section 29 of the Act, and Clauses (3) to (12) and (15) of Rule 35 of the Rules are invalid and unconstitutional.

20. We may now proceed briefly to deal with the individual O. Ps.

O. P. No. 4977/1967.

In the light of our above conclusion the proceedings evidenced by Ext. P4 series, P5 series and P6 are quashed. The goods have been released to the petitioner, pending this writ petition on its furnishing security in this Court. It is enough therefore to order that the security deposited by the petitioner will be duly released. The Original Petition is allowed as above. No costs.

O. P. No. 4995/1967.

The facts are practically the same as in O. P. No. 4977/1967. The petitioner herein is an individual having business in Mahe. The proceedings sought to be impugned are Exts. P4 series and P5 series. We quash

these proceedings. As in O. P. No. 4977/1967, we direct that the security deposited by the petitioner in this Court pending the O. P. will duly be released. The O. P. is allowed as above. There will be no order as to costs.

O. P. No. 2642/1967.

The facts in this writ petition are these. A consignment of goods of the petitioner from Kodhacherry to Chittattukara was intercepted on the night/morning of 16/17th April 1967. The goods were released on cash security of Rs. 1000 after giving the owner the option contemplated by the section and the rule, to get them so released in lieu of confiscation. Thereafter, by Ext. P3 proceedings a penalty of Rs. 1000 is levied on the petitioner and the cash security already furnished in lieu of confiscation has been adjusted towards the penalty so levied, in accordance with the proviso to Sec. 29(5) of the Act. In view of our finding that Section 29 (5) is unconstitutional, we allow this writ petition and quash Ext. P3 order and direct the 1st respondent to return the cash security of Rs. 1000 furnished by the petitioner to obtain release of his goods, as referred to in Ext. P3. We make no order as to costs.

Petitions allowed.

AIR 1970 KERALA 229 (V 57 C 33)

T. S. KRISHNAMOORTHY IYER AND
P. NARAYANA PILLAI, JJ.

Govindji J. Khona, Plaintiff-Appellant v.
K. Damodaran and others, Defendants-Respondents.

A. S. No. 1 of 1964, D/- 20-3-1969, from order of Addl. Sub-J., Ernakulam, in O. S. No. 44 of 1960.

Tort — Malicious prosecution — Suit for damages — Essentials required to be proved by plaintiff — Nature of proof — Malice — What is — Malice distinguished from lack for reasonable and proper cause.

Suits for malicious prosecution are by now on a well-trodden path. It is a tort maliciously and without reasonable and probable cause to initiate against another criminal proceedings which terminate in his favour and which result in damage to his reputation, person, freedom or property. The basis for the action is the abuse of the process of Court by wrongfully setting the law in motion. It is intended to discourage the use of the machinery of justice for improper purposes. It is now well established that the plaintiff in such a suit can succeed only on proof of the following points:—

(1) that he was prosecuted by the defendant;

(2) that the prosecution ended in the plaintiff's favour;

JM/CN/E917/69/RSK/VV

(3) that the defendant acted without reasonable and probable cause and

(4) that the defendant was actuated by malice.

All the above 4 requirements have to concur or unite. If any of them is found lacking the suit must fail. AIR 1926 PC 46 and AIR 1944 PC 1 & AIR 1930 Cal 392 & AIR 1915 Bom 320 & AIR 1953 Punj 213 & AIR 1957 Andh Pra 347 & AIR 1959 Mad 89 & 1961 Ker LJ 1313, Rel on.

(Para 18)

As regards the first 2 requirements it is not necessary that the defendant himself should be a party to the criminal proceedings. It is sufficient if he actively instigated them.

(Para 19)

With regard to the 3rd essential, as in the case of the other essentials the burden of proving the absence of reasonable and probable cause is cast on the plaintiff although it is a difficult task of proving a negative.

(Para 20)

The Civil Court can go behind the findings of the Criminal Court and conduct an independent inquiry to ascertain whether there was reasonable and probable cause for launching the prosecution. Courts decide whether there was a reasonable and probable cause for launching the prosecution after ascertaining the facts upon which the defendant started the prosecution.

The defendant must have honestly believed before he launched a prosecution that the proceedings were justified. If he launches a prosecution recklessly without any evidence at all it has to be taken that he had no reasonable and probable cause.

(Para 21)

The factors which are ordinarily considered in deciding whether there was reasonable and probable cause for launching the prosecution are whether the defendant had taken reasonable care to post himself with the true facts and whether he had acted in good faith on the advice of counsel. If advice of competent counsel has been taken before launching the prosecution it is difficult to establish lack of reasonable and probable cause.

(Para 23)

At the commencement a prosecution may not be malicious. But it may become malicious at a later stage when the defendant had no reasonable and probable cause for continuing the prosecution. Thus if during the pendency of a criminal prosecution the defendant gets positive knowledge of the innocence of the accused from that moment onwards the continuance of the prosecution is malicious.

(Para 24)

Malice has been kept separate from lack of reasonable and probable cause because 'however spiteful an accusation may be, the personal feelings of the accuser are really irrelevant to its probable truth' and 'malicious motives may co-exist with a genuine belief in the guilt of the accused'. A person actuated by malice may nevertheless have a justifiable cause for launching the prosecution.

(Para 25)

Want of reasonable and probable cause is an item to be taken into account in considering malice but from the presence of malice want of reasonable and probable cause cannot be inferred.

(Para 26)

Some of the items of evidence usually relied upon for proving malice are haste, recklessness, omission to make due and proper inquiries, spirit of retaliation and longstanding enmity.

(Para 27)

Cases Referred: Chronological Paras

- (1965) 1965-1 QB 348 = (1964) 2 All ER 610, Dallison v. Caffery 21
 (1962) 1962-1 All ER 696 = 1962 AC 726, Glinski v. Melver 21, 26
 (1961) 1961 Ker LJ 1313 = 1961 Ker LT 1067, Poulse v. Pappipilla Amma 18
 (1961) 1961-3 WLR 1240 = 1962-1 QB 432, Abbott v. Refuge Assurance Co. 22, 23
 (1959) AIR 1959 Mad 89 (V. 46) = 1959 Cr LJ 328, C. Ambalam v. S. Jagannatha 18
 (1957) AIR 1957 Andh Pra 347 (V 44) = 1956 Andh WR 530, Seshi Reddi v. Chandra Reddi 18
 (1953) AIR 1953 Punj 213 (V 40) = ILR (1951) Punj 8, Ramnath v. Bashir-ud-Din 18
 (1945) AIR 1945 Bom 320 (V 32) = ILR (1945) Bom 547, Dhanjishaw Rattanji v. Bombay Municipality 18
 (1941) AIR 1944 PC 1 (V 31) = 45 Cr LJ 303, Braja Sunder Deb v. Bamdeh Das 18
 (1938) 1938 AC 303 = 107 LJBK 225, Herniman v. Smith 21
 (1939) AIR 1930 Cal 392 (V 17) = ILR 57 Cal 25, Nagendra Nath v. Basanta Das 18
 (1928) AIR 1928 All 337 (V 15) = ILR 50 All 713, Shubraati v. Shamsuddin 18
 (1926) AIR 1926 PC 46 (V 13) = ILR 1 Luck 215, Bhalbaddar Singh v. Badri Sah 18
 (1919) 122 LT 44 C.A., Meering v. Charam White Aviation Co. Ltd. 22
 (1883) 1883-11 QBD 440, Abrath v. North Eastern Rly., Co. 18, 20, 21, 22
 (1881) 8 QBD 167 = 51 LJQB 268, Hicks v. Faulkner 21
 (1824) 2 B & C 693 = 107 ER 541, Ravenga v. Mackintosh 23

T. M. Krishnan Nambiar, T. V. Ramakrishnan, K. R. Kurup and K. Raghavan Nair, for Appellant; T. N. Subramanya Iyer, K. V. Narayanaswamy and K. N. V. Ramani (for No. 2) and K. Bhaskaran and T. L. Vishwanatha Iyer (for Nos. 3, 4 and 5), for Respondents.

NARAYANA PILLAI, J.—The appellant, Govindji J. Khona, Partner in Messrs. Govindji Jevat & Co., Bombay, sued the Respondents, the 1st Respondent being K. Damodaran, an industrialist at Cannanore and the 2nd Respondent, The Cannanore Spinning & Weaving Mills Ltd., in the Sub-

ordinate Judge's Court, Ernakulam for that the 1st Respondent acting as the Managing agent of the 2nd Respondent falsely and maliciously and without any reasonable or probable cause prosecuted the appellant and 2 other persons, Sippy and Krishna Shetty, upon a charge of having conspired together and cheated him of a large sum of money. The learned Subordinate Judge dismissed with costs the suit which was for recovery of Rs. 1,50,000.

2. The complex facts of which this story is made up are as follows: The appellant is a dealer in cotton, doing business at Bombay. Krishna Chetty and Sippy, describing themselves as commission agents at Coimbatore, offered to sell to the Respondents certain varieties of cotton in which the appellant was dealing. On 24-5-1956, Chetty sent the letter, Ext. D2, to the Respondents inviting orders for cotton. Three types of cotton were offered for sale in that letter. One of them was Hubli Jaidar, equal to sample T. 3729.356 bales of cotton of that variety at Rs. 875/- per candy, were stated in the letter to be available for sale. It was added in Ext. D2, at the foot note, that Hubli Jaidar was "an attractive quality in comparison to westerners." On 27-5-1956, the Respondents sent a telegram to Chetty offering to purchase 356 bales of Hubli Jaidar equal to sample T. 3729. On receipt of it Chetty on 27-5-1956 itself sent the letter, Ext. D4, to the Respondents accepting the offer. He stated in it that he was contacting his principal at Bombay about the sale.

3. On 30-5-1956 Chetty sent the telegram, Ext. D5, informing the Respondents that on contacting his principal at Bombay, it was understood that the price per candy had to be raised from Rs. 875/- to Rs. 890/-. On receipt of it the Respondents sent the telegram, Ext. D6, to Chetty accepting the revised price contained in Ext. D5 regarding sale of 356 bales of Hubli Jaidar. On 30-5-1956 itself on receipt of Ext. D6 telegram, Sippy wrote the letter, Ext. D7, to the Respondents confirming on behalf of his Principal, the appellant, the sale of 356 bales of Jayadhar at Rs. 890/-, per candy. That letter was sent by Chetty on 31-5-1956 with his forwarding letter, Ext. D8, to the Respondents. It was stated in both Exts. D7 and D8 that the usual contract of the sellers would follow.

4. In due course the Respondents received through Sippy the triplicate forms, Exts. D9 to D11, of the memorandum of the contract duly signed on 4-6-1956 by the appellant. They had to be signed by the Respondents also. Thereafter, one of them was to be retained by the Respondents and the remaining two were to be sent to Sippy, one for being retained by him and the other for being sent by him to the appellant. In Exts. D9 to D11 the quality of the cotton was described as only 'Indian raw cotton' and not 'Hubli Jaidar'. On suspicion being roused that the supply may not be of Hubli Jaidar

the Respondents inserted the words 'Hubli Jaidar' before the words 'Indian raw cotton' in the description of the cotton covered by the contract and after duly signing Exts. D10 and D11, sent them to Sippy with the covering letter, Ext. D13, dated 12-6-1956. In Exts. D9 to D11 the initial payment to be made was mentioned as 90 per cent. That was also altered by the Respondents as 80 per cent before they sent Exts. D10 and D11 to Sippy.

5. On receipt of Exts. D10, D11 and D13 Sippy sent the letter Ext. D14, on 14-6-1956 to the Respondents. In it he found fault with the Respondents for having made alterations in the contract and said that the contract was for sale by the sample, 3729, and not by description. According to him, his principal at Bombay always entered into transactions for sale only by sample and not by description. He requested the Respondents to confirm that the purchase was by sample and communicate it direct to the appellant. Copy of Ext. D14 was sent by Sippy to the appellant. On 18-6-1956, the Respondents sent the reply, Ext. D15, to Sippy informing him that they entered into the contract on the representation that the cotton to be supplied was Hubli Jaidar, that they wanted only Hubli Jaidar and that they were not prepared to make any alteration in the contract.

6. On 24-6-1956, Sippy sent the letter Ext. P12, to the Respondents to persuade them to accept the contract for sale by sample and contact the principal at Bombay direct. That letter reads as follows:

"We are in receipt of your Regd. Letter dated 18-6-1956 and in reply we have to say that you are aware that both Krishna Chetty and ourselves are brokers and as such we propose and introduce business between Principal to Principal and what is finally agreed is embodied in the terms of the contract and a transaction stands confirmed only when both the contracting parties viz., The Seller and The Buyer sign the same. You say, that in all your dealings 'description' and 'station' have found a prominent place, whereas our information is that with this very Seller you have had several transactions, of course through some other brokers, where simply "Indian Raw Cotton equal to our sample so and so" has been tendered and accepted by you and you have signed contracts embodying the above term.

In this case, you have approved the sample No. 3729 and sealed the same and we say that supply will be strictly equal to this. What is there in the name? We have already clarified this thing in our letter dated 14-6-1956. The Seller has the option of supplying you any variety of cotton so long as the same is equal to the basic sample No. 3729. You know, when the sales are made on 'description and station', no basic samples are allowed to be sealed and deposited with the buyers. You have approved and made purchase on the basic sample

No. 3729 and the supply will have to conform with this sample. In any case, we had suggested to you previously and also do so now, that you get in touch with the Sellers and if they are unwilling to sell on 'description' and 'station', the deal may be treated as cancelled.

We are very much pained at the contents of Para two of your letter under reply. You know brokers proffer 'solicited' or 'unsolicited' advice to their clients. You should have taken the same in the spirit in which it was given and considered the same as 'valuable and enlightening' and not termed the same as "cheap insinuations". We strongly protest at the choice of your language and the same does not speak highly of you.

It is quite improper that you are simply carrying on pointless correspondence with the brokers, leaving the principals out when you know full well our limitations. We understand that the cotton is ready for despatch and we advise you to write and thrash this out with the Sellers Messrs. Govindji Jevat and Co., Bombay immediately, but if you do not refer to them inside a week or ten days, we shall take it that you are agreeable to the supply as "Indian Raw Cotton equal to Sample No. 3729 approved by you and now lying with you" and the Sellers will arrange to despatch the cotton and your unauthorised corrections in the contract, will be ignored."

According to the Respondents this letter was never sent to them.

7. On 25-6-1956, two invoices, Exts. D16 and D17, and on 6-7-1956, three invoices, Exts. D18 to D20, were sent to the Respondents by the appellant. They were followed by the demand drafts, Exts. D21 to D23, dated 9-7-1956, amounting in all to Rupees 88,800/-. The 106 bales of cotton covered by Exts. D16 and D17 were the first to arrive. They came by one steamer. The remaining 250 bales came by a separate steamer. The contract number given in Exts. D16 and D18 to D20 was C. C. T/124, the same number which Exts. D9 to D11 bore. Sample was mentioned in Exts. D16 to D20 as 3729 and the description of the goods as Indian Raw Cotton. There was no mention anywhere that the cotton sent was Hubli Jaidar.

8. As the Respondents got suspicious about the type of cotton contained in the bales they sent on 23-7-1956 the telegram, Ext. D25, to Sippy enquiring whether the bales contained Hubli Jaidar. On 24-7-1956, they also sent the letter, Ext. D. 26, to him for confirmation that the bales really contained cotton of the description Hubli Jaidar. They sent a copy of it to the appellant. According to him he did not receive that copy. On 25-7-1956 Sippy sent the reply, Ext. D27, to the Respondents confirming that all the 356 bales despatched contained Hubli Jaidar equal to the sample.

9. After receipt of Ext. D27 — reply the respondents wrote the letter, Exts. D28, dated

26-7-1956, to Sippy requesting him to send his representative for attending weighment and passing. On 2-8-1956, Sippy sent the letter, Ext. D29, to the Respondents acknowledging receipt of Ext. D28 letter and agreeing to send his representative at the time of weighment and passing of all the 356 bales.

10. On weighment and passing of the 106 bales of cotton covered by Exts. D16 and D17 it was found that the cotton in them was really of the description Hubli Jaidar, although inferior in quality to the sealed basic sample but on weighment and passing of the remaining 250 bales it was found that they contained cotton of the quality 'Annaguri Laxmi' and 'Adoni Laxmi' and not 'Hubli Jaidar'. On the Respondents bringing it to the notice of Sippy and Chetty, who were present at the time they promised to communicate to him as to what should be done, before 30-8-1956. As no communication was received, the Respondents sent the letter, Ext. D33, on 31-8-1956 direct to the appellant complaining that the supply of cotton was different from that contracted for. In that letter the Respondents also informed the appellant that they were willing to accept the 356 bales covered by Exts. D16 to D20. On 3-9-1956, the appellant sent the reply, Ext. D31, informing the Respondents that the contract was for sale by sample and not by description. On the same day Sippy and Chetty also sent the letters, Exts. D35 and D36, to the Respondents. In them it was stated that copies of Ext. D33 letter were endorsed by the appellant to Sippy and Chetty and that they were sending Exts. D35 and D36 as replies to that letter. In Exts. D35 and D36 Sippy and Chetty said that both in class and quality all the bales of cotton supplied to the Respondents were superior to the basic sample given to them and that if there was any dispute about the quality the remedy of the Respondents was to avail of the provision in the contract for arbitration.

11. After receipt of Exts. D35 and D36 the Respondents took legal advice from Sri K. V. Narayanaswamy, Advocate at Coimbatore. Ext. D37 is the opinion recorded by him on 12-9-1956. He stated in it that both civil and criminal proceedings could be started. According to the appellant Ext. D37 is a record made or shaped to order after the launching of the criminal prosecution.

12. On 14-9-1956 the Respondents sent the letter, Ext. D39, to the appellant stating that if the price of the 250 bales which did not contain Hubli Jaidar was not returned the appellant and Sippy would be prosecuted for cheating. On the same day a copy of it was sent to Sri K. V. Narayanaswamy with the forwarding letter, Ext. D38. In Ext. D38 the receipt of Ext. D37 was acknowledged and it was mentioned that Ext. D39 was prepared on the basis of the draft prepared by Sri K. V. Narayanaswamy. For Ext. D39 letter Sippy sent the reply,

Ext. P19, dated 25-9-1956 to the Respondents. In that letter he stated that it was the Respondents who had tampered with the contents of contract by making corrections and alterations in them and that if they were prepared to cancel the contract at par for the 250 bales which did not contain Hubli Jaidar and give up the claims for interest and other charges he would persuade the appellant to take back the 250 bales. On 1-10-1956 the Respondents filed the complaint, Ext. P6, before the Sub-Divisional Magistrate, Tellicherry. The Magistrate forwarded the complaint to the police for investigation and report. For Ext. P19 letter the Respondents sent the reply, Ext. D54, on 7-10-1956 denying the allegations made in Ext. P19 and agreeing to consider the proposal made by Sippy regarding the taking back the 250 bales of cotton if it came from the appellant.

13. After investigation of Ext. P6 complaint the police laid a charge before the District Magistrate, Tellicherry on 30-3-1957 including in it only Section 420 I. P. C. On 30-7-1957 the Respondents applied for permission to appear and act in the case through an advocate under the control of the Assistant Public Prosecutor. In connection with the case the business premises of the appellant in Bombay were searched and he was arrested but released on bail the same day. On 28-5-1959 the Assistant Public Prosecutor filed the application, Ext. P5, supported by the 1st Respondent's affidavit, Ext. P4, for amending the charge so as to include in it Sections 34 and 109 of the Indian Penal Code also. The accused in that case were finally acquitted by the judgment, Ext. P18, giving them the benefit of doubt. From that judgment application for leave to appeal as also the appeal memorandum, Ext. P17, were filed in this court under Section 417, Criminal Procedure Code by the Respondents. The application for leave to appeal was granted and the appeal was admitted. The appeal was finally dismissed on 8-3-1960 by the judgment, Ext. P1.

14. On 10-6-1960 the present suit was instituted. In the plaint it was on 5 counts that damages were claimed. Rs. 25,000 was claimed as money spent for getting the appellant enlarged on bail and taking steps to defend himself in the District Magistrate's Court, Tellicherry. Rs. 10,000 was claimed as expenses incurred in connection with Ext. P-1 appeal. Rs. 25,000 was claimed as compensation for the mental shock, worry and pain consequent on the arrest of the appellant and the levelling of false charges against him. Rs. 15,000 was claimed as compensation for the mental pain connected with the filing of Ext. P1 appeal from Ext. P18 judgment. Rs. 75,000 was claimed as compensation for loss of reputation.

15. It is convenient to deal first with some of the important facts in dispute be-

tween the parties. One important fact in dispute is the sending of Ext. P12 letter by Sippy to the Respondents. The 1st Respondent who was examined as DW 1 deposed that no such letter was received by the Respondents. Sippy did not go into the box. His outward register has not been produced to show that he really sent a letter like Ext. P12 to the Respondents. It was stated in Ext. P12 that the Respondents had approved sale by sample and that it was unnecessary to attach any importance to the name Hubli Jaidar. Sippy advised the Respondents to get into direct contact with the appellant and found fault with them for making unauthorised corrections in Exts. D10 and D11. He also mentioned in the letter that the corrections would be ignored and that if no reply was received in 10 days it would be taken that the Respondents were agreeable to the supply of Indian Raw Cotton equal to sample 3729. The previous correspondence, Exts. D2 to D8, and the alterations made in Exts. D10 and D11 by the Respondents show that they had not really approved sale by sample alone and that they attached great importance to the description as Hubli Jaidar of the cotton to be purchased by them. In Ext. D15 letter, the Respondents had made it clear to Sippy that they wanted only cotton known as Hubli Jaidar and that they were not prepared to make any alteration in the contract. On receipt of the invoices wherein the sample was mentioned as 3729 and the description of the goods as Indian Raw Cotton the Respondents got suspicious and immediately sent Ext. D25 telegram. For that Sippy sent the reply Ext. D27. In it he clearly stated that all the 356 bales contained Hubli Jaidar. That would not have been the representation if he had sent Ext. P12 letter stating that no importance need be attached to the name and that the sale was really by sample. Similarly it was not likely that the Respondents who had throughout been insisting on the description of the cotton as Hubli Jaidar would have coolly submitted to the supply of cotton according to sample if they had really received Ext. P12 letter. Ext. P12 shows that a copy of it was sent by Sippy to the appellant. If really a copy had been sent it was not likely that the appellant would have consigned the goods to the Respondents before the expiry of the period of 10 days fixed in it. The 106 bales of cotton covered by Exts D16 and D17 were consigned on the next day after the date of Ext. P12. There is no doubt that Ext. P12 letter was not really sent by Sippy to the Respondents.

16. According to the appellant he did not get a copy of Ext. D26, the letter sent by the Respondents to Sippy. Ext. D26 shows that a copy of it was sent by the Respondents to the appellant. In the invoices the description of cotton sent was not mentioned. It was then that the Respondents sent Ext. P25 enquiring whether the

bales really contained Hubli Jaidar. The letter also mentioned a telegram sent by the Respondents to Sippy on the previous day to confirm telegraphically whether the bales despatched were Hubli Jaidar. The appellant who was examined as PW I denied having seen a copy of Ext. D26. According to him in July 1956 he had gone on a pilgrimage. He put forward that version only to show that even if a copy of Ext P 26 had reached his office he could not have seen it as he was away. There is no evidence about the exact day on which he went on pilgrimage and returned after that. There is also no evidence as to where he had gone on pilgrimage. He admitted that during his absence all his correspondence were being attended to by his Manager and that they used to be placed before him as soon as he returned. His version that a copy of Ext D 26 did not reach him cannot be believed.

17. According to the appellant Ext. D 37, the recorded legal opinion, had really not been obtained by the Respondents before they filed the complaint, and it was really procured only after the launching of the prosecution to justify the action that had been taken. The best evidence in this connection would have been that of Sri K. V. Narayanaswamy himself. In fact, the appellant included him in his witness schedule. But during the trial of the case the appellant gave up the idea of examining him. He was appearing in the present suit for the Respondents. He knew that Ext. D37 was being used by the Respondents to resist the appellant's claim for damages. It was not likely that he would have continued to appear in the case for the Respondents if really Ext. D 37 was a record which was not prepared on the date it bore. The entry D 49 (a) in the Inward Register, Ext. D 49, of the Respondents shows that really on 14-9-1956 a communication dated 12-9-1956 was received by the Respondents from Sri K. V. Narayanaswamy and that it related to the contract for 356 bales of Hubli Jaidar. Ext. D 37 had really been received by the Respondents before they filed the complaint, Ext. P 6.

18. Suits for malicious prosecution are by now on a well-trodden path. It is a tort maliciously and without reasonable and probable cause to initiate against another criminal proceedings which terminate in his favour and which result in damage to his reputation, person, freedom or property. In Black's Law Dictionary malicious prosecution is stated to be

"A judicial proceeding instituted against a person out of the prosecutor's malice and ill-will, with the intention of injuring him, without probable cause to sustain it, the process and proceedings being regular and formal, but not justified by the facts. For this injury an action on the case lies, called the 'action of malicious prosecution'."

It is a remedy for misuse of legal procedure. In other words, the basis for the action is

the abuse of the process of court by wrongfully setting the law in motion. It is intended to discourage the use of the machinery of justice for improper purposes. The law relating to it has evolved from a compromise of two rules of law both of which are equally important. One is that all men have the freedom to bring criminals to justice. In that is involved the liberty of the citizen. The other is that in public good it is necessary that false accusations against innocent persons have to be prevented. In the harmonious blending of these two principles some restrictions have been made in making a successful claim for malicious prosecution. In *Abrath v. North Eastern Rly. Co.*, (1883) 11 QBD 440 at p 455 Bowen, L. J., said as follows —

"This action is for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made, secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice. All those three propositions the plaintiff has to make out, and if any step is necessary to make out any one of those three propositions, the burden of making good that step rests upon the plaintiff."

It is now well established that the plaintiff in such a suit can succeed only on proof of the following points:—

(1) that he was prosecuted by the defendant;

(2) that the prosecution ended in the plaintiff's favour;

(3) that the defendant acted without reasonable and probable cause and

(4) that the defendant was actuated by malice.

All the above 4 requirements have to concur or unite. If any of them is found lacking the suit must fail. That is clear from the decisions in *Bhalbaddar Singh v. Badri Sah*, AIR 1926 PC 48; *Brja Sunder Deb v. Bamdeb Das*, AIR 1911 PC 1; *Shubrati v. Shamsuddin*, AIR 1928 All 337; *Nagendra Nath v. Basanta Das*, AIR 1930 Cal 392; *Dhanjishaw Ratanji v. Bombay Municipality*, AIR 1945 Bom 320, *Ramnath v. Bashir-uddin*, AIR 1953 Punj 213; *Seshi Reddi v. Chandra Reddi*, AIR 1957 Andh Pra 347; *C. Ambalam v. S. Jagannatha*, AIR 1959 Mad 89 and *Poulose v. Pappipilla Amma*, 1961 Ker LJ 1313.

19. As regards the first 2 requirements it is not necessary that the defendant himself should be a party to the criminal pro-

ceedings. It is sufficient if he actively instigated them. As regards the liability of such a person Street says as follows in his book on the Law of Torts (1955 Edition) at pages 411 and 412;

"The defendant must have been 'actively instrumental' in instigating the proceedings. If he merely states the facts as he believes them to, a policeman or a magistrate, he is not responsible for any proceedings which might ensue as a result of action taken on his own initiative by such policeman or magistrate. Nor is he necessarily responsible even though he actually prosecutes—for instance, he will not be so responsible where a judge has bound him over to prosecute, unless it was the perjured evidence of the defendant before the judge which caused the latter to require him to prosecute. It is not enough if the defendant has done no more than complain to the proper authorities for the purpose of setting a prosecution in motion; the legal proceedings must have commenced. Charging the plaintiff will no doubt constitute setting the prosecution in motion. The legal adviser of a litigant may be deemed to be responsible for the prosecution where he does more than merely advise the litigant in good faith."

20. With regard to the 3rd essential, as in the case of the other essentials the burden of proving the absence of reasonable and probable cause is cast on the plaintiff although it is a difficult task of proving a negative. The reason for it is given thus by Bowen, L. J. in (1883) 11 QBD 440:—

In one sense that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. The terms 'negative' and 'affirmative' are after all relative and not absolute. In dealing with a question of negligence, that term may be considered either as negative or affirmative according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which is bound to prove positively."

21. The Civil Court can go behind the findings of the Criminal Court and conduct an independent inquiry to ascertain whether there was reasonable and probable cause for launching the prosecution. Courts decide whether there was a reasonable and probable cause for launching the prosecution after ascertaining the facts upon which the defendant started the prosecution.

The elaborate and ill-embracing definition of absence of reasonable and probable cause was given as follows by Hawkins, J. in *Hicks v. Faulkner*, (1881) 8 QBD 167 at pp. 171 and 172:—

"Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be: first an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused."

This definition received the unanimous approval of the House of Lords in *Herniman v. Smith*, 1938 AC 305. If the facts prove that the defendant did not honestly believe in the guilt of the accused he cannot be said to have had reasonable and probable cause for launching the prosecution. In order to ascertain the state of the mind of the defendant about the 3rd essential namely absence of reasonable and probable cause the following questions were formulated by Cave, J. as the trial judge in (1883) 11 QBD 440.

(1) Did the defendants in prosecuting the plaintiff take reasonable care to inform themselves of the true state of the case?

(2) Did they honestly believe in the case which they laid before the magistrate? and the following questions by Talbot, J. as the trial judge in 1938 AC 305.

(1) Has it been proved that the defendant commenced and proceeded with the prosecution without any honest belief that the plaintiff was guilty of fraud?

(2) Has it been proved that the defendant failed or neglected to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution?

Cave, J. formulated the following question:—

Were the defendants actuated by any indirect motive in preferring the charge against the plaintiff?

and Talbot, J. the following question:—

"Has it been proved that the defendant, in commencing or proceeding with the prosecution was actuated by other motives than a desire to bring to justice one whom he honestly believed to be guilty?"

also, but they pertain to the 4th essential namely malice and the necessity for answering it would arise only if the answer to the previous 2 questions are in the affirmative.

tive. The questions formulated by Cave, J. were approved and his decision was confirmed in (1883) 11 QBD 440. The House of Lords took the view that the first two questions should not have been left to the jury by Talbot, J. but all the 3 questions taken by him from the questions formulated by Cave, J. were approved. The defendant before he launches the prosecution need not test the full strength of the defence. There need only be an honest belief on his part that there is a fit case to be tried and that a charge against the accused is warranted even though it turns out to be a mistaken belief.

In *Dalhison v. Caffery*, (1905) 1 QBD 318 at p. 371 Diplock, L. J. said

"The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely, whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause. Where that test is satisfied, the onus lies on the person who has been arrested or prosecuted to establish that his arrestor or prosecutor did not in fact believe what *ex hypothesi* he would have believed had he been reasonable."

The following propositions were laid down by the House of Lords in *Gliniski v. Melver*, 1962-1 All ER 690:—

(a) The question whether the defendant honestly believed in the guilt of the accused does not necessarily arise in every action, it should not be put to the jury unless there is affirmative evidence of the want of such belief, or some contested evidence bearing directly on that belief;

(b) the duty of the defendant prosecutor before bringing the criminal charge, which is the subject of the action, was to have found out whether there was reasonable and probable cause for the prosecution, rather than whether there was a possible defence or whether the proposed accused was guilty. The defendant must have honestly believed before he launched a prosecution that the proceedings were justified. If he launches a prosecution recklessly without any evidence at all it has to be taken that he had no reasonable and probable cause.

22. In *Abbott v. Refuge Assurance Co. Ltd.*, (1961) 3 WLR 1240, Upjohn, L. J. said that a reasonable man, would usually take the following steps before he launches a prosecution

"(1) he or his advisers would take reasonable steps to inform himself of the true state of the case. ((1883) 11 QBD 440); (2) he or his advisers would finally consider the matter upon admissible evidence only, *Meering v. Grahame-White Aviation Co. Ltd.*, (1919) 122 LT 44, C. A.); (3) in all but the plainest cases, he would lay the facts fully and fairly before counsel of standing and experience in the relevant branch of the law

and receive the advice that a prosecution is justified,....." In addition, of course, the defendant must bona fide accept and act on the advice and, though that is part of a subjective test, it cannot be wholly removed from consideration at this stage."

23. As regards taking legal advice Bayley, J. said in *Ravenga v. Mackintosh*, (1824) 2 B and C 693 = 107 ER 541.

"I accede to the proposition, that if a party lays all the facts of his case fully before counsel, and acts bona fide upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action of this description."

That much importance cannot be given to legal advice taken before launching the prosecution is clear from the following observations of Upjohn, L. J. in (1961) 3 WLR 1240:

"In so many cases counsel may disagree. A bold counsel might advise a prosecution; a more cautious one might take a contrary view, a third might advise making further inquiries before deciding upon a prosecution. Again, counsel may have to advise on a difficult question of law; it would be hard if a prosecutor acting on his advice was held to have acted without reasonable and probable cause, because after much conflict of judicial opinion, the advice of counsel is held to be wrong. Then there may be cases where a wise solicitor would take a second opinion, and so on."

Nevertheless Upjohn, L. J. said as follows at p. 1253 in 1961-3 WLR 1240:—

"However, ultimately, one has to reach a conclusion upon two matters; first, did the defendants or their advisers make a proper inquiry as to the true state of affairs, and, secondly, if they did, then did counsel reach a reasonable opinion upon the whole matter; thirdly (though part of the subjective test), did they bona fide act on the advice."

The factors which are ordinarily considered in deciding whether there was reasonable and probable cause for launching the prosecution are whether the defendant had taken reasonable care to post himself with the true facts and whether he had acted in good faith on the advice of counsel. If advice of competent counsel has been taken before launching the prosecution it is difficult to establish lack of reasonable and probable cause. It is stated as follows at page 582 of the Eighth Edition of Winfield on Tort:

"In practice, however, if the prosecutor believes in the facts of the case and is advised by competent counsel before whom the facts are fairly laid that a prosecution is justified, it will be exceedingly difficult to establish lack of reasonable and probable cause. An opinion of counsel favourable to the prosecutor is not conclusive, but it is a potent factor to be taken into account when deciding whether to prosecute."

24. At the commencement a prosecution may not be malicious. But it may become malicious at a later stage when the defendant

had no reasonable and probable cause for continuing the prosecution. Thus if during the pendency of a criminal prosecution the defendant gets positive knowledge of the innocence of the accused from that moment onwards the continuance of the prosecution is malicious. Street says as follows at page 412 of his book on Law of Torts (1955 Edition):—

“Although the defendant has properly commenced proceedings, if, during their continuance, he learns of facts which do not justify him in carrying on with them, he is liable if he proceeds with the suit.”

Anything which is an improper or an oblique motive for launching the prosecution is treated as malice. About malice Street in his book on the Law of Torts says as follows at page 415:—

“The question is not whether the defendant was angry or inspired by hatred, but whether the defendant had a purpose other than bringing an offender to justice—there is malice, for instance, if he uses the prosecution as a means of blackmail or any other form of coercion. Where the motives of the defendant were mixed, the plaintiff will fail unless he establishes that the dominant purpose was something other than the vindication of the law.”

25. Malice has been kept separate from lack of reasonable and probable cause because ‘however spiteful an accusation may be, the personal feelings of the accuser are really irrelevant to its probable truth’ and ‘malicious motives may co-exist with a genuine belief in the guilt of the accused’. A person actuated by malice may nevertheless have a justifiable cause for launching the prosecution.

26. Want of reasonable and probable cause is an item to be taken into account in considering malice but from the presence of malice want of reasonable and probable cause cannot be inferred. It was observed as follows in 1962-1 All ER 696:

“though from want of probable cause malice may be and often is inferred, even from the most express malice, want of probable cause, of which honest belief is an ingredient, is not to be inferred.”

27. Some of the items of evidence usually relied upon for proving malice are haste; recklessness, omission to make due and proper inquiries, spirit of retaliation and long-standing enmity.

28. Of the 4 essentials to a successful action for malicious prosecution the first two namely that the appellant was prosecuted by the Respondents and was acquitted are not in debate. It is upon the third and fourth essentials that the controversy has arisen. As regards the 4th essential, malice, the argument of the learned counsel appearing for the appellant was that the prosecution was launched by the Respondents with the indirect motive of being in a better position to negotiate with the appellant with

a criminal charge hanging over his head than he would be in negotiating as between persons on equal terms. The necessity for investigating the question of malice arises only if there is proof of lack of reasonable and probable cause.

29. We now return to the facts to find out the 3rd essential that is, whether the prosecution lacked reasonable and probable cause. The first subordinate point to be considered in that connection is whether the appellant made the Respondents believe that Sippy and Chetty were acting as the appellant's agents in the transaction. In Ext. D4 Chetty informed the Respondents that for despatch of the 356 bales of Hubli Jaidar for which they had placed an order with him he was contacting his principal at Bombay. Sippy's letter dated 30-5-1956 to the 2nd defendant, Ext. D7, shows that Sippy sent a copy of it to the appellant. In Ext. D8 Chetty informed the Respondents that he would send the contract form as soon as it was received from the principal. In Exts. D9 to D11 it was specifically stated that the sale by the appellant to the Respondents of the 356 bales was through Sippy. In Ext. D13 the Respondents informed Sippy that they had received the triplicate contract forms of Sippy's principal at Bombay. In Ext. D14 Sippy informed the Respondents that his principal at Bombay was selling cotton only by sample and requested them to contact him direct. The principal at Bombay was described in that letter as the appellant. The Respondents in their letter, Ext. D15, to Sippy treated the appellant as Sippy's principal. In the letter Ext. D33, sent by the appellant to the Respondents both Sippy and Chetty were described as the appellant's representatives. In these circumstances the Respondents must bona fide have believed that both Sippy and Chetty were the agents of the appellant.

30. The appellant Sippy and Chetty were acting in concert. Exhibits D2 to D6 show that from the beginning till the date of Ext. D6 the Respondents' communications were all with Chetty. Thereafter Sippy emerged at the scene. It was he who wrote Ext. D7 letter to the Respondents confirming on behalf of the appellant sale through Chetty of 356 bales of Jaidar. It was through Sippy that the appellant sent Exts. D9 to D11 to the Respondents. Exts. D34 to D36 also show that the appellant Sippy and Chetty acted in concert in the matter.

31. Exts. D2, D7, D9 to D14 and D24 to D27, deal with the negotiations connected with the contract, the clarifications made during the formation of the contract and the affirmation of the description of the cotton in the 356 bales being Hubli Jaidar. At every stage the Respondents were cautious and insistent on the sale being according to description and not merely by sample. In Ext. P12, Sippy is alleged to have asked the Respondents, “What is there in the name”. In Ext. D14 Sippy told the Respondents

that they need only satisfy themselves about the spinning performance of the cotton and not unnecessarily trouble themselves with the name. The description by name of the cotton is not so unimportant as that.

32. Section 15 (1) of the Cotton Control Order of 1955 passed by the Central Government under Section 3 of the Essential Commodities Act (10 of 1955) provides that all persons who hold either A or B class licence should submit to the appropriate authority an accurate return in form 'C' in respect of the stocks receipts and sales of each description of cotton. Form 'C' referred to there mentions 36 varieties of cotton. Of them 1 to 26 are Indian Cotton and the remainder foreign. The 16th variety mentioned there is Jaidar. Ext D1 is the notification published by the Central Government fixing the maximum and minimum prices of cotton for the season 1955-56. In Section 3 (g) of it Jaidar is described as follows:—

"Jaidar means cotton recognized as such and grown in the Dharwar, Belgaum, Bijapur, North and South Satara and Kolhapur districts of Bombay State and the Mysore State, provided the areas in which the cotton has been grown have been protected under the Cotton Transport Act, 1923 (Act III of 1923), or any corresponding Act." In schedule 'A' of that notification the maximum and minimum prices of Jaidar are mentioned. The sample given by the appellant's agents to the Respondents was only about the fitness of the cotton. Each spinning factory has its own mixing formula and spinning programme. According to the mixing formula cotton of specified description and quality has to be mixed in certain specific proportions. One variety of cotton may be superior to another in quality and costlier in price. Nevertheless it may not be of any use to a factory if its mixing formula and spinning programme has no place. Therefore from the mere fact that the cotton supplied was of a quality superior to that contracted for it cannot be taken that the factory to which it was supplied stood to gain by the supply.

33. In the present case the evidence adduced shows that the Respondents agreed to purchase cotton from the appellant on the representation made that it would be Hubli Jayadhar equal to sample T 3729. The first letter sent to the Respondents is Ext. D2. Therein both description by name and sample were given. Description by name was also given in Exts. D4, D6, D7 and D8. Ext. D7 shows that when Sippy sent it to the Respondents he sent a copy of it to the appellant also. Therein it was specifically mentioned that the 356 bales to be supplied were Jayadhar. The appellant has no case that he did not receive a copy of that letter. At least when that was received he should have been aware that the representation made by his agent to the Respondents was to supply 356 bales of Jayadhar.

34. The appellant sent through Sippy the triplicate forms, Exts. D9 to D11, to the defendants duly signed by him. The quality of the cotton to be supplied was mentioned in them as only Indian Raw Cotton equal to sample No. 3729 although the representation made to the Respondents till then was that it would be of the particular variety Hubli Jayadhar. The Respondents sent back Exts. D10 and D11 duly signed by them. They were not satisfied with the description of the name of the cotton as only Indian Raw Cotton in Exts. D9 to D11. So they inserted the words "Hubli Jayadhar" before the words "Indian Raw Cotton" in Exts. D10 and D11 before they sent them to Sippy duly signed. Sippy on receipt of Exts. D10 and D11 from the Respondents sent Ext. D10 to the appellant and retained Ext. D11 with him. Exts. D10 and D11 were recovered by the police after search of the premises of the appellant and Sippy. In Ext. D10 the words Hubli Jayadhar are seen to have been scored off but not in Ext. D11. The scoring off of those words may have been done either by Sippy or by the appellant. Anyway the Respondents were not aware of the striking off of those words and so they continued to be under the impression that the description of the cotton as Hubli Jayadhar was a term of the contract.

35. On receipt of Exts. D10 and D11 Sippy wrote the letter, Ext. D14, to the Respondents stating that he regretted to note that they had altered in the contract the description of the cotton. In that letter he requested the Respondents to confirm purchase by sample No. 3729 alone. The Respondents then sent the firm reply, Ext. D15, stating that they were insistent on supply of Hubli Jayadhar alone. In spite of that 250 bales despatched were not Hubli Jayadhar. Ext. D14 shows that when Sippy sent that letter to the Respondents he sent a copy of it to the appellant also. The appellant must at least on receiving copy of Ext. D14 have become aware that the correction in Ext. D10 was made by the Respondents and that they were insistent on sale by description by name. He must also have known that until then the corrections made by the Respondents had not been scored off by anybody.

36. Before taking delivery of the goods the Respondents informed Sippy by Ext. D28 letter that the contract was to supply Hubli Jayadhar and requested him to confirm telegraphically whether the bales which had arrived were really Hubli Jayadhar. The reply received from Sippy was that all the 356 bales despatched contained Hubli Jayadhar.

37. After the Respondents took delivery of the first consignment of 106 bales Chetty sent the letter, Ext. D30, to the appellant requesting him to send the remaining 250 bales without delay. In that letter it was

specifically stated that the sale of all the 356 bales to the Respondents was Hubli Jayadhar. Ext. D31 is the appellant's reply to it. He did not dispute in it that the sale to the Respondents was really Hubli Jayadhar.

38. After parting with large sums of money when the Respondents opened the bales they found that the cotton supplied was not of the description covered by the contract. When they wrote to the appellant claiming return of the money his reply, Ext. D34, was that the sale was only of Indian raw cotton equal to sample 3729. In the circumstances of the case it cannot be taken that the contract was for sale of cotton by sample alone. The contract was for sale of cotton by description as well as by sample. In such a case the bulk of the goods should correspond not only with the sample but also with the description. The Respondents had every reason to believe that the appellant and his agents had acted in concert and cheated him. They did not act in haste. As prudent and cautious persons they took legal advice also before filing the complaint. They placed all the facts before their legal adviser, got his recorded opinion, Ext. D37, and acted bona fide upon his opinion, which was not wrong. It cannot be said that the Respondents, when they filed the complaint acted without reasonable and probable cause. After the acquittal of the appellant by Ext. P18 judgment the Respondents filed Ext. P1 appeal before this court. That appeal was accepted after hearing and notice was issued to the Respondents. The acquittal of an accused by the trial court is only subject to the result of appeal if any. There is nothing wrong in testing the correctness of the decision of the trial court by appealing against it. In the circumstances of this case it cannot be said that the appeal was filed on unjustifiable grounds and without reasonable and probable cause. The learned Subordinate Judge rightly found that the Respondents were not liable for damages for malicious prosecution.

39. Hence this appeal is dismissed with costs.

Appeal dismissed.

AIR 1970 KERALA 239 (V 57 C 34)

P. T. RAMAN NAYAR AND P. GOVINDAN NAIR, JJ.

C. Sankaranarayanan and others, Appellants v. The State of Kerala, Respondent.

Writ Appeals Nos. 126 and 136 of 1968 and Original Petns. Nos. 1732 and 1959 of 1968, D/- 11-6-1969.

(A) Constitution of India, Arts. 19 (1) (f) and 31 — Property, acquisition of — Reduction in age of retirement made by rules — Power exercised in making rules being legislative,

rules cannot be challenged on ground of violation of principles of natural justice — Right to future employment is not property — Hence, reduction in age of retirement does not amount to deprivation of property in violation of Articles 19 (1) (f) and 31 of Constitution — (Civil Services — Kerala Education Act (6 of 1959), Sections 36, 12) — (Civil Services — Kerala Education Rules Ch. XIV (c), R. 2 (A)).

The reduction of age of retirement on superannuation was made by amendments to service rules. Rules being made under a legislative power there cannot be any question of a violation of the principles of natural justice. A right to future employment under the Government or a private employer whether stemming from contract or from statute, is not property, although, no doubt, emoluments actually accrued are property. Therefore, the lowering of the age amounts to deprivation of property in violation of Articles 19 (1) (f) and 31 of the Constitution. (Paras 2 and 3)

(B) Civil Services — Kerala Education Rules, Chapter XXVII A, Rule 8, Chapter XXVII B, Rules 2 and 4 and Chap. XIV C, Rules 2 and 2 (A) — Chapters XXVII A and XXVII B are mutually exclusive — Teachers of private schools governed by Chap. XXVII B — Age of retirement is 55 years and not 60 years — They cannot claim benefit of note to Rule 8 of Chap. XXVII A.; O. P. Nos. 1791, 1794 and 1795 of 1968 (Ker), Affirmed. (Paras 5, 6, 7 and 8)

Cases Referred : Chronological Paras

(1968) AIR 1968 Ker 158 (V 55) =

1967 Ker LT 853 (FB), Srinivasan

v. State of Kerala 4

(1965) AIR 1965 SC 1567 (V 52) =

(1965) 1 SCR 693, Bishun Narain

v. State of U. P. 4

In Writ Appeals Nos. 126 and 136 of 1968.

K. Chandrasekharan and T. Chandrasekhara Menon, for Appellants; Advocate General, for Respondent.

K. K. Ramachandran Nair, for Petitioner (In O. P. No. 1732 of 1968); K. Velayudhan Nair, V., S. Moothathu, N. R. K. Nair, K. J. Joseph and T. K. M. Unnithan, for Petitioner (In O. P. No. 1959 of 1968).

Govt. Pleader, for Respondents Nos. 1 and 2 (In O. Ps. Nos. 1732 and 1959 of 1968).

RAMAN NAYAR, J.: The petitioners in these cases are school teachers, some of them employed in Government Schools, the rest in private aided schools. Their complaint is that their age of retirement on superannuation has been reduced from 58 to 55.

2. So far as conditions of service are concerned, the teachers in the Government schools are governed by the Kerala Service Rules, rules made under the proviso to Article 309 of the Constitution, while those employed in private schools are governed by the Kerala Education Rules, rules made

under Section 36 read with Section 12 of the Kerala Education Act. The reduction of age, the petitioners complain of, was made with effect from 4-5-1967, in the first instance by an executive order, but, later, by amendments to the respective rules. We might, at the very outset, observe that the power exercised in making these rules is a legislative power so that there can hardly be any question of a violation of the principles of natural justice in the sense that the petitioners were not heard before the rules were made. Nor does it matter in the least that the age was earlier raised from 55 to 58 by an amendment of the rules, as a result, it is claimed on behalf of the private school teachers, of an understanding reached between them and the Government. The raising of the age thus effected might have been a consequence of the understanding, but it was effected not by the understanding but by statutory rule. If by such a rule, validly made, the age is lowered, it seems to us that no argument can rest on the ground that this was against the understanding that had earlier been reached.

3. The rules make it quite clear that the reduction in age applies to persons already in service when the rules effecting the reduction in age were made. For, they make provision regarding the retirement of persons in service who had already reached the age of 55 on 4-5-1967 and for those who were to reach that age within three months thereafter. Therefore, there can be no doubt regarding the intentment of the rules. It is that the lower age should apply to persons already in service when the change was made, and not merely to persons entering service thereafter. If that involves any element of retrospectivity, the power exercised being a legislative power and the legislative intent being manifest there is little point in the contention that a vested right is being taken away; if indeed the right to remain in service up to a particular age can be called a vested right. Nor do we think that a right to future employment under the Government or a private employer whether stemming from contract or from statute, is property, although no doubt, emoluments actually accrued are property. Therefore, we see little substance in the contention that the lowering of the age amounts to deprivation of property in violation of Articles 19 (1) (f) and 31 of the Constitution.

4. For the rest, the contentions raised, namely, of discrimination and of equitable estoppel, are, we think, clearly answered by the decisions in *Bishun Narain v. State of U. P.*, AIR 1965 SC 1567 and *Srinivasan v. State of Kerala*, AIR 1968 Ker 158 (FB).

5. So far as the teachers of private schools are concerned, there is one other contention advanced. This is based on the note to Rule 8 of Chapter XXVII A of the Kerala Education Rules. The rule says that

the age of retirement on superannuation shall be 55 years. It carries a note, which is really a proviso, and this note says:

"In the case of those who were in the service of any aided school prior to 4-9-1957 the age of retirement on superannuation shall be 60 years subject to the condition that the service beyond 55 years shall not qualify for pension and gratuity under these rules." (This note we might point out has suffered many changes, but, in the view we are taking, it is not necessary to consider their effect). The contention advanced on behalf of the petitioners who are teachers of private schools is that they were all in service prior to 4-9-1957 and that therefore the note entitles them to continue in service till the age of 60.

6. The learned single Judge who heard the petitions from which Writ Appeal Nos 126 and 136 of 1968 have been brought repelled this contention. We think he was right. For, in our view, the petitioners whom we are now considering are governed by Chapter XXVII B and not by Chapter XXVII A of the Rules. They cannot therefore claim the benefit of the note to Rule 8 of Chapter XXVII A. Although there are no express words to that effect, reading the provisions of Chapters XXVII A and XXVII B together, there can be no doubt that the provisions of Chaps. XXVII A cannot apply to those to whom the provisions of Chapter XXVII B apply. For, regarding the same matters, Chap. XXVII B makes independent and separate provision entirely inconsistent with that in Chapter XXVII A. Therefore there can be no question of Chapter XXVII A applying to all teachers and Chapter XXVII B only making additional provision for those to whom that chapter applies. The two chapters are mutually exclusive.

7. Rule 2 of Chapter XXVII B says that the rules in that chapter apply to teachers in aided schools to whom the rules in Chapter XIV (C) of the Kerala Education Rules apply. (We might remark that this itself, in the absence of any indication that the rules in Chapter XXVII A also apply, would imply that those rules do not apply.) It is not disputed that the rules in Chapter XIV (C) apply to the petitioners in these cases, and it follows from what we have said that the rules in Chapter XXVII A cannot apply to them. Rule 4 of Chapter XXVII B says that the date of compulsory retirement on superannuation applicable to teachers of Government schools shall apply to teachers of aided schools, which means to teachers of aided schools governed by that Chapter. (This again, by itself, would exclude the application of Rule 8 of Chapter XXVII A to them). The age of compulsory retirement on superannuation for teachers of Government Schools is 55, and it follows that that is the age of superannuation for the petitioners.

8. There is one other provision in the rules that is relevant for it puts the matter beyond shadow of doubt. That is R. 2 (A) of Chapter XIV (C). This rule expressly states that teachers who come under the provisions of Chapter XIV (C) shall retire at the age of 55.

9. We dismiss the appeals and the petitions but make no order as to costs.

Appeals and petitions
dismissed.

AIR 1970 KERALA 241 (V 57 C 35)

P. T. RAMAN NAYAR AG. C. J. AND
V. R. KRISHNA IYER, J.

P. B. Kader and others, Petitioners v. Thatchamma and others, Respondents.

A. S. Nos. 404, 405 and 406 of 1966, D/- 25-3-1969.

(A) Fatal Accidents Act (1855), Sec. 1-A — Suit for compensation — Consideration of subsequent events at appellate stage — When permissible.

Subsequent events cannot be considered at the appellate stage, since an appeal, though a continuation of the suit for purposes of hearing the entire matter, is not a continuation of the trial where fresh evidence can also be introduced. There are certain exceptions engrafted upon this rule. They are, such subsequent events must possess a decisive bearing on the issues in the case, must have occurred independently of the exertions of parties and must be such as would stultify the decree if not taken into account. The death of a principal or sole dependant has a deadly effect on the compensation claimable in many cases, in such cases Courts will be in order in having due regard to them while deciding the appeal, provided the pleadings are got amended, the opposite party afforded an opportunity to answer and other procedural prescriptions complied with. AIR 1962 Ker 341, (FB), Foll. (Para 6)

(B) Fatal Accidents Act (1855), Sec. 1-A — Fixation of multiplier — Considerations.

The Court should be realistic and have due regard to the risks and the prospects and those other vicissitudes and changes hidden by the thick veil of time. But all these 'mystic maybes' must be in the background only, while 'beaten-track' probabilities of the work-a-day world must occupy the foreground of the judicial mind. AIR 1962 SC 1 and AIR 1966 SC 1750, Rel. on. (Para 11)

(C) Fatal Accidents Act (1855), S. 1-A — Expression "child" — Means offspring.

The expression 'child' in the context only means offspring being correlative to parent. There should not be confusion between child and infant or child and minor. The accent is on the biological bond and not the tender years. Therefore in calculating the benefit

of a son or daughter one should not stop at 18, the age of majority. (Para 12)

(D) Civil P. C. (1908), Section 34 — Interest — Suit for compensation under Fatal Accidents Act — Interest can be awarded to the plaintiffs from the date of the suit. (Para 13)

(E) Civil P. C. (1908), Order 33, Rule 10 — Pauper suit — Court-fees — Lower Court ordering to pay Court-fees "on the amount decreed" and not on the amount claimed — Held, Order of Lower Court was patently wrong. (Para 14)

(F) Civil P. C. (1908), Order 32, Rule 6 (2) — Suit for compensation under Fatal Accidents Act decreed — Mother, guardian of minors — She can be allowed to withdraw money awarded.

Order 32, Rule 6 (2) requires the guardian or next friend to furnish security sufficient to protect the property of the minors. But, under the proviso to sub-rule (2) where the next friend or guardian happens to be the parent, the Court may dispense with security. Where the 3 children living with the mother, have to be sent to school and maintained by her and the prospects of her remarrying being remote, it is reasonable to dispense with security and direct that the plaintiff, the mother should be allowed to withdraw the money awarded to the plaintiffs without conditions, but to be used only on them. (Para 17)

(G) Fatal Accidents Act (1855), Section 3 — Some of dependants not brought on record — Suit is not liable to be dismissed.

The Act requires that all the dependants are to be named in the plaint in a suit for compensation. Strictly speaking, the section visualises some sort of a representative action, but, where the suit is brought, not by the executor or administrator, but by some of the beneficiaries themselves, the suit cannot be dismissed because the others are not on record. (Para 3)

(H) Fatal Accidents Act (1855), Sec. 1-A — Brothers and sisters are not entitled to rank as dependants. (Para 3)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 1750 (V 53) =

(1966) 3 SCR 649, Municipal Corporation of Delhi v. Subhagwanti 11

(1962) AIR 1962 SC 1 (V 49) =

(1962) 1 SCR 929, Gobald Motor Service Ltd. v. Veluswami 11

(1962) AIR 1962 Ker 341 (V 49) =

1962 Ker LT 446 (FB), Cannanore District Motor Transport Employees Co-operative Society Ltd. v. Malabar Public Conveyance 6

(1961) AIR 1961 Punj 400 (V 48),

Dr. Ram Saran v. Smt. Shakuntala Rai 9

(1957) AIR 1957 SC 875 (V 44) =

1958 SCR 548, Surinder Kumar v. Gian Chand 6

(1956) 1956-1 WLR 51 = (1956)

1 All ER 108, Waldon v. War Office 9

- (1953) 1953-1 QB 495 = 1953-1 All ER 314, *Rushton v. National Coal Board* 9
 (1942) 1942 AC 601 = 111 LJKB 418, *Davis v. Powell Duffryn Collieries* 5
 (1941) AIR 1941 FC 5 (V 28) = 1940 FCR 84, *Lachmewhar Prasad v. Keshwar Lal* 6
 (1940) 1940-2 KB 658 = (1940) 4 All ER 61, *Williamson v. Thornycroft* 5
 (1926) AIR 1926 Mad 1021 (V 13) = 51 Mad LJ 243, *Ramalingam Chettiyar v. Gokuldas Madhavji and Co.* 13
 (1858) 4 CB (NS) 296 = 140 ER 1098, *Dalton v. S. E. Rly.* 3

C. K. Sivasankara Panicker, P. G. P. Panicker, D. N. Potti, T. A. Narayanan Nair, for Appellants in all the Appeals; M. I. Joseph and Jos Thomas, for Nos. 1 to 4 In A. S. Nos. 404 and 406 of 1966 and (for Nos. 1 to 5) In A. S. No. 405 of 1966, Govt. Pleader (for No. 5) In A. S. Nos. 404 and 406 and (for No. 6) In A. S. No. 405 of 1966, for Respondents.

KRISHNA IYER, J.: The parties to these appeals invite the Court to evaluate life, which is priceless, by the negative device of assessing the loss inflicted by death on those who lived on the deceased's longevity. In this mundane world, even the irreparable can be repaired somewhat by money and the law computes compensation for loss of life as "a hard matter of pounds, shillings and pence", based not on "sentimental damage, bereavement or pain or suffering" but on "a reasonable expectation of pecuniary benefit as of right or otherwise, from the continuance of the life".

2. A stage carriage, belonging to the 1st defendant-company, was plying, with lethal rashness, on the Vypeen-Pallipuram road on the ill-starred day, the 12th December, 1959. This lovely island has but rugged roads and the working-class denizens, who make a livelihood by employment outside the island, depend largely on buses for their daily journeys. Three such workmen by name Ande Chouro, Joseph Sylvian and Pathrose Raphael, all employed in Volkart Bros., were on their way to their work-place in the morning that day. According to the plaintiffs, the 1st defendant's overloaded bus, propelled recklessly by its driver, barged against a 'waterpipe pillar,' turned turtle and, as a result, several persons sustained serious injuries of whom the three men later succumbed to their injuries and died. All the three were the breadwinners of their poor families and on their death the dependants were cut adrift and so, they claimed compensation under the Fatal Accidents Act, Act 13 of 1855 — for short, called the Act — by way of pauper suits, which were duly resisted by the owner of the bus, the 1st defendant company, both regarding culpability and quantum of compensation. The

trial Court overruled the pleas of the defendant on both heads and decreed damages to each set of defendants in substantial sums of Rs. 13,110 in O. S. No. 20 of 1955 of the Principal Sub Court, Ernakulam (O. S. No. 46 of 1901 of the Sub Court, Cochín) (Chouro), of Rs. 21,040 in O. S. No. 21 of 1965 of the Principal Sub Court, Ernakulam O. S. No. 48 of 1961 of the Sub Court, Cochín (Sylvian) and of Rs. 23,001 in O. S. No. 22 of 1965 of the Principal Sub Court, Ernakulam (O. S. No. 47 of 1901 of the Sub Court, Cochín) (Raphael). The owner of the bus, held vicariously liable by the Court below, has come up in appeal challenging the decree, by raising contentions, frivolous and serious, in a desperate effort, may be, to escape all liability under the Act. The recklessness of the driving is matched only by the recklessness of his pleas about culpability. For instance, in his written statement, the mishap is blamed on the bad condition of the road and in the appeal memorandum an audacious but confessional contention of *volenti non fit injuria* is seen raised. The dangerous and treacherous state of Vypeen roads, it is pleaded, almost induces accidents. If that be so and perhaps it is Government is lucky that few people are conscious of their right to claim damages from it where the injury is reasonably occasioned by its misfeasance. However, such lamentable neglect of the maintenance of the highway must make a prudent motorist, driving in broad day light on a familiar route, more circumspect and it can never be an excuse for releasing him from legal duty to take care. The greater the danger, the greater the care, should be the guideline of the motorist. In this case, the evidence is clear, and the circumstances speak for themselves, that the 'fifth act' of the tragic drama which took the toll of three lives was brought about by the gross negligence of the driver. The defendant has taken up a ground in appeal that the plaintiffs should be non-suited on the principle of *volenti non fit injuria*. *Scienti* and therefore *volenti* may, perhaps, be the basis of the argument. In other words, the plea of the owner is that the reckless driving of his buses is so chronic and notorious that any one who steps into them must be deemed knowingly and willingly to be walking into a death-trap! Now that the plea has been unhesitatingly abandoned by counsel who realised the implication, I can only remark "Father, forgive them, for they know not what they do". This preposterous plea of the operator is perhaps bottomed upon the painful phenomena frequently found in Kerala of bad roads, absence of effective cautionary signals and safety measures, frequent and callous violation of traffic regulations and failure of concerned authorities to take prophylactic action against recurrence, at least after major road tragedies, thanks to the anaesthetised attitude of the public and government to road safety. But I have

no doubt that the negligence of the defendant's driver is the *causa causans* of the accident under consideration.

In fairness to counsel for the appellant, it must be said that, at the time of arguments, he did but feebly challenge his client's liability. However, he rightly stressed his case that the quantum of compensation awardable under the Act was far less than the excessive award made by the trial Court and on this part of the case we found considerable force in his submission.

3. All the three suits have been tried together and a common judgment has been delivered, since the claims spring from the same accident. But we find a curious and indefensible procedure in drawing up a common decree for all the three suits; each suit must have a separate decree and even where there is a joint trial there cannot be a joint decree. The *Fatal Accidents Act*, placed on the statute book as early as 1855, is a trifle archaic in form and somewhat obsolescent in content, but Courts are called upon to enforce the statute as it is. Under the Indian Act, which is largely modelled on the English statute of 1846, brothers and sisters are not entitled to rank as dependants, although in England, the mother country (I mean, of the statute), by Section 2 of the *Fatal Accidents Act*, 1959, brother, sister, uncle and aunt of the deceased and the issue of such relatives have been inducted into the area of statutory dependency. The other progressive amendments to the English statute also have not been copied in our country. In one of the three suits we are concerned with viz., O. S. No. 22 of 1965, plaintiffs 3, 4 and 5 are the two brothers and sister of the deceased who, under the Indian Act, are not entitled to claim compensation. Again, the *Fatal Accidents Act*, 1855, states that "every such action or suit shall be for benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased". The Act also requires all the dependants to be named in the plaint. What happens, if all these dependants are not on record, although they are alive or the suit is brought by some but not for the benefit of the others also?

Strictly speaking, the section visualises some sort of a representative action, but, where the suit is brought, not by the executor or administrator, but by some of the beneficiaries themselves, should the suit be dismissed because the others are not on record? That would be taking an extremely technical view and therefore an objection in that form, taken in two suits where the parents are alive, but not impleaded (nor claim made on their behalf), has been rightly overruled by the trial Court, although that does not mean that the plaintiffs should get the benefit of the compensation which should have gone to the parents had they also claimed.

There was evidence led regarding funeral expenses, presumably on the footing that a claim could be put forward in that behalf; but the Indian Act does not provide for it, while the amended English Act provides for award of damages in respect of the funeral expenses of the deceased if such expenses have been incurred by the parties for whose benefit the action is brought. In India the reasoning in *Dalton v. S. E. Rly.*, (1858) 4 CB (N. S.) 296 still holds good that "the subject-matter of the statute is compensation for injury by reason of the relative not being alive" which is a narrower concept than compensation for injury by reason of a relative's death. The former embraces only what the deceased had he lived, would have done for the dependant; the latter includes in addition to this what the dependant would do and does, reasonably and necessarily, for the deceased as a result of his death, such as a son's expenses of travelling thousands of miles by air to his father's funeral, or a wife's expenses dealing with personal correspondence of sympathy and condolence on her husband's death" (*Mayne's Damages*, 12th Edition para 689, para 810).

4. We are, therefore, concerned only with assessing the amount of damages awardable to such of the plaintiffs as come within the scope of Section 1-A of the Act, measured by the loss occasioned to them by the death of the one on whom they depended, although a claim under Section 2 of the Act, available to the legal representatives by way of loss caused to the estate of the deceased, has not been put forward; by a serious omission in the pleading. Facts material to issue under Section 1-A are set out below:

A. S. No. 404 of 1966

O. S. 20/1965

1. Name of the deceased:

Ande Chouro — Aged 45

2. Relatives specified in Section (1) (a) who figure as plaintiffs:

1. Widow — Thachamma — aged 35
2. Son — Antony — aged 14
3. Daughter — Thressia — aged 12
4. Son — Xavier — aged 9

3. Relatives, not specified in Sec. 1 (a) but figuring as plaintiffs:

Nil

4. Relatives specified in Section 1 (a) but not figuring as plaintiffs:

Father and mother of the deceased

A. S. No 404 of 1966 (contd)

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| <p>4 (a). Relatives not specified in Section 1 (a) who were dependants of the deceased.</p> <p>5. The age of each relation who is plaintiff:</p> <p>6. The longevity in the region for persons of the respective ages of the relatives:</p> <p>7. The average income of the deceased.</p> <p>9. The multiplier to be adopted and the circumstances relevant to fixing the multiplier:</p> | <p>2 Brothers and 2 sisters (P. W. 1 page 4)</p> <p>1. Widow — 35 years</p> <p>2. Son — 14 years</p> <p>3 Daughter — 12 years</p> <p>4 Son — 9 years</p> <p>1 Widow — 35 years — 30 03</p> <p>2 Son — 14 years — 43 01 at 15</p> <p>3 Daughter — 12 years — 47.11 at 15</p> <p>4. Son — 9 years — (about 50)</p> <p>Rs 1,552.01 gross per year</p> <p>The evidence is that the deceased who was 43 years "could have worked in Volkart Office upto his 60th year"</p> |
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Decrease in multiplier due to:

1. for contingency of death, of parties,
2. daughter getting married,
3. son getting employed and becoming independent of parents etc

A. S. No. 405 of 1966

O. S 22/1965

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| <p>1. Name of the deceased:</p> <p>2. Relatives specified in Section 1 (a) who figure as plaintiffs:</p> <p>3 Relatives not specified in Sec. 1 (a) but figuring as plaintiffs:</p> <p>4. Relatives specified in Section 1 (a) but not figuring as plaintiffs:</p> <p>4(a). Relatives not specified in Sec. 1 (a) who were dependants of the deceased</p> <p>5. The age of each relative who is plaintiff:</p> <p>6. The longevity in the region for persons of the respective ages of the relatives</p> <p>7. The average income of the deceased.</p> <p>9. The multiplier to be adopted and the circumstances relevant to fixing the multiplier:</p> | <p>Raphael — aged 27</p> <p>1st Plaintiff Father Pathrose — aged 70</p> <p>2nd Plaintiff Mother Rosa — aged 57</p> <p>3rd Plaintiff — Brother Antony</p> <p>4th Plaintiff — Sister Divind</p> <p>5th Plaintiff — Sister Annamma</p> <p>Nil</p> <p>3rd, 4th and 5th plaintiffs (brother and sisters)</p> <p>1. Father — Aged 70</p> <p>2. Mother — aged 57</p> <p>3. Brother — Aged 23</p> <p>4. Sister — aged 19</p> <p>5. Sister — aged 16</p> <p>Father — aged 70 — Nil died on 28-1-1968</p> <p>Mother — aged 57 — 14.34 at 60</p> <p>Rs. 1,424.34 gross per year</p> <p>The evidence is that the deceased aged 27 could have worked up to 60th year, i.e., 33 years</p> |
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Decrease in multiplier due to

1. Contingency of the death of parties including the dependants,
2. Deceased likely to get married,
3. Benefit accrued to the dependants due to death of deceased.

(Plaintiffs 1 and 2 alone are entitled for damages)

1st plaintiff died on 28-1-68, i.e., 8 yrs. after the death of his son He was aged 70

Mother aged 57:

A. S. No. 406 of 1966

O. S, 21/1965

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| <p>1. Name of the deceased:</p> <p>2. Relatives specified in Section 1 (a) who figure as plaintiffs:</p> | <p>Sylvian — aged 40</p> <p>Plaintiffs.</p> <p>1. Widow Thressia — aged 24</p> <p>2. Son — Joseph — aged 6</p> <p>3. Daughter Molly — aged 4</p> <p>4 Daughter Gracy — aged 1</p> |
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A. S. No. 406 of 1966 (contd.)

3. Relatives not specified in Section 1 (a) Nil
but figuring as plaintiffs:
4. Relatives specified in Section 1 (a) Mother of the deceased
but not figuring as plaintiffs:
- 4(a) Relatives not specified in Sec. 1 (a) One brother and 2 sisters who were
who were dependants of the deceased: residing with the deceased
5. The age of each relative who is plain-
tiff: 1. Widow — aged 24
2. Son — aged 6
3. Daughter — aged 4
4. Daughter — aged 1
6. The longevity in the region for per-
sons of the respective ages of the
relatives: Widow — 24 years — 38.11 at 25
died 28-3-1968
Son — 6 years — 50.80 at 5
Daughter — 4 years 55.33 at 5
Daughter — 1 year — 55.78
Rs. 1,679.12 Gross per year.
7. The average income of the deceased:
9. The multiplier to be adopted and the
circumstances relevant to fixing the
multiplier: As in the case of A. S. 404/66 taking
into account the decrease in multi-
plier.
- 1st Plaintiff widow died on 28-3-1968
2nd Plaintiff son, aged 6.
3rd Plaintiff daughter, aged 4.
4th Plaintiff daughter, aged 1.

5. How do we ascertain the loss of the pecuniary benefit arising from the relationship, which would have been derived from the continuance of the life and which may consist of money, property or services; in other words, the value of the dependency? This amount would depend largely upon how long the deceased would have lived and earned, had he not been killed by the accident and how long the dependants would live; in other words, on how long the dependency would last? What would the deceased have contributed, on an average, to the dependant's well-being over the years; in other words, what is the basic figure? In a world where imponderable forces operate and unexpected changes occur, a peep into the future and prediction with precision of things dependant on varying human and social factors, may be cynically called an exercise in the art of pretense. In such an uncertain situation, Judges can only make intelligent guesses grounding themselves on existing realities, general probabilities and broad trends, making allowance for individual factors and freak possibilities. That is why the golden rule of 'reasonable expectations' has been accepted by Courts for want of a better. Standardised methods have also been devised for calculating the value of the dependency or the present value of the pecuniary benefit that the deceased would have conferred upon the dependant in the future. The annual value of the dependency is first arrived at, i.e., the basic figure, and this is multiplied by the number of years the dependency is expected to last, called the multiplier and the product is scaled down to reach the present value, because when a lump sum is being given, two considerations must weigh with us.

The compensation packet is not what the dependant gets if his prop were alive. Had he been alive, he would have given various small sums over the months and the years and to pay the aggregate in one lump is to help the dependant benefit by the death! Similarly, there are contingencies which might cut off the benefit prematurely. The formula works this way in practice. Estimate the average income of the deceased (I am ignoring the cases where the deceased has not begun to earn, although in such cases prospective earning and therefore prospective loss can be taken into account), take the various expenditure factors affecting the individual, from the point of view of his own habits, family circumstances and social conditions and derive, after appropriate deductions, the normal contribution that the deceased was making, about the time of the accident, in favour of the dependant in a year. This is the basic datum viz., the annual value of the dependency. This is not very scientific because this annual figure may vary from time to time and for a number of reasons but effect is given to these uncertainties while choosing the multiplier, as is the practice in the English Courts. The defence of this forensic procedure is not that it is the most rational but that it is the most practical in drawing up the balance-sheet based on a maze of factors.

A famlier quotation in this branch of the law is to be found in Lord Wright's speech in *Davies v. Powell Duffryn Collieries*, 1942 AC 601, dealing with the case of the death of a working husband. He said:

"The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may de-

pend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependant and other like matters of speculation and doubt."

The expectation of life, not merely of the deceased, but also of the dependant, is a matter to be taken into account, particularly when we are dealing with aged parents as dependants, for e.g., in O. S. No. 48 of 1961. Bad health certainly may affect expectation of a particular life, hazardous employment of another and so on. Fortunately, in this case we are not called upon to consider these variables as no evidence has been led on those lines. Similarly, the prospect of marriage of the deceased or the dependant has an important impact on the issue. Unmarried Raphael, the deceased, was just 27, an extremely marriageable age. The widow of Sylvian was in her twenties, still a vernal age when the prospect of a re-marriage is not pale. Among the many matters urged on this part of the case, there is one which has been the subject of much debate. The widow of Chouro had actually died when the appeal in this Court was pending and so counsel for the appellant contended that we are not in order in assuming a notional longevity for her, confronted as we were with the stark fact of her death. Not so important; yet Raphael's aged father also died during the pendency of the appeal. The argument is that the dependency snaps when the beneficiary dies and when that has happened, speculation about it is silenced. But the matter is, not that easy of solution. Damages begin to run from the time of the death of the victim of the fatal accident and are, therefore, normally assessed in relation to the facts then existing. Yet, subsequent events surely must be taken into account when they throw light on the actualities of the case, and the latest data should be made available to the Court at the time of the trial. Logically, therefore, if one of the contingencies that would end the dependency, namely, the death of the dependant, has materialised before the trial, this must be taken into account and damages assessed accordingly.

Scott, L. J., observed in *Williamson v. Thornycroft*, 1940-2 KB 658:

"It is quite true that the measure of damages has to be assessed as at that date (i.e., the husband's death), but Courts in assessing damages are entitled to inform their minds of circumstances which have arisen since the cause of action accrued and throw light upon the reality of the case. It seems to me wholly wrong to say that where a

death which involves the liability of a third party has occurred, as in the case, some years before the assessment of damages by the Court, the Court ought to shut its eyes to the fact that one dependant has had only a short tenure of life before death put an end to her dependence." Subsequent events may either augment or cut down the quantum of damages, but it is a moot point when they can be taken note of and if so, subject to what restrictions and conditions.

6. Every material event which affects the result of an action and occurs before the Courts take final leave of the lis should be taken into account, if the unreality gap between forensic findings and the facts of life is to be narrowed down and if dispensing justice is not to be confused with the cult of the occult. What would you think of a system of justice, when a Court deliberates at length, hears long arguments, takes considerable evidence and holds that a plaintiff-claimant will have another fifty years' span of life even if an hour before this judicial astrology is articulated, the plaintiff dies of heart failure in the Court hall? Justice is blind? I venture to suggest that justice is not, and ought not to be, blind to up-to-date facts, and Judges must see with their eyes and discern with their mind's eye to arrive at the truth. But there is another side to the question. On principle, a Court grants relief as on the date of the plaint and, strictly speaking, even events occurring up to the close of the trial may be considered only in exceptional cases. For, a perfect administration of justice gives a decree at least immediately the two parties appear in Court and all further protraction is often blamable on the 'law's delays'; similarly, it is quite conceivable that if the plaintiff has demanded only a prudent sum a sensible defendant may admit the claim.

And so, if a decree is passed on a reasonable estimate made by the plaintiff of the expectation of his life, the defendant consents to it and files no appeal, and some days later the claimant dies, can the defendant get the award of compensation upset on that ground or has he to accept it as a decree of fate what if the man lives longer? If the decree can be amended on this ground, can it be done years later or on the score that other similar material factors have altered? That would be introducing hobgoblins into the administration of law and undoing finality of decisions for ever! Such illustrations bring home the necessity for drawing the line somewhere and the futility of endeavouring to avoid injustice by looking into later happenings — apart from procedural complications of pleading and evidence. But, all things considered, the compelling logic of Scott, L. J., persuades me to include in the judicial algebra all things that occur, beyond the control of the parties, up to the close of the trial. But, comes the argument, then why not events subsequent to

the first Court's decree but precedent to the disposal of the appeal? Can we not classify the death of a dependant in a fatal accident case as of such special significance as to pass the barrier of exclusion of events subsequent to the trial? I am disposed to say 'yes'.

So long as there is a comprehensive legal proceeding pending, e.g., an appeal, in which the subject-matter of compensation is legitimately available for judicial scrutiny, light on the decisive facts, beyond the manipulation of parties, may be received and reliefs moulded accordingly. If no appeal is pending, you can't recall the verdict or seek review on account of later events. This may itself lead to anomalies. But our imperfect instruments have pragmatic limits in the search for perfection! The view I have taken can be justified by traditional judicial thought also. For brevity's sake, I shall refer to but one Full Bench decision of the Kerala High Court, reported in Cannanore District Motor Transport Employees Co-operative Society Ltd. v. Malabar Public Conveyance, 1962 Ker LT 446 = (AIR 1962 Ker 341) (FB).

The learned Chief Justice observed in that case — which was one relating to the grant of a permit to one among many competing applicants, under the Motor Vehicles Act, having regard to development between the disposal by the R. T. A. and the hearing of the appeal by the S. T. A. T.

"If the duty of the State Transport Appellate Tribunal is to decide — as we think it is — whether the Regional Transport Authority was wrong or not, it must naturally follow that the appellate decision must be on the basis of the facts and circumstances which formed the foundation of the order under appeal.

An appeal, no doubt, is in the nature of a rehearing. But that does not mean that it is in the nature of a fresh trial, with freedom to the parties to press into service every event that has occurred since the decision under appeal. All that an appellate power spells is a power to consider on the merits the decision of a lower Court or tribunal.

There is of course a type of subsequent events which a Court of appeal has to take into account in moulding the relief to be granted: the death of a party, a change of law, AIR 1941 FC 5, a judgment in rem AIR 1957 SC 875. This is a restricted category, and all that we need say is that neither a qualification obtained on the basis of a permit subsequently set aside in appeal nor one acquired by an applicant's endeavours during the interval between the decision of the Regional Transport Authority and the hearing before the State Transport Appellate Tribunal should be taken into account as a subsequent event which is material for the disposal of an appeal."

The rule is that subsequent events cannot be considered at the appellate stage,

since an appeal, though a continuation of the suit for purposes of hearing the entire matter, is not a continuation of the trial where fresh evidence can also be introduced. There are certain exceptions engrafted upon this rule, as pointed out by My Lord the Chief Justice. Such subsequent events must possess a decisive bearing on the issues in the case, must have occurred independently of the exertions of parties and must be such as would stultify the decree if not taken into account. I am inclined to the view that the death of a principal or sole dependant has a deadly effect on the compensation claimable in many cases and in such cases Courts will be in order in having due regard to them while deciding the appeal, provided the pleadings are got amended, the opposite party afforded an opportunity to answer and other procedural prescriptions complied with.

7. In the present case, this legal controversy cannot loom large, because where there are many dependants, all below the poverty line, as in this case, one or two deaths among them may not affect the gross sum set apart by the wage-earner for the family upkeep and, therefore, the compensation payable by the defendant, although inter se shares may be changed. In O. S. No. 48 of 1961 the death of the wife may be a material circumstance to reduce the budgetary provisions which the deceased would have made for the circle of dependants, but even this should not be exaggerated because he would have had to bring in some elderly lady to look after the children and incur extra expenditure on several small items which the presence of the wife might have obviated. Nor has any amendment of the pleading been sought at the appellate stage so as to enable the Court to rely on the circumstance of death of the 1st plaintiff and the opposite party to rebut the intensity of its impact on the complex of compensation factors. Moreover, she died only after 10 years after Sylvian's death and we are adopting not a much greater multiplier. The case of the 1st plaintiff in O. S. No. 22 of 1965 (Raphael's father) is no better because the multiplier adopted by us more or less accords with his death and neither party can have a grievance.

8. The table furnished earlier gives us approximately a gross annual income of Rupees 1,552/- for Chouro, Rs. 1,679/- for Sylvian and of Rs. 1,425/- for Raphael. There are many factors, material and minute, which affect the fixing up of the annual value of the dependency. While the learned Subordinate Judge has palpably erred in the matter of computation, the deduction he made on account of what would have been spent on the deceased himself being only the cost of transport and "outside meals" on working days, there is a broad fairness in adopting as the basic figure Rs. 800/- in the case of Chouro, Rs. 850/- in the case of Sylvian and of Rs. 800/- in the case of Raphael. While neither counsel wanted it to be under-

stood that they accepted these figures they did not call them unfair, having due regard to the many factors which cannot be very clearly articulated but can certainly be felt and appreciated and were thoroughly examined at the hearing before us

9. The real controversy rages round fixing the multiplier. A great deal of argument and reference to precedents has been our pleasure to listen to, but I am not much the wiser for all that because, essentially, this is a question which has to be resolved on the specific facts and circumstances of each case, the broad guidelines of judicial pronouncements being helpful only to a limited degree. In *Waldon v. War Office*, 1956-1 WLR 51 Singleton, L. J., observed:

"One point of law is raised. Mr. Gerald Gardiner asked that he might be allowed to refer the judge to decisions of other judges and of this Court in cases of a like nature in order to give some guidance as to the amount of damages which should be awarded. Mr. Roger Winn, objected to any such material being placed before the judge, and the judge, . . . gave judgment upon that question. He said that Mr. Gardiner had referred him to the decision of this Court in *Rushton v. National Coal Board*, 1953-1 QB 495 and in particular to certain words of Birkett, L. J. Lloyd Jacob, J., said, 'As I understand the language, it is in main directed to a consideration of those cases in the Court of Appeal, and, indeed, the language of Birkett, L. J., in which he says 'when, therefore, a particular matter comes for review one of the questions is, how does this accord with the general run of assessments made over the years in comparable cases?', is to my mind apt to indicate the practice in the Court of Appeal itself. . . . The Judge's decision is in these words, 'I do decide that in the circumstances it would not be right for me to permit Mr. Gardiner to refer to the quantum of damages awarded in similar cases. If I am wrong about that, he will be able to get the matter put right hereafter.'"

. The decision of the Court of Appeal to which reference was made drew attention to the desirability of approaching, as far as possible, something in the nature of a standard in certain classes of injury so as to help judges of first instance as much as possible. No one knows what is the right sum of damages in any particular case, and no two cases are alike . . . I do not consider that a Judge is bound to hear such evidence (of compensation awarded in other comparable cases). If counsel on one side or the other tenders such evidence or such material, it is for the Judge to say whether, in his discretion, he thinks it will be of help to him or not . . .

"The danger of such material is that it is apt to take the mind of the tribunal from the particular facts of the case on which it is to give a decision. It would not be

right that a claim for damages for personal injuries should open by counsel for the plaintiff saying: 'My Lord, I have here fifteen decisions of Judges in the last five years upon an injury like this one,' say the loss of a leg; and for counsel on the other side to say, 'I have twenty-five similar decisions,' the one quoting the high ones and the other quoting the low ones. That would not be of help to any Judge. A Judge in assessing damages draws upon his own experience. Where does he get that experience? From knowledge of other Judges' decisions as to amount, from knowledge of what is said in this Court, and in the House of Lords; and from his ordinary experience in life. It would not be wrong for counsel appearing in such a case to say to a Judge: 'I have here the report of a decision in the Court of Appeal on an appeal on damages in a case very like this one, and I have another case, a decision of Mr. Justice X, a case again very like this one. Would your Lordship like to have them? The Judge could not be wrong if he said, 'Yes, I should like that information. I should like to know what the Court of Appeal said and I should like to know how Mr. Justice X dealt with this subject, for it is one of which no one has great experience'."

In this context, I may also notice the observations of the Punjab High Court in *Dr. Rama Saran v. Shrimati Shakuntala Rai*, AIR 1961 Punj 400. At page 483 their Lordships have observed:

"It may, however, not be forgotten that no case is exactly like another, nor is it possible to extract from decided cases any precise principle of law on this point. The question of negligence in the present case is, as it is in all cases, essentially one of fact, and it must not be confused by importing into it, as principle of law, the reasoning applied in other cases for determining the issue of negligence on other sets of facts. The circumstances of each case are almost always peculiar and unique, with the result that the conclusion in one case can hardly constitute a safe or helpful illuminating guide for another."

10. A Judge in a compensation case cannot be led by the nose by other holdings but he may permit himself to be guided by the expression of the wisdom and experience of his compeers.

11. Two rulings of the Supreme Court reported in AIR 1962 SC 1 and AIR 1966 SC 1750 and a host of High Court rulings have been pressed before us by counsel. The multiplier in each case is different from the other for obvious reasons; and circumstances, such as, fall in money value, loss of society of the husband or wife, have been taken note of in some cases. It is difficult to derive direct benefit from these rulings; for, there exists no fool-proof formula regarding compensation. I can only observe — and that does not make any one the wiser — that the Court should be realistic and have

due regard to the risks and the prospects and those other vicissitudes and changes hidden by the thick veil of time. But all these 'mystic may-bes' must be in the background only, while 'beaten-track' probabilities of the work-a-day world must occupy the foreground of the judicial mind. I have attempted to arrive at a figure avoiding exaggerations on either side and come to the conclusion that in the case of Chouro a multiplier of 10 (ten) and in the case of Sylvian a multiplier of 12 (twelve) may be adopted safely. So far as Raphael is concerned, the old age of his parents is a weighty factor depressing the multiplier and the great likelihood of his marrying shortly, had he been alive, also works in the same direction. A multiplier of ten will be fair to the aged parents in his case. Chouro had around 15 years of working life while Sylvian had about 20. Life might snap before this, for many chancy reasons. They may be thrown out of employment. Working capacity may be impaired due to ill-health. The rupee may lose its purchasing power with inflationary trends. Among their present dependants, the sons may begin to earn and daughters marry, ceasing to depend or depend to the same extent. The lay-out on the family includes the expenses on the parents which have not been claimed in O. S. 20 of 1965 (Chouro) and to a lesser extent, on the brothers and sisters, who cannot claim, and these entail a deduction. O. S. 21 of 1965 also shows similar features. Chouro's family burden is slightly heavier than Sylvian's and the reduction in the multiplier induced by the factor of some members attaining self-dependence is greater in Chouro's case. Sylvian's widow, still in her twenties, might well re-marry, unlike Chouro's middle-aged widow. In the case of Raphael, his youth leaves a long working life ahead; but his parents, the only dependants figuring as claimants, are perilously near exit, going by longevity forecasts — one has died by now — and he himself might marry and spend much more on his spouse and children and much less on his parents. In the case of Raphael it has been mentioned by the Court below that there was some property belonging to him which would be inherited by the claimants in the present suit and that income should be deducted when working out the annual value of the dependency. Technically that is correct, but all things considered, there are many factors which might push up the value of the dependency in future and we do not have details about the improvements in the property so as to ascertain the period during which the income would be available. Being negligible even otherwise, I am inclined to ignore it in arriving at the basic figure. Many other plus and minus factors have to be looked into, actuarial operations figured out and movements up and down made on the mental vernier of the Judge, before reaching a multiplier, the nearest to a safe approximation

of reasonable expectations, crystallising vaporous possibilities. The intangible and complex mechanics of quantifying compensation demands personalised prediction in each individual case and cannot be substituted by wooden rules of thumb to which the learned Subordinate Judge has succumbed. We cannot but take exception to the curious but artificial calculations he has made. After all, as Hegde, J., recently observed, in a different context:

"The Judges are not computers. In assessing the value to be attached to oral evidence, they are bound to call into aid their experience of life. As Judges of fact, it was open to the appellate Judges to test the evidence placed before them on the basis of probabilities." (C. A. No. 667 of 1965 decided on July 23, 1968).

As I mentioned earlier, there are two ways in which the present value of the dependency can be worked out: either you fix the multiplier, disregarding the fact of lump sum payment now, and then, with reference to the relevant annuity tables, read down that figure into the present value; or alternatively, you reduce the multiplier, having in mind the thought that a lump sum is being paid now in the place of staggered payments over the years. Courts in England have leaned towards the latter method, and in arriving at the multipliers mentioned above I have adopted the same course.

12. A minor point. Section 1-A speaks of 'child' as a qualifying dependant. It was argued that a child ceases to be one on attaining 18 years of age and so in calculating the benefit of a son or daughter, one must stop at 18, the age of majority. I disagree. In this context, child merely means, offspring, being correlative to parent. We should not confuse between child and infant or child and minor. The accent is on the biological bond and not the tender years. It may well be that in our socio-economic conditions a child may begin to earn only in his twenties, while in the U. S. A. or the Scandinavian countries many teenagers cease to be dependants.

13. Interest has been decreed by the trial Court from the date of the institution of the suit. Counsel for the appellant contended that interest should not be allowed in claims for unliquidated damages till the date of quantification i.e., till the date of the decree. In this case, the suits have been pending for a long time and the arithmetical impact of the submission is obvious but Section 34 of the Civil Procedure Code governs the situation. This question was considered in a ruling reported in Ramalingam Chettiyar v. Gokuldas Madavji and Co., 51 Mad LJ 243 = (AIR 1926 Mad 1021).

"I see no reason why a successful party should be made to suffer because his claim is not decided soon after the filing of his plaint. When he files his plaint he puts the matter in the hands of the Court for deci-

sion. If it be held that the plaintiff cannot get interest from the date of his filing his plaint, it is equivalent to saying that the plaintiff must be deprived of the fruits of his success to the extent of losing interest from day to day during the pendency of his suit on the sum that he was entitled to at the date of his going to Court. The date of instituting the suit is the date upon which the rights of parties are ordinarily determined, and when the decree fixes the amount of damages due I think that they may be taken as fixed as on the date of the suit, and interest allowed upon that sum."

Mr Justice Venkatasubba Rao, J. observed on the same question:

"It is however contended for the defendant that if at the time of the suit the damages were unliquidated, interest cannot be awarded under the section. No distinction is made in the section between an ascertained sum of money and unliquidated damages. As a question of construction I find it difficult to accept the suggestion that the word 'money' in the section should be understood in the limited sense of an ascertained sum. The expression 'decree for the payment of money' is very general and to give it due effect, it must be construed as including a claim to unliquidated damages."

The mere fact that the decree is for the payment of damages cannot by itself be a bar to the plaintiff being awarded interest."

I adopt this view and award interest to the plaintiffs from the date of the suit at 6% per annum on the claim decreed.

14. The action having been instituted by paupers, the Court should calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper, such amount shall be recoverable by the State Government from any party ordered by the decree to pay the same. Had the plaintiff brought the suit in the ordinary course, he would have had to pay Court-fee on the full amount claimed in the plaint. However, it is surprising that the Subordinate Judge has ordered the plaintiffs to pay Court-fee "on the amount decreed" and not on the amount claimed. This is patently wrong. Another obvious error in the costs portion of the decree consists in awarding costs to the State Insurance Department, the 'why' of which no one could explain at the bar and which the Government Pleader himself neither could nor did support. The direction regarding court-fee has not been challenged before us by any party and it is not part of the subject-matter in appeal and so we leave it as it is. The direction regarding costs to the insurer has been challenged and has to be cancelled. We do so.

15. Another anomaly or self-contradiction in the judgment of the trial Court deserves mention before closing the judgment. In one part of the judgment i.e., at the close

of paragraph 8 the learned Subordinate Judge rightly observed:

"It is therefore clear that the plaintiffs have sought their remedies only under Section 1-A in the plaint and they cannot at this stage assert any claim under Section 2."

Somewhat curiously, what he said in paragraph 8 swam out of his ken as he reached paragraph 10, for he concludes:

"Taking all these facts into consideration, considering the pain and sufferings and mental agony the deceased persons had till their death and the loss of expectations of life and considering the age of the persons, it seems to me that it will be reasonable to fix Rs. 1,000/- on this account to the plaintiff in each of the suits."

We find that the Subordinate Judge was right in paragraph 8 and wrong in paragraph 10. And what is stranger still, all the three plaints allege not the pain and suffering of the deceased which alone are compensable under Section 2 of the Act but "the great mental pain and shock due to this tragedy" to the plaintiffs for which there is no remedy except words of sympathy. The observation of the lower Court in paragraph 10 that "the plaintiffs have claimed in all these cases a further amount of Rs. 5000/- for the value of pain and suffering for each party under Section 2 of the Act" is either ambiguous or a misreading of the averments. We disallow the award of Rs. 1,000/- each, made by the trial Court under the head provided for in Section 2 of the Act.

16. The Act contemplates not merely the award of a gross sum by way of compensation payable by the defendant, but also its division among the dependants "proportioned to the loss resulting from such death to the parties respectively". An unhappy feature of this case, relevant to the present aspect, needs mention. The parents of Chouro are alive and are entitled under Section 1-A of the Act to some compensation but are neither impleaded nor represented in the circle of beneficiaries on whose behalf the present action has been brought. While, in the circumstances of this case, this factor does not make any material change in the quantum of compensation payable by the defendant to the widow and children, there is the melancholy thought that it must have been ignorance or financial inability that has kept them back from putting forward their claim, emphasising the need not merely for legal aid to the poor but also for education of the backward sections of the people in their right, systematically, through some competent professional agency.

17. In O. S. No. 46 of 1961 the claimants are only the widow and her three young children, and having due regard to the needs of the education for the sons and the daughter and the provision for marriage of the latter, it may be just to apportion the total amount awarded among the 4 plaintiffs equally. Three of the plaintiffs are minors and Order 32, Rule 6 (2) re-

quires the guardian or next friend to furnish security sufficient to protect the property of the minors. But, under the proviso to sub-rule (2) where the next friend or guardian happens to be the parent, the Court may dispense with security. Considering that the 3 children are living with the mother, have to be sent to school and maintained by her and since the prospects of her re-marrying are remote, we think it reasonable to dispense with security in this case and direct that the 1st plaintiff be allowed to withdraw the money awarded to the plaintiffs 2 to 4 without conditions, but to be used only on them.

18. Sylvian's dependants, again, consist of the widow and three tiny kids. Unfortunately, the three children are orphans, now that the widow has also died. Having due regard to the totality of the circumstances of the case it is fair to award equal shares to the widow and each of the three children. They are stated to be under the care and protection of the grand-mother who has other children i.e., the brothers of Sylvian. We do not think it proper to allow this old lady to withdraw the money of the children who, by the way, will be entitled to their mother's share also, without some kind of security. We consider it sufficient safeguard if the grand-mother and the priest of the Parish to which the plaintiffs are attached, give personal bonds, undertaking to account for the sums withdrawn, to the Court. If the priest declines, some other alternative safeguard should be insisted on by the Court. It may be in the interests of the minors to have the amount invested profitably in some landed property. The executing Court also can take proper steps in this behalf under Order 21, Rule 15 (2) of the Civil Procedure Code, when the decree is sought to be executed. No further directions are deemed necessary by us.

19. The suit is decreed in each of the above cases in the following manner, with proportionate costs here and in the Court below. In O. S. No. 46 of 1961 of the Cochin Sub Court (renumbered as O. S. No. 20 of 1965 of the Ernakulam Sub-Court) (by Chouro's dependants) there will be a decree for Rs. 10,000/- with interest at 6% from date of suit and proportionate costs. In O. S. No. 48 of 1961 of the Cochin Sub-Court (renumbered as O. S. No. 21 of 1965 of the Ernakulam Sub-Court) (by Sylvian's dependants) there will be a decree for Rs. 10,000/- with 6% interest from the date of suit and proportionate costs, and in O. S. No. 47 of 1961 of the Cochin Sub-Court (renumbered as O. S. No. 22 of 1965 of the Ernakulam Sub-Court) (by Raphael's dependants) there will be a decree for Rs. 8,000/- with 6% interest from the date of suit and proportionate costs. This sum should be divided between the father and mother (Plaintiffs 1 and 2) in equal shares. The father's needs are more, but the mother's life

is likely to be longer and hence the justification for the equal division. The State Insurance Department, under Section 95 (2) (b) of the Motor Vehicles Act, is bound to pay a maximum of Rs. 2,000/- per passenger killed and this has already been deposited in deduction of the decree passed. It is sad that an Indian life should be so devalued by an Indian law as to costs only Rs. 2,000/-, apart from the fact that the value of the Indian rupee has been eroded and Indian life has become dearer since the time the statute was enacted, and the consciousness of the comforts and amenities of life in the Indian community has arisen, it would have been quite appropriate to revise this fossil figure of Rs. 2,000/- per individual, involved in an accident, to make it more realistic and humane, but that is a matter for the legislature; and the observation that I have made is calculated to remind the law-makers that humanism is the basis of law and justice.

20. The appeals are allowed to the extent set out above.

21. RAMAN NAYAR, AG. C. J.:— I have read the judgment prepared by my learned brother and I unreservedly agree with the conclusions reached by him and with the reasoning germane thereto.

Order accordingly.

AIR 1970 KERALA 251 (V 57 C 36)

K. SADASIVAN, J.

State, Complainant v. Thampikannu Mythen Picha, Accused.

Calendar Revn. No. 7 of 1969, D/- 14-7-1969, from Asst. Sessions Court, Kottayam in S. C. No. 80 of 1968.

Penal Code (1860), Sections 379, 75 — Offence under Section 379 read with Section 75 — For purpose of compounding only offence is one under Section 379 — Section 75 does not give different colour to it. (Criminal P. C. (1898), Section 35).

The contention that even though an offence under Section 379, I. P. C. is compoundable, it cannot be so compounded when the offence is under Section 379 read with Section 75, is not sound because conviction under Section 379 read with Sec. 75 is not a conviction for two 'distinct offences'. The conviction is only under Section 379. Section 75 is invoked for enhancement of the sentence. For purposes of compounding, the only offence available is the one under Section 379, I. P. C. Section 75 does not give a different colour to the offence under Section 379, I. P. C. (Moreover in view of the fact that there is a long interval between the last conviction and the present charge, S. 75 cannot be invoked at all). (1889) ILR 11 All 393 & AIR 1916 Mad 829, Rel. on. (Para 2)

LM/CN/F755/69/JHS/C

Cases Referred: Chronological Paras
 (1916) AIR 1916 Mad 829 (V 3) =
 30 Ind Cas 435 = 16 Cri LJ 611,
 In re, Muthurakka Thevan. 2
 (1889) ILR 11 All 393 = 1889 All WN
 152, Queen Empress v Khalak 2
 State Prosecutor, for Complainant, P. E.
 Muhammed Mustaffa, for Accused

ORDER.— An old offender was charged with having committed theft of Rs. 36/- and an L I C. bill from the shirt pocket of one Kesavan at about 6 p.m. on 26-8-1968 from the municipal bus stand, Kottayam where Kesavan had gone to board a bus to Eruttupetta. The accused was caught red-handed and was taken to the Kottayam West Police Station. Being an old offender the accused was committed to the Sessions. In the Sessions Court, P. W. 1 filed a petition praying for the leave of the Court to compound the offence stating that the matter was settled between him and the accused and he did not desire to proceed with the case. As the value of the property stolen was only Rs. 36/- the owner of the property can compound the offence with the permission of the Court. The Court accordingly, accorded sanction and the compromise was recorded and the accused acquitted.

2. The point taken in the calendar revision is that even though an offence under Section 379, I. P. C. is compoundable, it cannot be so compounded when Section 379 is read with Section 75. I do not think that this position is correct, because conviction under Section 379 read with Section 75 is not a conviction for two 'distinct offences'. The conviction is all the same, only under Section 379, Section 75 is invoked for enhancement of the sentence and that can come only at the time the sentence is to be imposed. The fact that the accused is an old offender is not to be taken note of by the Court at the trial. Only at the conclusion of the trial after entering the conviction, that question can be taken up for imposing the sentence. So Section 75 cannot give a different colour to the offence under Sec. 379, I. P. C. This is the view taken in Queen-Empress v. Khalak, (1889) ILR 11 All 393 and In re, Muthurakka Thevan, 30 Ind Cas 435 = (AIR 1916 Mad 829). In the case first cited it was held:—

"A person convicted under Sections 411-75 of the Penal Code is not convicted of 'distinct offences' within the meaning of Section 35 of the Criminal Procedure Code." And in the case second cited it was held:

"A person convicted under Sections 392 and 75 of the Penal Code is not convicted of distinct offences within the meaning of Section 35 of the Code of Criminal Procedure."

So, for purposes of compounding, the only offence available is the one under Section 379, Indian Penal Code. Moreover, in the present case there is an additional circumstance that the last conviction, next

preceding was in 1961. The present charge comes only in 1968. In view of such a long interval, Section 75 cannot be invoked at all. For these reasons, the order passed by the learned Assistant Sessions Judge is correct. The rule issued by this Court is discharged. Rule discharged

AIR 1070 KERALA 252 (V 57 C 37)

V. P. GOPALAN NAMBIYAR AND
 V. BALAKRISHNA ERADI, JJ.

P. K. Kunju, Petitioner v. State of Kerala and others, Respondents.

Original Petn No. 3882 of 1969, D/- 20-1-1970.

(A) Constitution of India, Article 166 (2) — Authentication of Government orders — Appointment of Commission under Commissions of Inquiry Act (1952) — Order for issue of notification in official gazette.

Where Order was not issued, signed or authenticated as required under rules framed under Article 166 (2) and Order also is not shown to have been issued in name of Governor, the notification issued in consequence thereof is void. Even though provisions of Article 166 (2) are only directory and not mandatory in absence of proper authentication it is necessary to prove by evidence de hors that action was taken in name of Governor (Para 7)

(B) Commissions of Inquiry Act (1952) Section 3 — Appointment of Commission — Purpose of appointment is to preserve purity and integrity of public administration.

Two Ministers were facing similar allegations. One of them was singled out for enquiry by Commission. Circumstances of the case showed that dominant object of ordering enquiry against the singled out Minister was to drop him from Ministry. Appointment of Commission and proceeding conducted by it were liable to be quashed (1951) 2 KB 284 and AIR 1964 SC 72 and AIR 1966 SC 740, Rel on.

(C) Constitution of India, Article 166 (2) (3) — Authentication of Government Order — Rules framed under Article 166 (2) and (3) — Rules of Government of Kerala — Rule 12 — Special Secretary to Government even though not specifically mentioned in Rule is competent to sign orders or instruments of Government. (Para 7)

Cases Referred: Chronological Para
 (1969) AIR 1969 SC 215 (V 56) =
 1968-3 SCR 789, Jagannath Rao v.
 State of Orissa
 (1969) AIR 1969 SC 258 (V 56) =
 1969 Cri LJ 520, Krishna Ballabh
 Sahay v. Commission of Inquiry 6, 10
 (1967) AIR 1967 SC 122 (V 54) =
 (1966) Supp SCR 401, State of J
 and K v. Bakshi Gulam Mohd. 6

- '1966) AIR 1966 SC 740 (V 53) =
 1966 Cri LJ 608, Ram Manohar
 Lohia v. State of Bihar 5
 1964) AIR 1964 SC 72 (V 51) =
 1965-1 SCA 259, Pratap Singh v.
 State of Punjab 5
 1951) (1951) 2 KB 284 = 1951-1
 All ER 982, Earl Fitz William's
 Wentworth Estates Co. Ltd. v.
 Minister of Town and Country
 Planning 5
 1942) 1942-1 All ER 142 = 1942 AC
 435, Crofter Hand Woven Harris
 Tweed Co. v. Veitch 5
 S. Easwara Iyer, L. G. Potti, P. Sankaran-
 cattu Nair and E. Subramani, for Petitioner;
 S. Narayanan Potti, for Respondents Nos. 1
 and 3.

JUDGMENT: After the general elections in March 1967, what was popularly known as the United Front Ministry took office in this State on 6-3-1967, headed by the 3rd Respondent (Sri E. M. S. Namboodiripad) as the Chief Minister. The personnel of the Ministry was drawn from seven different political parties, viz., the Marxist-Communists (C. P. I. M.), the Communist Party of India (Rightists or Right Communists — C. P. I.), the Revolutionary Socialist Party (R. S. P.), the Muslim League, the Samyuktha Socialist Party (S. S. P.), the Karshaka Thozhilali Party (K. T. P.) and the Kerala Socialist Party (K. S. P.). The Chief Minister belonged to the Marxist Communist Group, and the petitioner, who was the Finance Minister, to the S. S. P. It is of some relevance to mention that the Speaker of the Assembly was a Member of the S. S. P., and that Sri. Willington, the Health Minister, belonged to the K. T. P. There was a Co-ordination Committee drawn from the ranks of all the coalition parties, and of which all the Ministers were members, to evolve the greatest common measure of agreement amongst the parties, and to serve, according to the petitioner, as a balance-wheel in running the administration. On 13-2-1969 two members of the Legislative Assembly Sri. Wilson of the S. S. P. and Sri. K. T. George of the Congress Party (not within the fold of the United Front), made certain allegations against the petitioner on the floor of the Assembly. This eventually led to the constitution of a Commission of Enquiry under the Commissions of Inquiry Act 1952, under Ext. P6 notification, and to the petitioner vacating office as the Finance Minister, pending clearance of his conduct at the enquiry. Ext. P6 notification was published in the Gazette as ordered in Ext. P5 of the same date. A retired Judge of this Court was appointed as the Commission of Enquiry to go into the allegations against the petitioner, and to submit his report on or before 30th September 1969. Two different applications were moved before the Commission by the petitioner. The one complained that the charges were vague that Ext. P6 notification was without jurisdiction.

The other was to restrain proceedings on the ground that the same would constitute a breach of privilege of the Assembly. Both these were rejected by the Commission by Exts. P9 and P10 orders. This writ petition was moved to quash Exts. P5, P6, P9 and P10 on various grounds. At the admission stage, one of us (Eradi, J.), by an order dated 17-9-1969 found that there was no ground for interference with Exts. P9 and P10 orders, and overruled the petitioner's objections, (1) as to the Government's jurisdiction to issue Ext. P6 notification, (2) as to the authority of the 'Special' Secretary who had purported to authenticate Exts. P5 and P6 to exercise such power under Article 166 (2) of the Constitution, and (3) as to the correctness of the action taken by the 3rd Respondent in passing Ext. P6 order, without consulting, and placing the matter before, the Council of Ministers. The orders Exts. P9 and P10, passed by the Commission of Enquiry (2nd Respondent) were hence found to be not open to challenge. On the ground of mala fides, which had been raised in the writ petition, it was felt that investigation was necessary and called for, and therefore notice was issued to Respondents 1 to 3. Against this order of the learned Judge, Writ Appeal No. 893/1969 was filed by the petitioner and was dismissed in limine as incompetent and not maintainable. It was held that the writ petition was still pending, and the rejection by the learned Judge of some of the grounds urged in support of the really main relief to quash Ext. P6 notification, was, at best, only a finding regarding those grounds, and not a 'judgment' or 'order' within the meaning of Section 5 of the Kerala High Court Act, so as to attract a right of appeal conferred by that section. The writ petition was then ordered to be placed before a Division Bench and has come before us.

2. Counsel for the petitioner contended that the grounds of attack against Ext. P6 notification, even if they be common to the attack against Exts. P9 and P10 orders, and regarded as foreclosed by the order passed at the admission stage by one of us, are still at large. He further maintained that this writ petition having now been placed before a Division Bench, any expression of opinion — 'findings', as they were characterised in W. A. No. 893/1969 — made by one of us, at the admission stage, regarding the tenability of some of the grounds would not bind this Division Bench. Assuming that all the matters covered by the writ petition are still *res integra*, Counsel for the petitioner fairly stated that the only point found against at the admission stage by one of us, which he could usefully press before us, was that Exts. P5 and P6, had not been properly and validly issued.

3. The case as to mala fides, broadly stated, was developed by the petitioner thus: That the petitioner had from time to time been seething with discontent and protest against the 3rd Respondent's Ministry, that

his outbursts against the 3rd Respondent and his Ministry had caused resentment and annoyance to the 3rd Respondent and to his party, both of whom had come to regard him as a thorn by their side; and that the impugned action, ostensibly taken for the purpose of ordering an enquiry against him, was only a sinister device to weed him out of office. The 3rd Respondent was also accused of partiality and favouritism and even of double standards, in the course of action pursued against his other colleagues in the Ministry, against some of whom similar allegations had been voiced at or about the same time. It was also said that the 3rd Respondent had acted under political pressure from his party.

4. The 3rd Respondent has not appeared before us. A counter-affidavit was filed by him, but this, obviously, was on behalf of the 1st Respondent and in his capacity as the then Chief Minister of the State, although the superscription to the counter-affidavit is somewhat misleading. A counter-affidavit has also been filed on behalf of the 1st respondent by the Home Secretary of the State Government. The petitioner filed a lengthy rejoinder-affidavit on 18-11-1969, supported by nearly 25 exhibits, which has remained unanswered either by the 1st or by the 3rd respondent. After the conclusion of the hearing on 24-12-1969, to which date the matter was posted only for the production of certain files and records, Counsel for the 1st respondent made a request that the 3rd respondent be granted sometime to enter appearance and to put in his defence. He made it clear that he had no *locus standi* to represent the 3rd respondent. At the hearing of the case had started on 8-12-1969 and continued from day-to-day till 12-12-1969, when the hearing was concluded, and the matter was posted successively to 19-12-1969 and 24-12-1969 to enable Counsel for the 1st respondent to produce certain records, and as the 3rd respondent had sufficient time, if so minded, to appear before us, we declined the request of counsel for the 1st respondent and closed the case on 24-12-1969.

5. That the exercise of a statutory power for an unauthorised purpose, or even professedly for an authorised purpose, but in fact for a different one with an ulterior object, would vitiate the exercise of power, is clear and well settled. The proposition as such was not disputed, and could not be disputed. In *Earl Fitz-William's Wentworth Estates Co. Ltd., v. Minister of Town and Country Planning*, (1951) 2 KB 284 Lord Denning observed:

"So also the validity of Government action often depends on the purpose with which it is done. There, too, the same principle applies. If Parliament grants a power to a Government Department to be used for an authorised purpose, then the power is only validly exercised when it is

used by the department genuinely for that purpose as its dominant purpose. If that purpose is not the main purpose, but is subordinated to some other purpose which is not authorised by law, then the Department exceeds its powers and the action is invalid. The department cannot escape from this result by saying that its motive is immaterial. Just as its real purpose is crucial, so also is its true motive, because they are one and the same thing. see *Crofter Hand Woven Harris Tweed Co. v. Veitch*, (1942) 1 All ER 142, per Lord Maugham and per Lord Wright." Reference was made to the observations of Lord Denning in the above case, and the same principle was stated by the Supreme Court in *Pratap Singh v. State of Punjab*, AIR 1964 SC 72. At p 82 the Court observed.

"Sometimes Courts are confronted with cases where the purposes sought to be achieved are mixed, — some relevant and some alien to the purpose. The courts have, on occasions, resolved the difficulty by finding out the dominant purpose which impelled the action and where the power itself is conditioned by a purpose, have proceeded to invalidate the exercise of the power when any irrelevant purpose is proved to have entered the mind of the authority.

(7) As we said earlier, the two grounds of ultra vires and mala fide are thus most often inextricably mixed. Treating it as a question of ultra vires, the question is what is the nature of the power which has been granted to achieve a definite object in which case, it would be conditioned by the purpose for which it is vested. Taking the present case of the power vested in Government to pass the impugned orders, it could not be doubted that it is vested in Government for accomplishing a defined public purpose viz. to ensure probity and purity in the public service by enabling disciplinary penal action against the members of the service suspected to be guilty of misconduct. The nature of the power thus discloses its purpose. In that context the use of that power for achieving an alien purpose — wreaking the minister's vengeance on the officer would be mala fide and a colourable exercise of that power, and would therefore be struck down by the Courts."

Again in *Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 740 it was observed:

"Although this Court has already stated that allegations of bad faith can be considered, it may be added that where statutory powers are conferred to take drastic action against the life and liberty of a citizen, those who exercise it may not depart from the purpose. Vast powers in the public interest are granted but under strict conditions. If a person, under colour of exercising the statutory power, acts from some improper or ulterior motive, he acts in bad faith. The action of the authority is capable of being viewed in two ways. Where power is mis-

used but there is good faith the act is only ultra vires but where the misuse of power is in bad faith there is added to the ultra vires character of act, another vitiating circumstance. Courts have always acted to restrain a misuse of statutory power and the more readily when improper motives underlie it. The misuse may arise from a breach of the law conferring the power or from an abuse of the power in bad faith." In the light of the above principles, let us examine the case of mala fides put forward by the petitioner.

6. The purpose and the object of ordering an enquiry under the Commissions of Inquiry Act, 1952, is to preserve the purity and integrity of public administration. Section 3 of the Act in so far as it effectuates this purpose, reads:—

"3. (1) The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by the House of the People, or as the case may be, the Legislative Assembly of the State, by notification in the Official Gazette, appoint a Commission of Enquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly."

The scope of the similar section in the State of Jammu and Kashmir Act fell to be considered in Bhakshi Gulam Mohammed's case, AIR 1967 SC 122. It was ruled that the extent and nature of the assets possessed by the former Prime Minister of the Kashmir State and others and the question whether they had obtained such assets by abusing official positions or by exploitation by others with their consent, are definite matters of public importance, in respect of which an enquiry can be ordered under the Act, no less so, because on the date of ordering enquiry the persons sought to be proceeded against had ceased to hold a public office. Jagannath Rao v. State of Orissa, AIR 1969 SC 215 was a case where, on analysis, the court held that the dominant purpose of setting up the Commission of Enquiry was to promote the need for maintaining purity and integrity of the administration in the political life of the State and not the 'character assassination' of the Chief Minister and the Deputy Chief Minister. Of particular relevance to the scope and the purpose of taking action under the provision of the Act, appear the following observations of Hidayatullah, C. J. in Krishna Ballabh Sahay v. Commission of Enquiry, AIR 1969 SC 258.

"It cannot be stated sufficiently strongly that the public life of persons in authority must never admit of such charges being even framed against them. If they can be made then an inquiry whether to establish them or to clear the name of the person

charged is called for. If the charges were vague or speculative suggesting a fishing expedition, we would have paused to consider whether such an inquiry should be allowed to proceed."

It is clear therefore that if the Government were of opinion that a definite matter of public importance had to be investigated, a commission of enquiry could be set up under the provisions of the Act. But what has been alleged for the petitioner is that his protests against the actions of the 3rd Respondent and the Ministry had so very much incensed the 3rd Respondent and his party bosses, that they bided their time, and allowed these smouldering embers to be stirred into a blaze by the impugned proceedings, constituting a Commission of Inquiry. This was sought to be made out in two ways: (1) that the proceedings leading to Exts. P5 and P6 have not been taken in the strictly legal manner; and (2) that the dominant object was not the statutory purpose sanctioned by the Act, but to get rid of an inconvenient and troublesome colleague like the petitioner.

7. We may first scan the legality of the proceedings evidenced by Exts. P5 and P6. Under Section 3 of the Commissions of Inquiry Act, action has to be taken by the "Government". Articles 154 and 166 of the Constitution become relevant in this connection. Under Article 154 of the Constitution, the Executive power of the State is vested in the Governor and shall be exercised by him either directly or through his subordinates in accordance with the Constitution. Article 166 of the Constitution provides:

"166. (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor, and

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

Under Rule 12 of the Rules of Business, framed under Clauses (2) and (3) of the above Article, every order or instrument of the Government of the State shall be signed by a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary or an Assistant Secretary or by such other Officer as may be specially empowered in that behalf and such signature shall be deemed to be the proper authenti-

cation of such order, or instrument. It has been ruled that the provisions of Art. 166 (2) are only directory and not mandatory, and that even in the absence of proper authentication as contemplated therein, it is permissible to prove by evidence de hors, that the action in question had been taken in the name of the Governor. In the present case, Exts. P5 and P6 notifications purport to be signed by the Special Secretary to the Government, under the superscription: "By Order of the Governor." The contention of the petitioner's counsel, that a Special Secretary is not a Secretary to the Government and does not fit in with any of the labels specifically mentioned in Rule 12 of the Rules of Business, does not appeal to us. We are clear that by reason of his "speciality" he does not lose his general brand as a Secretary to Government. Had the matter rested here, — and the petitioner's complaint in the petition and argument went no further — we would have had no hesitation to sustain Exts. P5 and P6 as validly and properly authenticated. But the hearing disclosed a fundamental defect against Ext. P6 proceedings. We asked Counsel appearing for the 1st Respondent, to satisfy us by production of the files, that Ext. P6 order had been validly and properly issued. After the hearing closed on 12-12-1969, the matter was adjourned successively to 19-12-1969 and 24-12-1969 for production of the original of Ext. P6 and of certain other records, about which we shall, in due course, make mention. The original of Ext. P6 was not made available, and on 24-12-1969 Counsel for the 1st Respondent clearly and unequivocally stated to us that we may proceed on the basis that there was no original order signed by the Special Secretary to the Government, as Ext. P6 would purport to disclose. We are not inclined to blame the petitioner for not having made an impossible averment in his petition that the original of Ext. P6 had not in fact been signed by the Special Secretary, as it purports to be. On 24-12-1969, Counsel appearing for the 1st Respondent submitted, that although original of Ext. P6 had not in fact been signed by the Special Secretary, it had nevertheless been properly and validly issued by the Chief Minister within whose allotted sphere the matter stood, according to the Rules of Business framed under Article 166 (2) and (3) of the Constitution, and consistent with Article 154. We shall assume with counsel for the 1st Respondent that a Minister is an Officer 'subordinate to the Governor' within the meaning of Article 254 (1) of the Constitution, and that he is empowered to duly authenticate orders and other instruments under Rules made under Art. 166 (2) thereof. (The matter was claimed to be in the Chief Minister's portfolio as the subject of 'anti corruption' had been allotted to him under the business Rules, and also on the ground that 'subjects not mentioned elsewhere' had been allotted to the Chief Minister in pursuance

of Rule 5 of the Rules of Business. By way of contrast we were referred to item 25 of the Second Schedule to the Rules by which only Reports of Enquiry had to be placed before Council of Ministers. The petitioner's Counsel would have it that under R. 84 (2) (x) of the Rules, cases of such administrative importance as the Chief Minister might consider necessary, or as the Governor may wish to see, had to be submitted to the Governor, and under item 32 of Second Schedule all cases of administrative importance not already covered, are to be brought before the Council of Ministers). Even on the case of the 1st Respondent, the fact remains that the proceedings must be validly signed and authenticated by the Chief Minister. In the instant case, Counsel for the 1st Respondent was not able to produce the original of Ext. P6 which could be said to have been authenticated and signed by the Chief Minister by order of the Governor. All that he could produce from the files was the draft of a notification which eventually resulted in Ext. P6 having been drawn up without any one's signature, but only with some unidentified and undated initials. It does not purport to be "By Order of the Governor." At the top of the first page of the draft, and on its left-hand corner, we see an endorsement "This order may issue." The same has been initialed and dated by the 3rd Respondent on 5-6-1969. There are one or two other initials also in the margin of the first page of the said draft. We are clearly of the view that this cannot amount to a signature or authentication of the original of Ext. P6 notification by the Chief Minister. At best, it can only amount to an order of the Chief Minister, approving the draft put up before him and directing its issue. There is nothing to show that a notification or order, was accordingly drawn up or that it had been duly issued, signed and authenticated. The result is that we have to hold that there is no valid notification appointing the Commission of Enquiry. Ext. P5 which merely directs the publication of Ext. P6, is an inconsequential order which cannot stand apart from Ext. P6, and must stand or fall with it.

8. Assuming Ext. P6 to have been properly issued and authenticated, we may next turn to certain features in regard to its contents. It sets out in paragraph (1) that the Commission was constituted to enquire into the allegations made on the floor of the Assembly on 13-2-1969 by Sri. P. P. Wilson, M. L. A., and Sri. K. T. George, M. L. A. and supported by letters of Sri. Wilson dated nil to Speaker, and dated 26-3-1969 to the Chief Minister. We should have expected the allegations made and the letters referred to — or at least the substance thereof — to be put down as an annexure or appendix to the notification, which in fact, had a place for an Appendix, to which we shall presently refer. But strangely enough, this

and also requested that their lands be released but the respondent No. 1 did not accede to their request. It was, thereafter, that the petitioners in the two cases filed these petitions.

3. The Improvement Scheme No. 5 and the action taken therefor have been challenged in the two petitions inter alia on the following grounds:

(i) The Municipal Corporation, Jabalpur, is the authority empowered to regulate markets, including the wholesale grain market, within the limits of the Corporation. Further such a market can be established and regulated under the provisions of the Agricultural Produce Markets Act, 1960. That being so, the respondent 1 could not undertake, or be allowed to usurp, the functions of those authorities and the action taken by it is, therefore, illegal.

(ii) Acquisition of land for such a purpose is not a public purpose within the meaning of Article 31 (2) of the Constitution.

(iii) The Scheme, as framed, is not an improvement scheme specified in Section 31 of the Act. It is not covered by Sections 37 and 39 of that Act.

4. Other grounds raised relate to matters of procedure. According to the petitioners, the notices published under Section 46 of the Act were not in accordance with the requirements of that section. Further, while no notice under Section 48 (1) of the Act was given to one set of petitioners (M. P. No. 357 of 1966), those served on others were not issued within the prescribed time. Moreover, a reasonable opportunity of being heard as contemplated by Section 50 of the Act was also not afforded. Finally, before sanction for acquisition was accorded by the State Government, individual notices under Section 68 (1) of the Act were not sent in one case [M. P. No. 357 of 1966] and no enquiry was made and no opportunity was given to the petitioners to make any representation.

5. The respondents 1 and 2 and the State Government filed separate returns, denied that there were any material irregularities in procedure, traversed all other adverse allegations made in the two petitions and contested the claims of the petitioners to the reliefs sought by them.

6. We have heard the counsel at some length and reached the conclusion that these petitions must be dismissed. In our opinion, Sec. 52 (2) of the Act is a complete answer to the procedural irregularities and relieves us of the duty to consider whether the respondent 1 committed any irregularities which affected the validity of the manner in which the Scheme was framed or sanctioned. As we have already indicated, the State Government had sanctioned the Scheme and announced it by a notification published under Section 52 (1) of the Act. Sub-section (2) of that Section reads:

“(2) The publication of a notification under sub-section (1) in respect of any scheme shall

be conclusive evidence that the scheme has been duly framed and sanctioned.”

A somewhat similar provision was made in Section 67 (8) of the C. P. and Berar Municipalities Act, 1922 which read as follows:

“(8) A notification of the imposition of a tax under this section shall be conclusive evidence that the tax has been imposed in accordance with the provisions of this Act.”

This Court and the Supreme Court considered the meaning and effect of the expression “conclusive evidence”. In *Municipal Committee, Khandwa v. Radhakisan Jaikisan*, AIR 1930 Nag 157, it was held that the expression ‘conclusive evidence’ implied that the publication of the notification dispensed with all corroborative evidence of imposition of the tax in accordance with the provisions of the Act and forbade consideration of all contra-indicating evidence. In *Onkarsa Tukaram v. Municipal Committee, Nandura*, AIR 1940 Nag 293 a Division Bench of this Court stated that the notification served to validate the entire proceeding relating to the imposition of the tax and precluded any objection to its regularity or legality. Finally, in *Berar Swadeshi Vanaspathi v. Municipal Committee, Shegaon*, AIR 1962 SC 420 it was stated:

“This notification, therefore, clearly is one which directs imposition of octroi and falls within sub-section (7) of Section 67 and, having been notified in the Gazette, it is conclusive evidence of the tax having been imposed in accordance with the provisions of the Act ‘and it cannot be challenged on the ground that all the necessary steps had not been taken,’ (underlined (here in ‘) by us)

7. In *Punjab Development and Damaged Areas Act, 1951*, sub-sections (3) and (4) of Section 5 provided as follows:

“(3) The State Government shall then notify the scheme, either in original or as modified by it and the scheme so published shall be deemed to be the sanctioned scheme.

(4) The publication under sub-section (3) shall be conclusive evidence that a scheme has been duly framed and sanctioned.”

The Supreme Court considered the meaning and effect of these provisions in *Trust Mai Lachmi Sialkoti Bradari v. Chairman, Amritsar Improvement Trust*, AIR 1963 SC 976 and observed:

“The conclusive effect postulated by Section 5 (4) can only be in regard to the formalities prescribed by Sections 3, 4 and 5 and does not touch a case where there is complete lack of jurisdiction in the authorities to frame a scheme.” (Page 980)

However, a somewhat different opinion was expressed in *Raza Buland Sugar Co. Ltd., Rampur v. The Municipal Board, Rampur*, AIR 1965 SC 895. In that case, their Lordships were considering the effect of Section 135 (3) of the *Uttar Pradesh Municipalities Act, 1916*, which provided as follows:

“A notification of the imposition of a tax under sub-section (2) shall be conclusive proof

that the tax has been imposed in accordance with the provisions of this Act."

It was observed by Wanchoo, J., who spoke for the majority, that the aforesaid provisions would not preclude an attack on the validity of imposition of any tax if there was no compliance with the mandatory provisions of the procedure for imposition of such tax. But, in *Municipal Board, Hapur v. Raghavendra Kripal*, AIR 1966 SC 693, the view taken in AIR 1962 SC 420 (supra) was reaffirmed. The passage from the judgment delivered in that case, which we have reproduced above, was recalled and it was held that the protection of Section 135 (3) would be available against the defects in procedure. Hidayatullah, J., who had recorded a dissenting opinion in AIR 1965 SC 895 (supra) observed:

"As observed already some of the provisions controlling the imposition of a tax must be fully complied with because they are vital and therefore mandatory, and the others may be complied with substantially but not literally, because they are directory. In either case the agency for seeing to this compliance is the State Government. It is hardly to be expected that the State Government would not do its duty or that it would allow breaches of the provision to go unrectified. One can hardly imagine that an omission to comply with the fundamental provisions would ever be condoned. The law reports show that even before the addition of the provision making the notification conclusive evidence of the proper imposition of the tax, complaints brought before the Courts concerned provisions dealing with publicity or requiring ministerial fulfilment. Even in the two earlier cases which reached this Court and also the present case, the complaint is of a breach of one of the provisions which can only be regarded as directory. In cases of minor departures from the letter of the law especially in matters not fundamental, it is for the Government to see whether there has been substantial or reasonable compliance. Once Government condones the departure, the decision of Government is rightly made final by making the notification conclusive evidence of the compliance with the requirements of the Act. It is not necessary to investigate whether a complete lack of observance of the provisions would be afforded the same protection. It is most unlikely that this would ever happen and before we pronounce our opinion we should like to see such a case."

We may add that the defects in procedure put forward in these petitions are not of mandatory character. Therefore, even if there were those defects — and their existence has in fact been disputed in the returns — the protection of Section 52 (2) would be available against them and it must accordingly be held that the Scheme was framed and sanctioned in accordance with the provisions of the Act.

8. Another defect alleged to exist is that no notice of the intention of the respondent 1 to acquire the lands was given to individual owners. The short answer to this is that Section 68 of the Act does not contemplate such notices and, therefore, no objection can be taken on that ground. It is not claimed that notices in accordance with Section 68 (1) were not issued. That being so, if some of the petitioners did not raise any objection or avail of the opportunity of being heard so afforded to them, they cannot legitimately make a grievance that the requirements of that section were not fulfilled. In this connection, we may mention the fact that the petitioners in this case [M. P. No. 316 of 1966] had utilised that opportunity, though their objections were rejected.

9. It is next argued that, before according sanction for acquisition of the lands, the State Government did not make any enquiry as contemplated by Section 70 of the Act to satisfy itself that the acquisition was in public interest. Moreover, being the ultimate or final authority to sanction the acquisition, it was obliged to afford to the petitioners an opportunity of being heard. In our opinion, there is no substance in this contention. Under Section 70 of the Act, it is open to the State Government, if it so thinks fit, to make an enquiry, but it is not obliged to do so. The reason is this. Under Section 68 of the Act, the Improvement Trust gives a public notice of its intention to acquire land for purpose of any scheme, invites objections, gives an opportunity of being heard and then takes decisions on the objections, if any. Thereafter, when applying to the State Government under Section 69 of the Act for sanction of the proposed acquisition, it is required to send the record of the aforesaid proceedings, a report containing a summary of the objections and its decisions thereon and the following information:

- (i) the names of the owner and occupier of the land;
- (ii) full description of the land and of any structure thereon;
- (iii) the purpose for which the land is required;
- (iv) such other particulars as may be prescribed.

It would thus appear that the procedure prescribed by Sections 68, 69 and 70 of the Act is substantially similar to the one envisaged by Sections 4, 5A and 6 of the Land Acquisition Act, 1894. As we have indicated in the foregoing paragraph that procedure was followed in this case. That being so, the sanction accorded by the State Government in this case cannot be assailed on the ground that it did exercise its discretionary power of further making under Section 70 of the Act "such enquiry as it may deem necessary".

10. This takes us to the three main grounds urged in support of these petitions.